**[Cite as *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools*, 2019-Ohio-4187.]**

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

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| STATE OF OHIO ex rel.<br>CABLE NEWS NETWORK, INC., et al.<br><br>*Relators*<br><br>v.<br><br>BELLBROOK-SUGARCREEK LOCAL SCHOOLS, et al.<br><br>*Respondents* | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | Appellate Court Case No. 2019CA0047<br><br><br><br><br><br>[Original Action in Mandamus] |

**DECISION AND FINAL JUDGMENT ENTRY**
October 2, 2019

PER CURIAM:

## INTRODUCTION

**{¶ 1}** Relator News Agencies seek a writ of mandamus to compel Bellbrook-Sugarcreek Local Schools to release records about a former student. The student, Connor

Betts, graduated from Bellbrook High School in 2013 and is deceased. The News Agencies[1] assert that the records they requested from the School[2] are public records that must be disclosed under Ohio's Public Records Act, R.C. 149.43. They posit that Betts' right to privacy in his school records terminated upon his death and that the records must therefore be released.

**{¶ 2}** The School asserts that the records are confidential education records, the release of which is prohibited by state and federal law, and therefore may not be released. The School argues that the relevant law contains no exception for the death of an adult former student. It asserts that it properly denied the public records requests presented to it.

**{¶ 3}** We conclude that a writ of mandamus will not issue, as the News Agencies have not shown that the School has a clear legal duty to release Betts' school records.

## BACKGROUND AND PROCEDURAL POSTURE

**{¶ 4}** On August 4, 2019, Connor Betts killed nine people, injuring 27 more during a mass shooting in which he was also killed. He was 24 years old at the time and a 2013 graduate of Bellbrook High School.

**{¶ 5}** In the days after August 4, the News Agencies electronically submitted public records requests to the School for records, including disciplinary records, concerning Betts.

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[1] Relators are Cable News Network, Inc.; Cox Media Group, Inc. d/b/a Dayton Daily News and WHIO-TV Channel 7; WDTN-TV2; Scripps Media, Inc. d/b/a WCPO-TV; The Cincinnati Enquirer, a Division of GP Media, Inc.; The New York Times Company d/b/a The New York Times; American Broadcasting Companies, Inc[.] d/b/a ABC News; and The Associated Press. We refer to them collectively as "News Agencies."

[2] Respondents are Bellbrook-Sugarcreek Local Schools and Douglas A. Cozad, Ph.D., in his official capacity as Superintendent of Bellbrook-Sugarcreek Local Schools. We refer to them collectively as the "School."

The School released "directory information" for Betts but otherwise denied the requests for records.

**{¶ 6}** On August 9, 2019, the News Agencies filed this lawsuit to obtain the unreleased records. The parties agreed to an expedited schedule and have submitted briefs on the merits of the case. Ohio Attorney General, Dave Yost, has also submitted an amicus curiae brief. The matter is ripe for decision.

## LEGAL STANDARDS

### *Standard for a Writ of Mandamus*

**{¶ 7}** "A writ of mandamus is an extraordinary remedy that only applies in a limited set of circumstances." *State ex rel. Parisi v. Heck*, 2d Dist. Montgomery No. 25709, 2013-Ohio-4948, ¶ 4. It is an appropriate way to seek compliance with Ohio's Public Records Act. R.C. 149.43(C)(1)(b); *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 23.

**{¶ 8}** To be entitled to a writ of mandamus, the News Agencies must establish that they have a clear legal right to receive the public records they've requested, and that the School has a clear legal duty to provide those records. *State ex rel. McQueen v. Weibling-Holliday*, 150 Ohio St.3d 17, 2016-Ohio-5107, 78 N.E.3d 825, ¶ 6. Unlike other relators filing in mandamus, "persons requesting records under R.C. 149.43(C) need not establish the lack of an alternative, adequate legal remedy in order to be entitled to the writ." *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 171, 724 N.E.2d 411 (2000); *State ex rel. Caster v. Columbus*, 151 Ohio St.3d 425, 2016-Ohio-8394, 89 N.E.3d 598, ¶ 15. Relators must, however, prove the elements of their mandamus claim by clear and convincing evidence. *State ex rel. Doner v. Zody*, 130 Ohio

St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 55, quoting *State ex rel. Pressley v. Indus. Comm*., 11 Ohio St.2d 141, 161, 228 N.E.2d 631 (1967) ("in mandamus cases, '[t]he facts submitted and the proof produced must be plain, clear, and convincing' before a writ will be granted").

*Standards for Public Records Act Requests*

**{¶ 9}** Ohio's Public Records Act (or "PRA") is codified in R.C. 149.43. The PRA requires a "public office" to provide "public records" kept by that office upon request, subject to certain exceptions and exemptions. The parties agree that Bellbrook-Sugarcreek Local Schools is a public office, and that requests were made. *See* R.C. 149.43(A)(1) (naming "school district units" as public offices). They disagree as to whether the requested records are public records.

**{¶ 10}** A "record" includes "any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). "Because a school district's maintenance of student information is one of its integral functions,[3] the records containing personally identifiable student information that [a school district] maintains are records within the meaning of R.C. 149.011(G)." *State ex rel. School Choice Ohio, Inc. v. Cincinnati Pub. School Dist.*, 147 Ohio St.3d 256, 2016-Ohio-5026, 63 N.E.3d 1183, ¶ 14. The parties have not parsed the particular records at issue here under this definition, except to note that disciplinary records have been requested. The parties instead treat the records concerning Betts as a collective whole that is or is not categorically

[3] "School districts are required by law to collect the personally identifiable information of all their students and to compile the information in a variety of forms: districts must collect student information, including names and addresses, and a variety of data for demographic and funding purposes, R.C. 3301.0714(D)(1); district superintendents must keep uniform records regarding all enrolled students, including names, studies pursued, and standing, R.C. 3319.32; and reports of student names, ages, and addresses must be provided to the school district board of education, R.C. 3321.12." *School Choice Ohio* at ¶ 14.

protected. We follow their lead and do not analyze any individual records, instead analyzing the arguments as to the requested records as a whole.

**{¶ 11}** Under the PRA, public records are defined as "records kept by any public office." R.C. 149.43(A)(1). However, not all records kept by a public office are public records. The definition of public records excludes, among other things, "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). In this case, the parties focus on a state law, Ohio's Student Privacy Act (or "OSPA"), R.C. 3319.321, and a federal law, the Family Educational Rights and Privacy Act of 1974 (or "FERPA"), 20 U.S.C. 1232g.

**{¶ 12}** The Public Records Act "mandates access to public records upon request unless the requested records are specifically excepted from disclosure." *Lucas Cty. Bd. of Commrs.*, 88 Ohio St.3d at 170, 724 N.E.2d 411, citing *State ex rel. Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 170, 680 N.E.2d 956 (1997). "Release may be prohibited by an exception or by another statute providing protection to the subject of the information sought." *Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 6. The records "custodian has the burden to establish the applicability of an exception" to release or access. *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 30. Exceptions "are strictly construed against the public-records custodian." *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, 940 N.E.2d 1280, ¶ 24. The PRA itself " 'is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records.' " *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d

179, ¶ 7, quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996).

**{¶ 13}** Even with such a construction, a " 'relator must still establish entitlement to the requested extraordinary relief by clear and convincing evidence.' " *Caster,* 151 Ohio St.3d 425, 2016-Ohio-8394, 89 N.E.3d 598, ¶ 15, quoting *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 16. "Clear and convincing evidence is 'that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *State v. Corp. for Findlay Mkt.*, 135 Ohio St.3d 416, 2013-Ohio-1532, 988 N.E.2d 546, ¶ 15, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

## ANALYSIS

**{¶ 14}** As outlined above, the News Agencies must show they have a clear legal right to obtain the records at issue, and that the School has a corresponding clear legal duty to release them. Under the posture and evidence in this case, if the requested records are public records, the News Agencies have made such a showing.

**{¶ 15}** "Records the release of which is prohibited by state or federal law" are not public records as defined in the PRA. R.C. 149.43(A)(1)(v). The School here argues that the release of Betts' school records is prohibited by both state and federal law. We begin with the state law, Ohio's Student Privacy Act (or "OSPA"), enacted at R.C. 3319.321. The Supreme Court of Ohio has recognized OSPA as an exception to the PRA under R.C. 149.43(A)(1)(v). *See School Choice Ohio,* 147 Ohio St.3d 256, 2016-Ohio-5026, 63 N.E.3d

1183, ¶ 32 (discussing OSPA as an exception in the context of directory information).[4] Titled "Limits on public access to records concerning pupils," OSPA states in relevant part:

> No person shall release, or permit access to, personally identifiable information other than directory information concerning any student attending a public school, for purposes other than those identified in division (C), (E), (G), or (H) of this section, without the written consent of the parent, guardian, or custodian of each such student who is less than eighteen years of age, or without the written consent of each such student who is eighteen years of age or older.

R.C. 3319.321(B).

**{¶ 16}** The School has satisfied its burden to establish the applicability of this exception. *Carr,* 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 30. There is no dispute here that the records at issue contain "personally identifiable information other than directory information" concerning a student who attended a public school. The parties agree that Betts attended Bellbrook High School and that information about him specifically has been requested. The requests are not for directory information, as that information has already been released. None of the purposes or situations identified in R.C. 3319.321(C), (E), (G), and (H) that allow release without consent are relevant here.[5] Applying the

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[4] FERPA is also a recognized exception. *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 25 ("FERPA, if applicable, does constitute a prohibition on the release of records under R.C. 149.43(A)(1)(v)").

[5] Division (C) allows "the transfer of a student's record to an educational institution for a legitimate educational purpose." Division (E) allows "access to a student's records to a law enforcement officer who indicates that the officer is conducting an investigation and that the student is or may be a missing child." Division (G) allows compliance with "any order issued

remainder of the rule, the School is prohibited from releasing any personally identifiable information concerning 24 year-old Betts without his consent. In other words, without Betts' consent, the release of the requested records is prohibited by state law. R.C. 149.43(A)(1)(v). We find that the School has met its burden to "prove that the requested records 'fall squarely within the exception.' " *State ex rel. Rogers v. Dept. of Rehab. & Correction.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 7, quoting *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10.

**{¶ 17}** That OSPA was intended to, and generally does, prohibit the release of records about adult former students without their written consent does not appear to be controversial or unsettled. *See* 82 Ohio Jurisprudence 3d, Schools, Universities, and Colleges, Section 355 (2019) (outlining the "confidentiality of pupil information"); 1987 Ohio Atty.Gen.Ops. No. 87-037, at *5 ("The stated purpose of [Am. S.B. No. 367, enacting R.C. 3319.321] is 'to restrict the release of information about public school pupils' "). The News Agencies do not dispute that OSPA generally safeguards these records. Instead, the News Agencies ask this court to recognize an exception to OSPA and hold that an adult former student's right to privacy ends at death. The News Agencies acknowledge that OSPA is silent as to a student's death, and they point to no cases holding that, as a matter of law, OSPA ceases to apply or allows release without written consent when an adult former student dies. We have likewise found no cases so holding.

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pursuant to" statutes concerning probation departments and complaints "that a child is an abused, neglected, or dependent child." Division (H) allows reports "that a pupil committed any violation [of a statute] on property owned or controlled by * * * the board of education." The parties have not argued that these divisions are relevant here.

**{¶ 18}** The News Agencies rely in large part on the common law in Ohio and other states concerning a tort plaintiff's right to recover for a wrongful invasion of privacy. *See, e.g., McCormick v. Haley*, 37 Ohio App.2d 73, 135, 307 N.E.2d 34 (10th Dist.1973), citing *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) ("Each person possesses a right of privacy and may maintain an action for a wrongful invasion thereof"). It has been held that the common law right to privacy "lapses with the death of the person who enjoyed it." *See Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990 (6th Cir.1969) (construing Tennessee law on a claim of "an alleged unauthorized public disclosure of private matters"). *See also Young v. That Was The Week That Was*, 423 F.2d 265 (6th Cir.1970) (assuming, in the absence of authority to the contrary, that the *Cordell* rule would apply in Ohio); *Estate of Leach v. Shapiro*, 13 Ohio App.3d 393, 398, 469 N.E.2d 1047 (9th Dist.1984) (citing *Young* and holding that the right to privacy "lapses with the death of the person who enjoys it"). However, this proposition of law does not appear entirely settled in all contexts. The Supreme Court of Ohio recognized in 1996, in a mandamus action, that " '[t]he law remains unsettled as to whether deceased persons have privacy interests.' " *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St.3d 580, 583, 669 N.E.2d 835 (1996), quoting 1 Braverman & Chetwynd, *Information Law* (1985) 411, Section 10-4.1.2.

**{¶ 19}** Ohio cases appear to interpret this proposition in the tort context as meaning that a "decedent's heirs may not recover for the invasion" of a decedent's privacy. *Estate of Leach* at 398*; Kutnick v. Fischer,* 8th Dist. Cuyahoga No. 81851, 2004-Ohio-5378, ¶ 28 (implying that the claim was moot after decedent's death); 35 Ohio Jurisprudence 3d Defamation and Privacy, Section 166 (2019) ("The right of privacy is not descendible;

therefore, one's right to sue for invasion of privacy dies with him or her and cannot be claimed or asserted by his or her estate, relatives, or friends").

**{¶ 20}** We find these tort cases inapposite. The matter before us is not a common law tort action seeking relief on behalf of a deceased person whose privacy has been invaded; it is a request for an extraordinary writ to overcome a deceased person's *statutory* right to consent before his/her educational records are released. We are not convinced that the inability of a deceased person or his/her family members to maintain an actionable common law tort claim necessarily means that anyone with a public records request can overcome the clear, codified rights of a deceased adult former student. *See generally State ex rel. Woods v. Oak Hill Community Med. Ctr.*, 91 Ohio St.3d 459, 461-462, 746 N.E.2d 1108 (2001) (distinguishing between common law duties, which do not support mandamus relief, from statutory duties, which do); 35 Ohio Jurisprudence 3d Defamation and Privacy, Section 166 (2019) (while the common law right of privacy lapses on death, "the *statutory* right of publicity in an individual's persona is freely transferable and descendible, in whole or in part") (emphasis added).

**{¶ 21}** In fact, we find the News Agencies' focus on an individual's right to privacy somewhat misplaced. The question here is not Betts' rights, but rather the School's legal duties under the PRA and OSPA, and the News Agencies' corresponding legal rights. The common law right to privacy in Ohio, enforceable by way of a tort claim when violated, and the statutory mandate to schools to hold their students' educational records confidential unless they have obtained written consent, are simply different. "An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the

wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Housh*, 165 Ohio St. 35, 133 N.E.2d 340 at paragraph two of the syllabus. None of those facets of a tort claim is relevant to or mentioned in OSPA. OSPA, in contrast, makes nearly all student records presumptively confidential, with certain narrow exceptions, and unless the relevant person consents in writing to the release. R.C. 3319.321(B).

**{¶ 22}** The News Agencies also rely on the policy of construing ambiguity in the Public Records Act in favor of disclosure, given that a democratic government should be open to its people. *See, e.g., State ex rel. Rogers v. Dept. of Rehab. & Correction*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 6-7 (concerning policy and construction). But we do not see any ambiguity in the Public Records Act to construe. The PRA unambiguously provides that records that cannot legally be released are not public records. R.C. 149.43(A)(1)(v). Neither party takes a different view. OSPA, which, as an exception to the PRA, must be "strictly construed" against the custodian, is also not ambiguous. OSPA's plain language prohibits the release of an adult former student's records without written consent. R.C. 3319.321(B). No further construction of either statute is necessary. *See State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996) ("If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary").

**{¶ 23}** The requirement that we "strictly construe" OSPA is not an authorization to reshape that statute or add unwritten exceptions to it. Even though certain statutes must be "strictly construed * * * 'courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction;

in such situation, the courts must give effect to the words utilized.' " *State v. Snowder*, 87 Ohio St.3d 335, 337, 720 N.E.2d 909 (1999), quoting *Morgan v. Adult Parole Auth.,* 68 Ohio St.3d 344, 347, 626 N.E.2d 939 (1994). Here, we " 'do not have the authority' to dig deeper than the plain meaning of an unambiguous statute." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.2d 203, ¶ 8, quoting *Morgan*.

**{¶ 24}** We are likewise not persuaded that OSPA's silence as to an adult former student's death creates ambiguity. " 'A statute is ambiguous when its language is subject to more than one reasonable interpretation.' " *Lang v. Dir., Ohio Dept. of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶ 14, quoting *Clark v. Scarpelli,* 91 Ohio St.3d 271, 274, 744 N.E.2d 719 (2001). "However, the fact that a statute can be applied in situations not expressly anticipated does not demonstrate ambiguity but, instead, shows breadth." 85 Ohio Jurisprudence 3d Statutes, Section 192 (2019), citing *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001).

**{¶ 25}** Here, OSPA's language – which contains no exception for the death of an adult former student – permits only one reasonable interpretation, and that is that OSPA does not contain such an exception. The News Agencies can make a reasonable *argument* that such an exception *should* exist, but their argument must be directed elsewhere. *See generally Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 38 ("It is not the role of the courts to establish legislative policy or to second-guess policy choices the General Assembly makes"). The language of OSPA is clear and contains no exception for the death of an adult former student; we will not read one into it.[6]

[6] We observe that the General Assembly has spoken to the confidentiality of records after a person's death in other contexts. *See, e.g.*, R.C. 5119.28(A)(16) (titled "Records pertaining

**{¶ 26}** Relatedly, the News Agencies argue that this court should not construe statutory silence as prohibiting disclosure. However, it is not silence that prohibits disclosure; it is the statute itself. OSPA prohibits disclosure of an adult former student's records without written consent. The statutory silence at issue is as to any exception to that prohibition when the student has died. In other words, if disclosure is the rule under the PRA, and if OSPA is an exception to disclosure, the News Agencies are asking us to recognize an unwritten exception to the exception. We decline to do so. *See Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 23 ("The court must give effect to the words used, making neither additions nor deletions from words chosen by the General Assembly"); *State ex rel. Steffen v. Court of Appeals*, *First*

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to person's mental health condition confidential; exceptions" and providing "[t]hat records and reports relating to a person who has been deceased for fifty years or more are no longer considered confidential"); R.C. 5153.171 (concerning information requests "about a child under eighteen years of age who was a resident of the county served by the agency at the time of death and whose death may have been caused by abuse, neglect, or other criminal conduct"); R.C. 2151.421(I) (titled "Persons required to report injury or neglect; procedures on receipt of report" and discussing how confidential reports are treated when "the child who is the subject of the report dies for any reason at any time after the report is made, but before the child attains eighteen years of age"). The General Assembly could have specifically addressed this situation in OSPA but did not.

The School also points to a sunset provision in the PRA that could allow later release:

> A record that is not a public record under division (A)(1) of this section and that, under law, is permanently retained becomes a public record on the day that is seventy-five years after the day on which the record was created * * *. If any other section of the Revised Code establishes a time period for disclosure of a record that conflicts with the time period specified in this section, the time period in the other section prevails.

R.C. 149.43(A)(1). While it is unnecessary to resolve the question of when the records at issue will become available and if this provision will apply in the future, this provision suggests that the legislature's omission of a separate death exception in OSPA was not unintentional.

*Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, ¶ 26 ("[W]e are forbidden to add a nonexistent provision to the plain language" of the statute).

**{¶ 27}** The argument that this court should, in an apparent case of first impression, interpret OSPA to include an exception for the death of an adult former student on the basis of common law, or should interpret OSPA in lockstep with FERPA (or rather, consistent with an informal letter by the Department of Education's Family Policy Compliance Office interpreting FERPA on the basis of Tennessee tort law as it stood in 1969) is inherently problematic in the context of an extraordinary writ of mandamus. As alluded to above, the rights/duties enforced in mandamus must be legislatively created, not judicially created, meaning that common law rights are not determinative or particularly relevant. The Supreme Court of Ohio recognized these issues in *State ex rel. Woods v. Oak Hill Community Med. Ctr.*, 91 Ohio St.3d 459, 746 N.E.2d 1108 (2001). There, the Court summarily rejected relator's reliance on common law and non-statutory sources of the claimed rights/duties:

> Woods seeks a writ of mandamus to compel Oak Hill [Community Medical Center] to identify and notify patients of lab reports misstating the normal range for CK-MB% blood enzyme testing. Woods alleged in his amended complaint that Oak Hill had a "duty to disclose this material information to its patients under applicable law, compelling public policy, and common morality." Woods initially relies on precedent from medical malpractice cases as well as ethical regulations adopted by the American Medical Association and the American Osteopathic Association.
>
> Woods's claim is meritless. Certainly, a duty for *negligence* purposes may be established by common law, through a legislative enactment, or by the

particular facts and circumstances of the case. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198, 201. But in mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of government. *State ex rel. Brettrager v. Newburgh Hts.* (2000), 89 Ohio St.3d 272, 274, 730 N.E.2d 981, 983; *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3-4, 640 N.E.2d 1136, 1138. Courts are not authorized to create the legal duty enforceable in mandamus. *Davis v. State ex rel. Pecsok* (1936), 130 Ohio St. 411, 5 O.O. 20, 200 N.E. 181, paragraph one of the syllabus; *State ex rel. Stanley v. Cook* (1946), 146 Ohio St. 348, 32 O.O. 419, 66 N.E.2d 207, paragraph eight of the syllabus.

Therefore, the malpractice and fraud cases cited by Woods in support of his mandamus action are inapposite. * * * Further, the medical ethical regulations adopted by the American Medical Association and the American Osteopathic Association do not create a cognizable duty on the part of Oak Hill in mandamus. * * *

Similarly, Woods's request that Oak Hill organize medical records in order to comply with the regulations of the Joint Commission on Accreditation of Hospitals is not cognizable in mandamus because these regulations are not legislatively created. *Brettrager*, 89 Ohio St.3d at 274, 730 N.E.2d at 983; *Davis*, 130 Ohio St. 411, 5 O.O. 20, 200 N.E. 181, paragraph one of the syllabus.

(Emphasis in original.) *Woods* at 461-462.

**{¶ 28}** The request for mandamus relief before us, based on and importing common law tort concepts and the guidance of an informal Department of Education letter, fares no better. The duty to be enforced in mandamus must be clearly articulated by the General Assembly. We cannot "interpret" an exception into existence in mandamus. Assuming that a legal position along the lines proposed by the News Agencies could arguably be reasonable, mandamus is not the forum to establish such a position in the first instance. Our analysis asks whether an established, clear legal right and clear legal duty already exists in the law. *State ex rel. Willis v. Sheboy*, 6 Ohio St.3d 167, 168-69, 451 N.E.2d 1200 (1983), quoting *State ex rel. Federal Homes Properties, Inc., v. Singer*, 9 Ohio St.2d 95, 96, 223 N.E.2d 824 (1967) ("The function of mandamus is to compel the performance of a present existing duty as to which there is a default"). Taking the News Agencies' position here would require us to establish the exception that would impose the rights and duties here, and then enforce them. Because we cannot establish the rights/duties, and the News Agencies have not directed us to any legislatively-created rights/duties or binding interpretations of legislatively-created rights/duties, we conclude that the News Agencies have not satisfied their burden to show that the School has a clear legal duty to release the records and that the News Agencies have a clear legal right to obtain them.

**{¶ 29}** We acknowledge the keen public interest in the public records requests before us, and also recognize the policy concerns raised by the School and the News Agencies. These considerations, however, do not play a part in the statutory analysis required of us in mandamus. *Ohio Neighborhood Fin.,* 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 38 ("the position that [the parties] urge upon this court is fraught with legislative policy decisions, and to adopt that position would exceed the bounds of this court's

authority"). We are also cognizant that "[t]he "policy underlying the Public Records Act is that 'open government serves the public interest and our democratic system.' " *School Choice Ohio,* 147 Ohio St.3d 256, 2016-Ohio-5026, 63 N.E.3d 1183, ¶ 12, quoting *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. But this concern is not absolute or determinative, as shown by the myriad exceptions in the PRA itself and other statutory prohibitions on release of records. *See Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 6. We must rely on the enactments of the General Assembly to tell us where the balance is, that is, which records must be released and which must be protected. We will not create an exception to an exception in the name of a policy of open government or any other equitable theory, as that would exceed our authority. " '[S]ubjective principles of equity and fundamental fairness' do not dictate whether a writ of mandamus will issue; instead the question is whether there is a clear legal duty to perform the requested act." *State ex rel. Save Your Courthouse Commt. v. Medina*, Ohio Sup.Ct. Slip Opinion No. 2019-Ohio-3737, _ N.E.2d _, ¶ 43, quoting *State ex rel. VanCleave v. School Emps. Retirement Sys.*, 120 Ohio St.3d 261, 2008-Ohio-5377, 898 N.E.2d 33, ¶ 26. We find no clear legal duty here.

**{¶ 30}** We need not determine whether FERPA prohibits release of the records, as we conclude here that the plain language of OSPA bars release. However, we note that FERPA also does not contain a statutory exception for the death of a student. *See* 20 U.S.C. 1232g. Although the Department of Education's Family Policy Compliance Office has opined that FERPA does not prohibit the release of records about a deceased, adult former student, based on a 1969 reading of Tennessee tort law*,* we find the well-reasoned guidance letter from the Ohio Attorney General in 1990 more analogous and more

persuasive. That letter, from then Ohio Attorney General Anthony J. Celebrezze, Jr., advised that an exception for a person's death cannot be read into a (different) silent confidentiality statute:

> Your second question asks whether a duty to treat particular information as confidential alters upon the death of the person who is the subject of the record. No provision of R.C. Chapter 1347 provides that a personal representative of a deceased person may exercise that person's rights under R.C. Chapter 1347 to inspect personal information that is not a public record kept by a government agency. No relevant Ohio statute extends generally such a right after the death of a person who is the subject of a record made confidential under Ohio law. The particular statutes examined herein also fail to mention such an exception. Exceptions not made by the legislature cannot be read into a statute. *Lima v. Cemetery Ass'n*, 42 Ohio St. 128 (1884); *accord, Morris Coal Co. v. Donley*, 73 Ohio St. 298, 76 N.E. 945 (1906) ("[a]n exception to the provisions of a statute not suggested by any of its terms should not be introduced by construction from consideration of mere convenience"). Absent a clear and unequivocal expression on the part of the General Assembly providing an exception, such a variance from the terms of the statute may not be implied. 1988 Op. Att'y Gen. No. 88-007.

(Emphasis added.) 1990 Ohio Atty.Gen.Ops. No. 2-264, at *8. We observe that the prohibition against reading an exception into a silent statute on which this passage relies has long been black-letter law in Ohio, and is inconsistent with the approach taken in the Department of Education letter. We therefore do not find the Department of Education letter

persuasive in interpreting an unambiguous Ohio statute that bars release without written consent.

## CONCLUSION

**{¶ 31}** In sum, we find that the School has shown that the requested records fall squarely within an exception to the definition of public records under the PRA, namely, OSPA. The News Agencies have not convinced us that an unwritten exception to this exception exists, making the records public records. We cannot and will not create such an exception.

**{¶ 32}** Because the requested records are not within the definition of public records, the School does not have a clear legal duty to release them. We conclude that the News Agencies have not shown, by clear and convincing evidence, the corresponding clear legal right and clear legal duty elements of their mandamus claim. They are therefore not entitled to a writ of mandamus.

**{¶ 33}** The request for a writ of mandamus is DENIED on the merits. Both relators' and respondents' requests for damages, attorney fees, and/or costs are OVERRULED. The motion for oral argument is OVERRULED.

SO ORDERED.

JEFFREY M. WELBAUM, Presiding Judge

MARY E. DONOVAN, Judge

MICHAEL L. TUCKER, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).

JEFFREY M. WELBAUM, Presiding Judge

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