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Arizona Corporation Commission
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AZ CORP COMMISSION
DOCUMENT CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

8 **WILLIAM A. MUNDELL**
9 **CHAIRMAN**
10 **JIM IRVIN**
11 **COMMISSIONER**
12 **MARC SPITZER**
13 **COMMISSIONER**

Docket No. S-03418A-01-0000

**RESPONDENT RAMEY'S RESPONSE
TO SECURITIES DIVISION MOTION
TO QUASH DEPOSITION AND
SUBPOENA OF JERRY LOWE**

14 **IN THE MATTER OF:**

15 **RONALD LEE KEEL; DONALD**
16 **RAMEY; and MERACANA MINING**
17 **CORPORATION,**

18 **Respondents.**

19 Respondent Donald Ramey (hereinafter "Respondent") hereby responds to the Arizona
20 Corporation Commission Securities Division's Motion to Quash the Deposition and Subpoena of
21 Jerry Lowe, and for the reasons set forth herein, respectfully requests that this court deny said
22 Motion to quash and order that the deposition and subpoena proceed.

23 **I. Factual Background**

24 The Securities Division of the Arizona Corporation Commission (hereinafter the
25 "Division") has been investigating the activities of Meracana Mining Corporation (Meracana)
26 and it's Directors and Officers. As part of his investigation, Mr. Lowe distributed questionnaires
27 to shareholders of Meracana and presumably spoke to them as well. Further Mr. Lowe requested
28 corporate documents and records from various shareholders and/or officers and directors. On or
about April 3, 2002, in response to requests from Respondent's counsel, the Division disclosed
various documents, including the written transcripts of the deposition of Respondents Ramey and
Ronald Keel. The Division provided absolutely no identifying or source information with regard
to the documents.

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1 Furthermore, the Division claimed to specifically reserved the right to add additional
2 documents for use at the hearing. The Division provided no clue as to what those additional
3 documents may be. When asked if the Division would identify or divulge any potentially
4 exculpatory or helpful information, counsel for the Division declined out of hand.

5 The Division has indicated that it intends to call its investigator, Mr. Jerry Lowe, as a
6 witness. See, letter from Anthony Bingham, Division attorney, attached hereto as Exhibit. A.
7 The Division provided no disclosure about the substance of his proposed testimony, and now
8 objects to the deposition of Mr. Lowe and the production of documents, nor have they agreed to
9 allow Respondent to interview or depose him. The Division then again reserved its "right" to
10 name additional witnesses for the hearing.

11 II. Procedural Background

12 The issue before the court is to what extent the tenets of Due Process and Fundamental
13 Fairness mandate reasonable disclosure by the Securities Division to Respondents who must
14 appear and defend allegations before the Corporation Commission. The court is asked to decide
15 to what extent records of the Division may be discovered by a Respondent to a Securities action,
16 and whether the Division's investigating officer, who has been named as a witness, must be made
17 available for interview or deposition.

18 The Securities Division moved to quash Respondent's subpoena and the deposition
19 notice of investigator Jerry Lowe on the grounds that Respondent's discovery request seeks
20 material that is confidential under A.R.S. §44-2042 and A.A.C. R 14-4-303, and that the Arizona
21 Administrative Code which provides subpoena and deposition rights under R14-3-109, is
22 unenforceable in light of the confidentiality statute.

23 Respondent has filed this Response to the Division's Motion to Quash asserting that
24 "confidentiality" has been waived as to Jerry Lowe, and asking the court to consider the
25 constitutionality of the confidentiality statute and rule under these circumstances, to inspect the
26 Division's file *in camera* for a determination of the applicability of "work-product" privilege as
27 to any particular item, and to order the release to Respondent of any non-privileged material.
28

1 course of an investigation”, which is precluded under A.R.S. §44-2042 and agency rule. First, as
2 argued more fully below, it is Respondent’s position that such a broad sweeping confidentiality
3 preclusion is unconstitutional and should ONLY be used to preclude discovery of things which
4 are in the public interest to protect. The Division has not articulated any reason why any of the
5 information Mr. Lowe has needs to be “protected”. Second, if Mr. Lowe is likely to divulge
6 things which it is in the public interest to keep secret, then Respondents would argue that he
7 cannot give testimony at the upcoming public hearing, either. If the Division insists that this
8 divulgence is not against public interest, then it is Respondent’s position that divulging it to
9 Respondents today is not against public interest, either. By naming Mr. Lowe as a witness for
10 the upcoming hearing, the Division has waived any claim for confidentiality. Either Respondent
11 should be given the opportunity to question Mr. Lowe about the substance of his proposed
12 testimony, or this court should order the preclusion of Mr. Lowe’s testimony as a violation of
13 A.R.S. §44-2042.

14
15 **B. A.R.S. §44-2042 is unconstitutional because its application in Respondent’s**
16 **case violates his Due process rights under the Constitutions of the United**
17 **States and the State of Arizona.**

18 Due Process of Law, as guaranteed by our federal and state constitutions is a principle
19 calculated to ensure that decisions, whether quasi-judicial (as by an agency) or court-made, are
20 not arbitrary and provide for fundamental fairness. See Bradbury v. Idaho Judicial Council, 28
21 P.2d 1006, (Idaho 2001) (Opportunity to be heard prior to the deprivation of life, liberty, or
22 property must occur at a **meaningful time** and in a **meaningful manner** in order to satisfy the
23 requirement of Due Process. *emphasis added*) This test applies to the actions of the Arizona
24 Corporation Commission as well. See, Polaris International Metals Corporation v. Arizona
25 Corporation Commission, 133 Ariz. 500, 652 P.2d 1023 (1982); Sulger v. Arizona Corporation
26 Commission, 5 Ariz. App. 69, 423 p.2d 145 (1967) (Action by Commission tested under Due
27 process). The question, then, is whether the Division’s application of A.R.S. §44-2042 and
28 A.A.C. R14-4-303 denies Respondent the protections afforded him in the Due Process of Law
clauses of the US. And Arizona Constitutions.

1 **1. The Court must apply the Mathews v. Eldridge balancing test in**
2 **analyzing whether Respondent is receiving Due Process of Law.**

3 In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, (1976) the United States Supreme
4 Court prescribes the Due Process test to be applied to administrative proceedings. The Mathews
5 test has three prongs: 1. The private interest at stake, 2. The risk of erroneous deprivation of that
6 interest through the agency procedures used, and the probable value of additional or substitute
7 procedures, 3. The State's interest. This test must be applied in the case at bar

8 **a. Private Interest**

9 Applying first prong - "private interest" - Respondent clearly has fundamental property
10 interests at stake in that he faces the potential deprivation of his entire life savings, and more, if
11 the Division wins its case. Compare, State ex rel. Dublin Securities, Inc. v. Ohio Div. of
12 Securities, 627 N.E.2d 993 (Ohio 1994) (the lower court's order disclosing certain information by
13 the Securities Division was overruled by the Ohio Supreme Court because the court found that
14 Dublin had no "direct economic interest in records"); Bradbury v. Idaho Judicial Council, 28
15 P.2d 1006 (Idaho 2001) (no property interest in reporting judicial misconduct); New Jersey
16 Division of Youth and Family Services v. M.R., 715 A.2d 308 (New Jersey 1998) (Due process
17 was not implicated because there was no property or liberty interest in reputation, however,
18 mother was entitled to child abuse reports under fundamental fairness doctrine.)

19
20 _____

21 2
22 Disclosure of securities files has not generated much review by way of published cases. Ohio, in
23 Dublin Securities, Inc. V. Ohio Division of Securities, 1992 WL 394910 (Ohio App. 10 Dist.
24 1992) and State ex rel. Dublin Securities v. Ohio Division of Securities, 627 N.E.2d 993 (Ohio
25 1994), seems to be the only state which has published its struggle with the issues of
26 confidentiality within its state securities law. The Ohio court of appeals conducted an *in camera*
27 inspection of the Securities Division file. After balancing Dublin's need for information against
28 the State's need to maintain confidentiality, the appellate court ordered the disclosure of certain
items that were neither work-product nor where 'confidential informer' concerns were present.
Dublin Securities, supra. Following appeal by the Division, the decision was overturned by
Ohio's Supreme Court, without touching the item by item analysis of the lower court, on the
grounds that Dublin, under investigation but not named as a party in any agency action, did not
have a "direct economic interest." State Ex Rel. Dublin Securities, supra. The Ohio cases are
attached hereto for the court's convenience.

1 b. Risk of Erroneous Decision

2 With regard to the second prong - risk of erroneous decision - Respondents are accused of
3 making misstatements or omitting material facts. The foundation of the Division's case against
4 the Respondents is what was said to prospective shareholders and by whom. Therefore, the case
5 becomes a question of "credibility" involving disputed adjudicative facts. In order to
6 adequately prepare a defense to the allegations, the Division must provide for disclosure to
7 Respondent in a **meaningful manner** and in a **meaningful time**. This is particularly crucial
8 here, where it appears that much of Respondent's liability rests upon the "controlling persons"
9 and "joint and several liability" theories of Arizona's Securities Laws. If the alleged statements
10 and the respective source and recipient of those statements are not disclosed to recipient, he will
11 be 'blind-sided' at the hearing and the risk of an erroneous result becomes a certainty.

12 c. State's Interest

13 The third prong - State's interest - Respondent concedes that the State has a strong
14 interest in protecting innocent or unwitting investors from unscrupulous securities dealers and
15 schemers. Under Mathews v. Eldridge however, this court must analyze the State's interest in
16 keeping securities investigations secret. The obvious place to find an articulation of the State's
17 interest in maintaining the confidentiality of the investigation files is the legislative history of the
18 statute.

19 The Division correctly observed that the securities confidentiality statute (A.R.S. §44-
20 2042) was enacted in the year 2000. The legislature provided no meaningful insight, however,
21 into the interest it wanted to protect or the reasons such a rule is desirable. Indeed, the Senate
22 Bill fact sheet simply notes that section 2042 "Codifies confidentiality protections currently
23 contained in the Arizona Administrative Code." (See, Arizona State Senate, Fact Sheet for S.B.
24 1099, attached hereto as Exhibit. B) The Arizona Administrative Code, and the 1979
25 Administrative Digest (the year the commission adopted the confidentiality provision) are silent
26 as to the need for secrecy as well.

27 One, therefore, is left with guessing what the state's interest is in maintaining the secrecy
28 of securities investigations. Perhaps, the Commission likened its investigations to

1 “whistleblower” investigations. This would give the State an interest in maintaining the secrecy
2 of investors who may suffer some kind of retaliation, perhaps through the redaction of names,
3 etc., but would not give the State any need to close the entire file to parties in the action.

4 Similarly, perhaps the Commission gets “confidential informers” who need protection because
5 they may face some (realistic) form of retaliation. Without some specifically identified concern,
6 however, there is no state interest in question.

7 **2. Under Mathews v. Eldridge the State cannot show that it has a**
8 **compelling state interest in keeping securities investigations secret.**

9 Assuming, *arguendo*, that the State has at least some legitimate interest in keeping its
10 securities investigations secret, the court must then decide how to weigh the three prongs against
11 one another. In this instance the court must use the “Compelling State interest” test. That is,
12 “When a statute infringes on a fundamental right or a suspect class, the presumption is that the
13 statute is invalid unless the state can demonstrate the statute is necessary to serve a compelling
14 state interest. Heller v. Doe, 509 U.S. 312, 319, 113 S. Ct. 2637 (1993). The confidentiality
15 statute, as well as the Commission rule invade the fundamental right of Respondent not to have
16 his property taken away or be fined, or suffer a potential prison term, without adequate
17 procedures to ensure he receives Due Process of law. The State must show that it has a
18 compelling reason to so invade his rights. This it cannot do. At best the State may have a
19 compelling reason to withhold particular names or identifying information, but only in some
20 circumstances. The State has no articulatable interest in requiring “blanket” confidentiality.³
21 Accordingly, Respondent’s fundamental right to be free from restrictions upon his liberty or
22 property without Due Process of Law outweigh the State’s interest and the statute and rule must
23 be struck as unconstitutional.

24
25
26
27 ³With no articulable interest to support “global” confidentiality, the statute and rule could
28 not even pass the easier “rational basis test.”

1 **C. The Division’s Application of A.R.S. §44-2042, as well as A.C.C. R14-4-303, is**
2 **fundamentally unfair and is an unconstitutionally overbroad restriction of**
3 **Respondent’s Due Process rights to meaningful and timely disclosure.**

4 A.R.S. §44-2042 creates a presumption that all records held in the Securities Division’s
5 file, no matter their source or content, require secrecy. When this policy results, as in this case,
6 in “trial by ambush,” it conflicts with the fundamental tenets of fairness and Due Process of Law
7 inherent in our Federal and State Constitutions. The traditional notions of a fair trial and due
8 process are deeply rooted in the adversarial system of resolving factual questions. As Justice
9 Frankfurter observed in Watts v. Indiana, 338 U.S. 49, 54, 69 S. Ct. 1347, we have freed
10 ourselves from the days of the “Star Chamber.” The statute and rule harkens back to those days
11 of “secret investigations,” “trial by ambush,” and withholding of potentially exculpatory
12 documents - all trial practices our constitutional guarantees are designed to abolish.

13 The statute must be struck down. Even if the statute were constitutional because of the
14 disclosure allowed if “not against the public interest” provision, the “public interest”
15 determination made by the Division appears to be arbitrary and capricious and thus
16 unconstitutional in its application. Assuming that the legislature could lawfully authorize the
17 Division to make a determination re: the public’s need to maintain secrecy about certain
18 documents and records, the delegation is nevertheless unconstitutional in this case. The
19 Division has made no attempt whatsoever to articulate why disclosure of the documents in its file
20 would be “contrary to public interest.” And in making said assertions, the Division should
21 identify each item whose disclosure is considered “contrary to public” interest and explain WHY,
22 as to each item, it is so. Although the Division has made some disclosures to Respondent, the
23 failure to identify those documents and their source, the refusal to identify with specificity the
24 documents not disclosed and the reason why it is in the public interest to maintain the secrecy of
25 the documents, is simply an arbitrary and capricious exercise of the authority granted by the state
26 legislature.

1 **D. Fundamental fairness requires that Respondent be granted the disclosure he**
2 **seeks.**

3 Even if this court were to find that the blanket application of the confidentiality statute
4 does not violate Respondent's Due Process rights under Mathews v. Eldridge, Respondent is
5 nevertheless entitled to the enforcement of his subpoena and deposition of Jerry Lowe under the
6 doctrine of "Fundamental Fairness." Quasi-judicial and administrative hearings as well as
7 judicial proceedings are subject to fundamental fairness review in Arizona. See, Polaris, 133
8 Ariz. 500, supra (corporation commission); Amey v. Industrial Commission of Arizona, 156
9 Ariz. 390, 752 P.2d 43 (1988) (industrial commission hearing); Zavala v. Arizona State
10 Personnel Board, 159 Ariz. 256, 766 P.2d 608 (1988) (state personnel board hearing). The
11 Fundamental Fairness doctrine was elaborated by the United States Supreme Court in Roviaro v.
12 United States, 353 U.S. 53, 77 S.Ct. 623 (1957). In Roviaro, the Supreme Court was asked to
13 address the applicability of the government's privilege to withhold the name of an informer.
14 The Court recognized that a "limitation on the applicability of the privilege arises from the
15 fundamental requirements of fairness" Id. at 60.

16 As in Roviaro, the scope of the Securities Division's confidentiality privilege must be
17 "limited by its underlying purpose". Id. at 60. Furthermore, when the disclosure is "relevant
18 and helpful to the defense of an accused, or is essential to a fair determination of the cause, the
19 privilege must give way" Id. Without meaningful disclosure from the Division, Respondent will
20 be at a complete loss as to the factual basis of the Division's allegations. Respondent, as the
21 largest investor in Mercana, faces great losses if he is prevented from meaningful investigation
22 and preparation of his case. The Division's proposed use of the confidentiality statute to prevent
23 Respondent from receiving meaningful and timely disclosure is fundamentally unfair.

24 **Conclusion**

25 Respondent is grateful for the Division's decision to share some of its documents with
26 him. That disclosure, however, without concomitant identifying information and interviews only
27 fractionally improves Respondent's position. Respondent is entitled to have the upcoming
28 hearing conducted according to the tenets of Due Process and Fundamental Fairness. Those

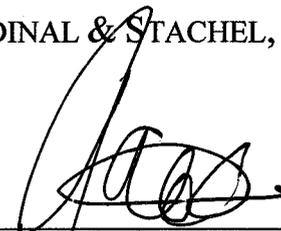
1 rights dictate that he shall receive meaningful and timely disclosure. The State has failed to
2 articulate any compelling reason why he is not entitled to that disclosure. While the State may
3 have a compelling interest in keeping work product or certain identifying information secret, the
4 Division's global application of the statute is overbroad and violates tenets of fundamental
5 fairness and Due Process of Law.

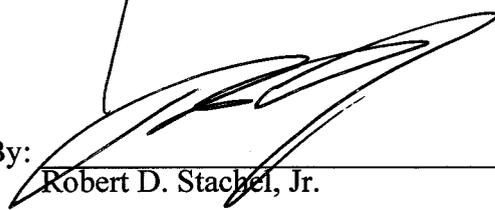
6 The Division has named Mr. Jerry Lowe as one of its witnesses for the upcoming hearing.
7 By doing so, the State has waived any claim that Mr. Lowe (and the knowledge he has) is
8 protected under the confidentiality statute. Respondent is entitled to the immediate scheduling of
9 his deposition.

10 Respondent respectfully requests that this court order the Division to either produce all
11 documents requested under the subpoena, or provide a detailed and itemized description as
12 required under Arizona law, of any documents not discoverable as work product or otherwise
13 privileged. Should the department fail on either count, the Division should be precluded from
14 introducing Jerry Lowe as a witness or using any materials obtained by Mr. Lowe and not
15 disclosed to the Respondent.

16 DATED this 20th day of May, 2002.

17 CARDINAL & STACHEL, P.C.

18
19
20 By: 
Jana E. Flagler

21
22
23 By: 
Robert D. Stachel, Jr.

- 1 Copies of the foregoing
- 2 mailed this 20 day of
- 3 May, 2002, to:
- 4 W. Mark Sendrow, director
- 5 Securities Division
- 6 ARIZONA CORPORATION COMMISSION
- 7 1300 West Washington Street
- 8 Phoenix, Arizona 85007
- 9 Anthony Bingham
- 10 Assistant Attorney General
- 11 ARIZONA ATTORNEY GENERAL'S OFFICE
- 12 1275 West Washington Street
- 13 Phoenix, Arizona 85007
- 14 Ronald Lee Keel
- 15 c/o Sunbridge Park Villa Healthcare
- 16 2001 N. Park Avenue
- 17 Tucson., Arizona 85719
- 18 Meracana Mining Corporation
- 19 c/o Richard Keel
- 20 5496 Fitz Avenue
- 21 Portage, IN 46368
- 22 Respondent Donald Ramey
- 23
- 24
- 25
- 26
- 27
- 28

Likewise, the Division has failed to prove that the documents in question are exempted from disclosure pursuant to R.C. 1707.12(C), which provides:

"Confidential law enforcement investigatory records and trial preparation records of the division of securities or any other law enforcement or administrative agency which are in the possession of the division of securities shall in no event be available to inspection by other than law enforcement agencies."

***434** The court of appeals correctly determined that the items which the Division wishes to conceal are neither "confidential law enforcement investigatory records" nor "trial preparation records." Because I find no abuse of discretion with its determinations, I would affirm the lower court's application of R.C.

1707.12(C).

The exceptions to disclosure contained in R.C. 1707.12(B) and (C) do not apply to the documents in question. They should be disclosed pursuant to R.C. 1707.12(D). [FN6]

FN6. R.C. 1707.12(D) provides:

"All public records shall be prepared and made available promptly to any member of the general public at all reasonable times for inspection. Upon request, the custodian of public records shall make copies of the records available at cost, within a reasonable period of time. To facilitate public access, the division shall maintain public records in such a manner that they can be made available pursuant to this section."

END OF DOCUMENT

EXHIBIT A

WILLIAM A. MUNDELL
CHAIRMAN

JIM IRVIN
COMMISSIONER

MARC SPITZER
COMMISSIONER



ARIZONA CORPORATION COMMISSION

BRIAN C. McNEIL
EXECUTIVE SECRETARY

MARK SENDROW
DIRECTOR

SECURITIES DIVISION
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April 4, 2002

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VIA FACSIMILE & U.S. MAIL

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RE: In the matter of Ronald L. Keel, et. al., Docket No. S-03418A-01-0000

Dear Mr. Stachel and Ms. Flagler:

This letter is to provide you with witnesses the Securities Division plans on calling at a hearing in this case. This list of witnesses was inadvertently left out of the letter to you dated April 3, 2002. The list of witnesses is as follows: Jerry Lowe, investigator with the Securities Division; Vince Fessio, former geologist for Meracana Mining Corporation/Minera Real S.A.; a mining expert or geologist to be named at a latter date; and one or more persons who invested in Meracana Mining Corporation. This is the most complete list of witnesses that can be provided to you at this time. The Securities Division reserves the right to supplement in the future this list of witnesses.

Sincerely,

A handwritten signature in black ink that reads "Anthony B. Bingham".

Anthony B. Bingham
Attorney, Registration & Compliance

N:\ENFORCE\CASES\Meracana Mining Corp.tbb\CORRESP\4-4-02 List of Witnesses to Ramey's Attny.doc

EXHIBIT B

Assigned to FIR
COMMITTEE

FOR

ARIZONA STATE SENATE
Phoenix, Arizona

FACT SHEET FOR S.B. 1099

securities; conformity; revisions

Purpose

Makes numerous changes to securities and investment management statutes, including those that would conform Arizona law to federal law and regulations.

Background

The National Securities Markets Improvement Act of 1996 (NSMIA) amended the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940, three of the most significant laws regarding these transactions. In 1997, the Legislature passed legislation based on NSMIA (Laws 1997, Chapter 240). S.B. 1099 incorporates and parallels further federal statutory changes and regulations based on NSMIA into Arizona securities and investment management statutes.

Among its more substantive changes, S.B. 1099 seeks to discourage litigation tactics by awarding legal fees and costs to the Arizona Corporation Commission (Commission) if a court determines that a person's refusal to obey a Commission-issued subpoena is not substantially justified. The standard for such an award is patterned after Rule 37, Arizona Rules of Civil Procedure, which provides for sanctions against a party opposing a discovery request if the nondisclosure is not substantially justified. S.B. 1099 also closes a loophole used by revoked securities dealers and investment advisers whereby they immediately reapply for registration and necessitate the waste of Commission resources.

The Commission asserts that this bill also clears up areas of confusion, codifies long-standing practices of the Commission and attempts to make its oversight more efficient and less cumbersome for the entities it regulates.

Provisions

1. Defines and clarifies several terms including "SEC," "closed-end company" and "investment adviser."
2. Changes the deadline when security examination assessments are due from the date the notice is mailed to merely the date of notice.
3. Imposes reasonable expenses, including attorneys' fees, on a securities or investment adviser party who unjustifiably refuses to obey a subpoena or citation issued by the Commission.

4. Codifies "no action" letters and details the requested information that must go in such letters. Specifies that such letters do not have precedential value.
5. Reflects and parallels the changes made to securities and investment adviser laws by NSMIA and subsequent regulations adopted by the Securities Exchange Commission based on NSMIA.
6. Expands the "institutional investor" exemption pursuant to federal law.
7. Relaxes requirements to abandon incomplete notice filings.
8. Eliminates contradictory language regarding the refundability of registration fees.
9. Clarifies and makes uniform the entities and the circumstances that may allow denial of securities registration or an investment adviser license.
10. Replaces the term "changes in financial position" with "cash flow" to reflect a terminology change in the accounting industry.
11. Formalizes several application requirements for securities dealers.
12. Prohibits a securities dealer/salesman or investment adviser/representative whose registration or license is revoked or denied from reapplying for security registration or an investment license for at least one year.
13. Specifies that a securities dealer/salesman or investment adviser/representative that has voluntarily terminated or allowed registration/licensure to lapse shall continue to be subject to actions by the Commission if the conduct began prior to the termination of registration/licensure. Requires the Commission to begin to take action within two years of the termination.
14. Adds failing to reasonably supervise salesmen as a grounds to deny or revoke the registration of a salesman.
15. Lengthens the amount of time by which a securities registration or investment adviser license hearing must be set, thereby reflecting time limits set forth in the Arizona Administrative Procedures Act.
16. Codifies confidentiality protections currently contained in the Arizona Administrative Code.
17. Formalizes additional licensure requirements for investment advisers.
18. Authorizes the use of electronic registration for investment adviser representatives.
19. Distinguishes between a renewal violation of the Investment Management Act and more serious violations by allowing technical violators to pay a prescribed penalty based on the length of lapse in licensure. Failure to renew within 40 days may result in a formal administrative action.
20. Clarifies an investment adviser's responsibility to retain only licensed investment adviser representatives.
21. Conforms the Investment Management Act with the Securities Act in terms of the basis to deny, revoke or suspend an adviser's license and jurisdictional authority to bring actions against advisers.

22. Clarifies the current requirement that no new fees are required when an open-end investment company pays the maximum notice filing fee.
23. Codifies notice filing requirements for closed-end investment companies based on passage of NSMIA.
24. Makes numerous technical, clarifying and conforming changes.
25. Provides for a general effective date.

Prepared by Senate Staff
January 24, 2000



Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
County.

STATE of Ohio ex rel. DUBLIN SECURITIES,
INC., Relator,
v.
OHIO DIVISION OF SECURITIES et al.,
Respondents.

No. 91AP-782.

Dec. 31, 1992.

In Mandamus.

Climaco, Climaco, Seminatore, Lefkowitz &
Garofoli Co., L.P.A., Anthony Delligatti, Jr., and
Paula L. Brooks, for relator.

Lee Fisher, Atty. Gen., and Robert A.
Zimmerman, for respondents.

OPINION

TYACK, Judge.

*1 On July 18, 1991, Dublin Securities, Inc., ("Dublin Securities") filed an original action in mandamus in this court seeking a writ compelling the Ohio Division of Securities and Mark V. Holderman, Commissioner of Securities, to permit Dublin Securities to inspect certain documents in the possession of Mr. Holderman and the Ohio Division of Securities. Pursuant to Civ.R. 53(C) and Section 13, Loc.R. 11 of the Tenth District Court of Appeals, the action was referred to a referee of this court to conduct appropriate proceedings. A variety of discovery-related procedures were then conducted. Subsequently, the court ordered the matter withdrawn from the referee and submitted to a panel of judges of this court for further proceedings.

The action is now before the court for consideration on the merits based upon an agreed statement of

facts, the briefs of the parties, and exhibits submitted by the Ohio Division of Securities purporting to represent the information in its possession.

The stipulated facts show that Dublin Securities is a licensed broker and dealer of securities. The Ohio Division of Securities ("Division of Securities") is that part of the Ohio Department of Commerce responsible for the regulation of the securities industry in Ohio. The Division of Securities has received letters of complaint regarding Dublin Securities and has conducted an investigation.

In April and May of 1991, Dublin Securities repeatedly asked the Division of Securities for access to the letters of complaint. The requests were made pursuant to R.C. 1707.12(A) and (B), which read:

"(A) All applications and other papers filed with the division of securities shall be open to inspection at all reasonable times, except for unreasonable or improper purposes.

"(B) Information obtained by the division through any investigation shall be retained by the division and shall not be available to inspection by persons other than those having a direct economic interest in the information or the transaction under investigation, or by a law enforcement officer pursuant to the duties of his office."

Apparently in reliance upon R.C. 1707.12(C), the Division of Securities refused the requests. R.C. 1707.12(C) reads:

"Confidential law enforcement investigatory records and trial preparation records of the division of securities or any other law enforcement or administrative agency which are in the possession of the division of securities shall in no event be available to inspection by other than law enforcement agencies."

The phrases "[c]onfidential law enforcement investigatory records" and "trial preparation records" are defined by statute in R.C. 1707.12(E) as follows:

"(1) 'Confidential law enforcement investigatory record' means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, provided that release of the record would create a high

probability of disclosure of any of the following:

*2 "(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality reasonably has been promised;

"(b) Information provided by an information source or witness to whom confidentiality reasonably has been promised, which information reasonably would tend to disclose his identity;

"(c) Specific confidential investigatory techniques or procedures or specific investigatory work product.

"(2) 'Trial preparation record' means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a criminal, quasi-criminal, civil, or administrative action or proceeding, including, but not limited to, the independent thought processes and personal trial preparation of an attorney and division personnel, their notes, diaries, and memoranda."

In addition to requesting the letters of complaint, Dublin Securities asked for an official acknowledgement that the Division of Securities was investigating any activities of Dublin Securities

Dublin Securities has indicated that it wishes to address any problems reported to the Division of Securities and that it (Dublin Securities) is obligated to take such steps, but cannot do so if the problems are concealed.

The record reveals that the Division of Securities and Mark V. Holderman have confirmed in a statement to the primary local newspaper that an investigation is underway. They have therefore indicated their belief that any records not heretofore revealed are confidential and hence not subject to inspection.

R.C. 1707.12 has not generated much review by way of reported cases. While an analogy with the case law regarding R.C. 149.43 (commonly known as Ohio's public records statute) is possible, such an analogy involves risk. R.C. 1707.12 by its express terms limits access to law enforcement personnel and parties with a direct financial interest in the information or underlying transactions. Thus, we are not dealing with the right of the public-at-large

to know the contents of the file, and we are not addressing R.C. 1707.12 in a First Amendment context. The issue is the narrow one of how much information regarding a Division of Securities investigation should be made available to an entity under investigation prior to the formal initiation of civil, criminal, quasi-criminal or administrative proceedings.

The statutory scheme contained in R.C. Chapter 1707 attempts to balance conflicting interests. Dealers in securities and the securities industry have a strong interest in policing themselves in order to maintain public trust. This interest is best served by full disclosure of the details of complaints that investors may have and information developed as a result of the investigation of the complaints.

On the other hand, the Division of Securities may have its ability to police the industry impaired if all the details of the division's investigations are revealed to those who are being investigated. Because of the competing interests, a bright-line rule in favor of disclosure or nondisclosure is impossible. Some general principles can be developed, but ultimately an item-by-item review of the contents of the Division of Securities file is necessary in order to resolve this particular case.

*3 The Division of Securities has provided the court with twelve binders of documents and three audio tapes for review. Addressing the tapes first, the larger tape includes the interview of an employee of a corporation whose stock Dublin Securities sells or used to sell. Although the Division of Securities asserts in its brief that the individual was promised confidentiality, no evidentiary basis for that bare assertion is before us. Of the other prerequisites for exclusion from inspection, the specific investigatory work-product exception alone applies. The tape should not be made available because it is part of the work product of the formal investigation already begun.

As to the other, smaller tapes, the same exclusion is applicable for the same reasons.

Turning to the three-ring binders, Binder 1, Tab A begins with a subpoena issued to another securities dealer in the Columbus area seeking records related to transactions involving six companies. Both the subpoena and the documents received as a result of

the subpoena contained behind Tab A are investigatory work product and therefore not presently subject to disclosure.

The items indexed under Tab C include handwritten notes resulting from interviews and other documents related to interviews which would constitute specific **investigatory work product**. This section of the binder includes inner-office communications which also are work product.

The documents under Tab D all seem to be notes resulting from interviews. All these documents are investigatory work product.

The documents under Tab E include a flow-chart identifying the relationship between certain broker-dealer firms. Since the source of this chart is unknown, we cannot say that it is or includes work product; nor is other information available such that another exclusion from inspection can be applied.

The remaining documents include a variety of checking account records. While the source of these and the remaining documents under Tab E is unknown, the documents appear to have been obtained as a part of the **investigation** and qualify as work product.

The documents under Tab F include a transcript of a confidential conversation which qualifies for exclusion under R.C. 1707.12(E)(1)(b).

The documents under Tab G include interviews of former employees of Dublin Securities. The interviews qualify for exclusion as specific **investigatory work product**. Under the same tab are subpoenas duces tecum, which are also **investigatory work product**.

Binder 2 begins with Tab H. The documents under this tab include a transcript of an interview and documents received as the result of the issuance of subpoenas duces tecum. The subpoenas, the documents received and the interviews are not subject to disclosure.

No documents are present behind Tab I.

Tab J's documents are all transcripts of interviews not subject to disclosure.

Tabs K and L contain documents circulated by Dublin Securities. No basis has been shown for failing to make these documents available for inspection.

*4 Binder 3, Tab M includes the transcript of an interview and tapes of interviews, all of which are work product.

Tab N includes an apparently unsolicited complaint from a licensed securities dealer to the National Association of Securities Dealers, Inc. ("NASD"). This complaint does not fit under any of the exclusions and hence is subject to disclosure.

Also under Tab N are documents forwarded without explanation from the Mogadore Police Department. No information is provided about how or why these documents were obtained, so no exclusion has been shown to apply.

Additional correspondence between the NASD and the Ohio Department of Commerce dating from 1989 is contained under Tab N. For purposes of R.C. 1707.12, we consider the NASD to be a law enforcement agency, since the NASD has an obligation to assist in the enforcement of federal laws governing licensed dealers. The documents involve an **NASD investigation** of a third party which was then in progress. Under the circumstances, the correspondence is specific **investigatory work product** of the NASD not subject to disclosure.

The documents indexed under Tab O are documents issued to or received from Dublin Securities. The record does not demonstrate the source of these documents or the existence of a promise of confidentiality to the individual involved with Dublin Securities. Therefore, a need for exclusion from disclosure has not been established.

Tab O also includes letters of complaint from several investors who had transactions through Dublin Securities. These letters of complaint apparently initiated the investigation of Dublin Securities and are the essence of what should be disclosed to a securities dealer if self-policing is to have any possibility of success. Therefore, we find that all the items under Tab O are subject to disclosure.

Binder 4, Tab P includes more complaints by customers of Dublin Securities, some of which were not pursued because more than three years had lapsed since the transactions involved. These complaints are also subject to disclosure.

Tab Q begins with a subpoena to a company whose stock is or was sold by Dublin Securities. Neither the subpoena nor the response is subject to disclosure.

Binder 5, Tab R includes computer lists of shareholders in corporations and other corporate records, and the subpoena which was used to obtain the documents. Also, handwritten notes from an interview are included. None need be revealed.

Binders 6, 7, 8, 9, 10 and 11 consist of a volume of records relating to a corporation, the sale of whose stock by Dublin Securities is being investigated. All of these binders are work product of a specific investigation.

Binder 12, Tab S begins with records related to another corporation, the sale of whose stock was and/or is being investigated. These records are work product.

The next section, which is not separately tabbed, consists of a letter directed to a corporation, the sale of whose stock was and/or is being investigated. The copy of the letter and the record generated in response to the letter need not be disclosed.

*5 The next section of Binder 12 contains information obtained as a result of the investigation of a corporation linked to Dublin Securities. This again is work product.

Binder 12 also contains a series of broker-dealer examinations for Dublin Securities. As best as can be told, these are routine examinations by the Division of Securities and not a part of a specific investigation related to a contemplated proceeding. Therefore, the results of these examinations should

be disclosed.

Tab T in Binder 12 contains miscellaneous correspondence between attorneys with the Ohio Department of Commerce and a law firm which is handling a lawsuit brought against Dublin Securities. This correspondence reflects a spirit of cooperation between counsel with arguably coinciding interests. The correspondence and accompanying documents are not shown to be part of the actual investigation and should be disclosed.

The final set of documents under Tab T consists of correspondence related to a contract and a copy of a contract sought by the Division of Securities as a part of the investigation. These documents need not be disclosed since they are work product.

In review, the documents to be disclosed generally are the written complaints lodged against Dublin Securities and the documents generated in the course of routine broker-dealer examinations. The formal investigation which resulted from the written complaints is considered to be specific investigatory work product for purposes of R.C. 1707.12(E)(1)(c) and hence not subject to disclosure. The information voluntarily shared with counsel who has initiated litigation against Dublin Securities and also voluntarily provided by said counsel to the Division of Securities is also subject to disclosure since this sharing of information was not demonstrated to be part of the actual investigation.

As a result, a writ of mandamus shall issue compelling the Division of Securities to make available for inspection those documents which we have indicated above should be made available for disclosure.

Writ of mandamus granted.

BOWMAN and DESHLER, JJ., concur.

END OF DOCUMENT

H

Supreme Court of Ohio.

The STATE EX REL. DUBLIN SECURITIES,
INC., Appellee,
v.
OHIO DIVISION OF SECURITIES et al.,
Appellants.

No. 93-358.

Submitted Oct. 19, 1993.

Decided March 9, 1994.

Securities dealer sought writ of mandamus to compel production of information possessed by state Division of Securities. The Court of Appeals, Franklin County, issued writ compelling Division to make some of the requested documents available for inspection. Division appealed. The Supreme Court, Wright, J., held that: (1) only statute pertaining to inspection of documents filed with, or obtained through investigation by, state division of securities, not public records statute, governs information collected by division; (2) registration filings, broker applications, and dealer financial statements were subject to disclosure; but (3) dealer was target of investigation and thus did not possess "direct economic interest" in consumer complaints and other investigative records, as required to inspect those records.

Reversed.

Pfeifer, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Statutes  223.4
361k223.4

Subsequent, general statutory provision prevails over special provision only if legislature enacts or amends general provision later in time and manifests its intent to have general provision apply coextensively with special provision. R.C. § 1.51.

[2] Records  31
326k31

[2] Statutes  223.4
361k223.4

Because public records statute was enacted subsequent to specific statute pertaining to inspection of documents filed with, or obtained through investigation by, state division of securities, and General Assembly never manifested intent that two provisions be coextensive in either original enactment or any successive amendment, specific statute pertaining to division of securities is sole provision governing information collected by division. R.C. §§ 1.51, 149.43, 1707.12.

[3] Records  30
326k30

Division of securities had duty to release registration filings, broker applications, and dealer financial statements requested by securities dealer, since documents routinely filed with division were required to be open to inspection. R.C. § 1707.12(A).

[4] Records  33
326k33

As target of administrative investigation by state division of securities and criminal investigation by special prosecutor, securities dealer did not possess "direct economic interest" in consumer complaints and other investigative records possessed by state division of securities, and thus was not entitled to inspect those records, since "direct economic interest" exception to rule of nondisclosure for investigatory information was not intended to provide access to target of investigation. R.C. § 1707.12(B).

[5] Records  33
326k33

Persons with "direct economic interest" who have right to inspect investigative documents in possession of state division of securities should generally be limited to consumers; legislature specifically intended to provide right of inspection to consumers with direct economic interest in information, not to target of investigation. R.C. § 1707.12(B).

****994 Syllabus by the Court**

*426 Because the General Assembly enacted R.C. 149.43 subsequent to R.C. 1707.12, and never manifested an intent that the two provisions be coextensive in either the original enactment or any successive amendment, R.C. 1707.12 is the sole provision governing information collected by the Ohio Division of Securities.

Appellant Ohio Division of Securities ("the Division") is the state agency responsible for regulating the securities industry in Ohio pursuant to R.C. Chapter 1707. Appellee Dublin Securities, Inc. ("Dublin") is a dealer licensed by the Division to engage in the purchase or sale of securities in Ohio pursuant to R.C. 1707.14.

On April 25, 1991, counsel for Dublin met with three individuals from the Division. During the meeting counsel for Dublin orally requested, but were refused, a copy of all complaint letters received by the Division concerning Dublin.

Dublin repeated its request in writing on April 29, 1991, relying on R.C. 1707.12, the statute specifically dealing with information collected by the Division. On May 1, 1991, the Division, while not stating whether Dublin was under investigation, replied that pursuant to R.C. 1707.12(C), confidential law enforcement investigatory records and trial preparation records can be made available only to law enforcement agencies.

Between May 13 and July 15, 1991, Dublin renewed its request in writing four more times, broadening the scope of the request to include all unsolicited materials and any investigation files concerning the company, its principals and *427 affiliates. The company demanded to know whether it was under investigation and stated that its purpose in requesting the material was to satisfy the company's duty to self-regulate. The Division responded to these requests on July 17, 1991, reiterating its former position and asserting that R.C. 1707.12(C) permitted it to release only registration filings, salespersons' applications, and dealer financial statements.

On July 18, 1991, Dublin filed a complaint in mandamus in the Court of Appeals for Franklin County, seeking a writ to compel production of the

requested information possessed by the Division. A referee was appointed and a lengthy discovery process ensued. During this period the Division disclosed**995 that Dublin was indeed under investigation. After nearly a year of discovery activity, on June 10, 1992, the court of appeals withdrew the action from the referee and assigned it to a panel of judges on the appeals court. On December 31, 1992, the court of appeals rendered a decision based upon an agreed statement of facts, the briefs of the parties, and the material in question submitted by the Division and reviewed by the court *in camera*.

Conducting an item-by-item review of the contents of the Division's file, the court of appeals determined that most of the submitted material was confidential, but that some of the information, including the unsolicited complaint letters, must be made available to Dublin. [FN1] Based on this review, the court issued a writ of mandamus compelling the Division to make available for inspection those documents which it indicated should be disclosed.

FN1. The Division submitted to the court of appeals twelve binders and three audio tapes of contested information. Of that material, the court of appeals ruled that a flow chart, several documents circulated by Dublin, solicited and unsolicited complaint letters, certain documents forwarded without explanation by a police department, dealer examinations, and miscellaneous correspondence between counsel for both parties were subject to disclosure under R.C. 1707.12(C).

The cause is now before this court upon an appeal as of right.

Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A., John R. Climaco, Richard M. Knoth and Kevin P. Prendergast, Cleveland, for appellee.

Lee I. Fisher, Atty. Gen., and Robert A. Zimmerman, Asst. Atty. Gen., for appellants.

King, Polson & Assoc., P.C., and Lee Polson, Austin, TX, urging reversal for amicus curiae, North American Securities Administrators Ass'n, Inc.

WRIGHT, Justice.

This case presents this court with its first opportunity to interpret R.C. 1707.12, the Ohio statute directed towards the inspection of documents filed *428 with, or obtained through investigation by, the Division. In deciding this case two issues must be addressed. First, the court must determine whether and to what extent R.C. 1707.12 prevails over the public records statute, R.C. 149.43. If R.C. 1707.12 controls and the Division obtained the information through an investigation, then this court must determine whether Dublin has a "direct economic interest" in the information and, if so, whether R.C. 1707.12(C) exempts the information from disclosure as either "confidential law enforcement investigatory records" or "trial preparation records." For the reasons stated below, we hold that R.C. 1707.12, not 149.43, governs the disclosure of information collected by the Division. We further hold that Dublin, as the target of an investigation, has no direct economic interest in the Division's files and pursuant to R.C. 1707.12(B) the information obtained by the Division cannot be disclosed. We do not reach the issue of what constitutes confidential law enforcement investigatory records or trial preparation records within the meaning of R.C. 1707.12(C).

I

Dublin argues that R.C. 149.43 rather than 1707.12 controls the availability of the records in this case because there is no conflict between the two statutes and R.C. 1707.12 is silent on the matter. [FN2] In doing so, Dublin **996 relies on R.C. 1.51. We find Dublin's position untenable.

FN2. The full text of R.C. 1707.12 and the pertinent parts of R.C. 149.43 are set out below.

R.C. 1707.12 provides:

"(A) All applications and other papers filed with the division of securities shall be open to inspection at all reasonable times, except for unreasonable or improper purposes.

"(B) Information obtained by the division through any investigation shall be retained by the division and shall not be available to inspection by persons other than those having a direct economic interest in the information or the transaction under investigation, or by a law enforcement officer pursuant to the duties of his office.

"(C) Confidential law enforcement investigatory

records and trial preparation records of the division of securities or any other law enforcement or administrative agency which are in the possession of the division of securities shall in no event be available to inspection by other than law enforcement agencies.

"(D) All public records shall be prepared and made available promptly to any member of the general public at all reasonable times for inspection. Upon request, the custodian of public records shall make copies of the records available at cost, within a reasonable period of time. To facilitate public access, the division shall maintain public records in such a manner that they can be made available pursuant to this section. "(E) As used in this section:

"(1) 'Confidential law enforcement investigatory records' means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, provided that release of the record would create a high probability of disclosure of any of the following:

"(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality reasonably has been promised;

"(b) Information provided by an information source or witness to whom confidentiality reasonably has been promised, which information reasonably would tend to disclose his identity;

"(c) Specific confidential investigatory techniques or procedures or specific investigatory work product.

"(2) 'Trial preparation record' means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a criminal, quasi-criminal, civil, or administrative action or proceeding, including, but not limited to, the independent thought processes and personal trial preparation of an attorney and division personnel, their notes, diaries, and memoranda."

R.C. 149.43 provides in part:

"(A) As used in this section: "(1) 'Public record' means any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

"(2) 'Confidential law enforcement investigatory

(Cite as: 68 Ohio St.3d 426, *428, 627 N.E.2d 993, **996)

record' means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

"(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

"(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose his identity;

"(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

"(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

"(3) 'Medical record' means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

"(4) 'Trial preparation record' means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney."

*429 It is a well-settled principle of statutory construction that when two statutes, one general and the other special, cover the same subject matter, the special provision is to be construed as an exception to the general statute which might otherwise apply. *Acme Eng. Co. v. Jones* (1948), 150 Ohio St. 423, 38 O.O. 294, 83 N.E.2d 202, paragraph one of the syllabus; *State ex rel. Elliott Co. v. Connar* (1931), 123 Ohio St. 310, 175 N.E. 200, syllabus; *State ex rel. Steller v. Zangerle* (1919), 100 Ohio St. 414, 126 N.E. 413. The General Assembly codified this common-law rule in 1972 by enacting R.C. 1.51. That statute states:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the *430 provisions is irreconcilable, the special or local provision prevails as an exception to

the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

In construing R.C. 1.51 this court has ruled that "[w]here there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence." *State v. Frost* (1979), 57 Ohio St.2d 121, 11 O.O.3d 294, 387 N.E.2d 235, paragraph one of the syllabus. Likewise, in *Cincinnati v. Thomas Soft Ice Cream, Inc.* (1977), 52 Ohio St.2d 76, 80, 6 O.O.3d 277, 279, 369 N.E.2d 778, 781, we stated that "the later, general provision * * * shall control over the special **997 provision * * * only if this court determines that the 'manifest intent' of the General Assembly is that the general provision shall prevail." See, also, *State ex rel. Myers v. Chiaramonte* (1976), 46 Ohio St.2d 230, 75 O.O.2d 283, 348 N.E.2d 323.

In *State v. Chippendale* (1990), 52 Ohio St.3d 118, 556 N.E.2d 1134, we provided a framework in which to analyze a conflict between general and special provisions: "[I]t is critical in the first instance to determine whether the statutes * * * are general, special or local. If the statutes are general and do not involve the same or similar [subject matter], then R.C. 1.51 is inapplicable." *Id.* at 120, 556 N.E.2d at 1136. However, when two statutes, one general and the other specific, involve the same subject matter, R.C. 1.51 must be applied. *Id.*

Proceeding with the analysis, the *Chippendale* court stated: "Where it is clear that a general provision * * * applies coextensively with a special provision, R.C. 1.51 allows [both provisions to apply]. Conversely, where it is clear that a special provision prevails over a general provision or the [general provision] is silent or ambiguous on the matter, under R.C. 1.51, * * * only * * * the special provision [applies]. The only exception in the statute is where ' * * * the general provision is the later provision and the manifest intent is that the general provision prevail.' Thus, *unless the legislature enacts or amends the general provision later in time and manifests its intent to have the general provision apply coextensively with the special provision, the special provision must be the only provision applied * * *.*" (Emphasis added.) *Id.* at 120-121, 556 N.E.2d at 1137.

(Cite as: 68 Ohio St.3d 426, *430, 627 N.E.2d 993, **997)

Employing the framework outlined above, we now turn to Dublin's position. R.C. 149.43 is the public records statute. It is clearly a general provision. By contrast, R.C. 1707.12 applies only to documents filed with or obtained by the Division through any investigation. It is a specific statute enacted as part of an overall statutory scheme that authorizes the Ohio Division of Securities to investigate alleged violations of Ohio's securities laws. Therefore, in accordance with the *Chippendale* analysis, this court must apply R.C. 1.51.

[1][2] In doing so, we initially conclude that the conflict between R.C. 149.43 and 1707.12 is irreconcilable since R.C. 1707.12 appears to be an exception to the *431 general public records provision and the language of R.C. 1707.12 expressly limits inspection requests. There is no question that R.C. 149.43 was enacted subsequent to R.C. 1707.12. [FN3] Consequently, pursuant to R.C. 1.51, the subsequent, general provision prevails over the special provision only if "the legislature enacts or amends the general provision later in time and manifests its intent to have the general provision apply coextensively with the special provision. * * * " *Chippendale, supra*, 52 Ohio St.3d at 120-121, 556 N.E.2d at 1137. While much of the language of both statutes is similar, neither statute refers to the other. The later, general statute, R.C. 149.43, has never, in either its original form or subsequent amendments, manifested an intent to apply coextensively with the special provision. There is nothing in the language of either statute to lead this court to believe the legislature intended the two to be coextensive. Indeed, we may properly assume that the General Assembly had knowledge of the prior legislation when it enacted R.C. 149.43, and had it intended to modify the effect of R.C. 1707.12 it would have done so expressly.

FN3. R.C. 149.43 was originally enacted in 1963, R.C. 1707.12 in 1929. See 130 Ohio Laws 155; 113 Ohio Laws 229. Both have been extensively amended.

Thus, because the General Assembly enacted R.C. 149.43 subsequent to R.C. 1707.12, and never manifested an intent that the two provisions be coextensive in either the original enactment or any successive amendment, we hold that R.C. 1707.12 is the sole provision governing information collected

by the Ohio Division of Securities.

II

Having determined that R.C. 1707.12 is the proper provision to be applied, we must now ascertain which section of the statute governs Dublin's request for inspection. R.C. 1707.12 **998 provides a three-tier inquiry for assessing information requests.

[3] First, under R.C. 1707.12(A), "[a]ll applications and other papers filed with the division of securities shall be open to inspection at all reasonable times, except for unreasonable or improper purposes." The key word in this section is "filed." R.C. 1707.12(A) is the least restrictive provision among the three and its plain language dictates that we interpret it to cover those documents, such as applications, routinely *filed* with the Division. Accordingly, the appeals court properly held that the Division had a duty to release the registration filings, broker applications, and dealer financial statements.

[4] Second, R.C. 1707.12(B) mandates that "[i]nformation obtained by the division through any investigation shall be retained by the division" and shall be made available only to law enforcement personnel or to those who have a "direct *432 economic interest" in the information. Because we find that Dublin does not possess a direct economic interest, this part of our opinion is limited to the R.C. 1707.12(B) analysis. [FN4]

FN4. We do not reach the third and most restrictive inquiry, *i.e.*, that under R.C. 1707.12(C). That section requires that confidential law enforcement investigatory records or trial preparation records be made available for inspection only to law enforcement agencies.

The term "direct economic interest" is not defined in the statute. Furthermore, aside from the case history presented in this action by Dublin, R.C. 1707.12 has generated little case law. [FN5] Thus, we are guided in our interpretation solely by the language of the provision and the intent of the Ohio General Assembly.

FN5. See *Republic Oil Co. v. Columbus Accounting & Tax Serv., Inc.* (June 1, 1989), Franklin C.P. No. 85CV-11-6851, unreported; *Worthington Invest. Corp. v. McGill* (Feb. 12,

1992), S.D. Ohio No. C-2-91-659, unreported.

Dublin asserts it has a direct economic interest in the Division's files by virtue of its duty to self-regulate under Ohio Adm.Code 1301:6-3-15. One manner of fulfilling its responsibility, it claims, is to inspect and follow up on all complaints lodged against it with the Division. If Dublin failed to meet its responsibility, it could be subject to license suspension, license revocation, or other administrative proceedings. The prospect of such an action, Dublin argues, surely vests the company with a direct economic interest in inspecting any unfavorable information obtained by the Division.

[5] While we find Dublin's definition of "direct economic interest" interesting, it must be rejected in this context as too broad. We also reject the suggestion that Dublin's inability to inspect consumer complaints filed with the Division results *ipso facto* in a failure to meet its duty to self-regulate. Dublin was the target of an administrative investigation by the Division and is currently under criminal investigation by a special prosecutor. In a word, it was hardly the legislative intent of R.C. 1707.12 to place investigatory files in the hands of a subject under investigation. Instead, we hold that persons with a "direct economic interest" should generally be limited to consumers who, for example, may wish to file a civil suit against a dealer where the Division investigated the consumer's complaint but chose not to proceed against the dealer. While R.C. 1707.12(B) generally exempts from inspection "[i]nformation obtained by the division through any investigation," the General Assembly specifically intended to provide a right of inspection to *consumers* with a direct economic interest in the information, not to the *target* of an investigation. The court of appeals erred in ruling otherwise and in releasing the sundry complaint letters and other information noted above.

Accordingly, Dublin is not entitled to inspection of those documents.

*433 For the reasons and to the extent stated herein, the judgment of the court of appeals is reversed.

Judgment reversed.

MOYER, C.J., and A. WILLIAM SWEENEY,

DOUGLAS, RESNICK and FRANCIS E. SWEENEY, JJ., concur.

PFEIFER, J., concurs in part and dissents in part.

**999 PFEIFER, Justice, concurring and dissenting.

I concur with the majority's syllabus, but I respectfully disagree with its disposition of this case.

While R.C. 1707.12 is the sole provision governing information collected by the Ohio Division of Securities (the "Division"), the Division has failed to prove that the documents it wishes to conceal from disclosure fulfill the statutory test in R.C. 1707.12.

While I am aware that Dublin Securities, Inc. has recently been indicted, this occurrence is irrelevant to the matter before us. The majority devotes a significant portion of its opinion to analyzing R.C. 1707.12(B), which provides:

"Information obtained by the division *through any investigation* shall be retained by the division and shall not be available to inspection by persons other than those having a direct economic interest in the information or the transaction under investigation, or by a law enforcement officer pursuant to the duties of his office." (Emphasis added.)

This provision prohibits disclosure *only* when the records at issue were obtained "through any investigation." Before the Division can exclude documents from disclosure pursuant to R.C. 1707.12(B), it must prove that an active investigation was underway at the time the Division received the document in question. The record is devoid of any evidence indicating that the Division had begun investigating Dublin Securities before receiving the requested documents. A governmental body refusing to release records has the burden of proving that the records are exempted from disclosure. See *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79, 526 N.E.2d 786, paragraph two of the syllabus. The Division failed to meet its burden of proof and may not refuse to disclose the documents in question on the basis of R.C. 1707.12(B). Thus, the majority's detailed analysis of whether Dublin possesses "a direct economic interest" pursuant to R.C. 1707.12(B) is premature.