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Now That You Found That Helpful Information On A Government Website, Can You Use It In Court?

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In today's connected world, a wealth of information is available online ("Online Information") at websites operated by federal and state government agencies. For example, recent sales prices for real property can be found on the county auditor's website, information regarding public utilities such as gas, electric and telephone companies can be found on the Public Utilities Commission of Ohio's website, safety information regarding the operation of interstate pipelines can be obtained from the Office of Pipeline Safety, U.S. Department of Transportation's website and information about the safety record of trucking companies can be found on the Federal Motor Carrier Safety Administration's website.

Can this Online Information can be used as evidence at hearings before an Ohio administrative tribunal ("Tribunal") or at trial in an Ohio court ("Court")? This article discusses two potential arguments supporting the exclusion of Online Information and the countervailing arguments.

The Role of the Ohio Rules of Evidence in Determining the Admissibility of Online Information

The Ohio Rules of Evidence ("Rules") govern whether evidence, such as Online Information, is admissible and can be considered by a Court. The Rules do not strictly apply to hearings before a Tribunal, however, a Tribunal will usually be guided by the Rules in determining whether particular evidence is admissible. For example, the Supreme Court of Ohio has held that the Board of Tax Appeals is not bound by, but may look to, the Rules for guidance. *Bd. of Educ. for Orange City School Dist. v. Cuyahoga County Bd. of Revision*, 74 Ohio St.3d 415, 416 (1996). Thus, in determining whether Online Information is admissible before a Court or Tribunal, the first step is to consider whether the Rules present any potential roadblocks to its admission.

Is Online Information Admissible As "Public Records?"

Generally, the Rules prohibit the admission of statements and/or documents that are hearsay. Ohio R. Evid. 802. Hearsay is a statement made outside of the trial or hearing that is used to prove the truth of something. Ohio R. Evid. 801(C). However, Ohio R. Evid. 803 excludes certain statements or documents from the definition of hearsay, and

allows such information to be admitted. One of the hearsay exclusions provides support for the admission of Online Information.

Under Ohio R. Evid. 803(8), the following are not excluded by the hearsay rule:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . . unless the sources of information or other circumstances indicate a lack of trustworthiness.

This provision allows a Court or Tribunal to admit what are generally known as "public records," providing that there is nothing indicating that the information is not trustworthy.

The Tenth District Court of Appeals has held that Online Information are "public records" admissible under this rule. *Johnson-Wooldridge v. Wooldridge* (Ohio Ct. App. July 26, 2001), No. 00AP-1073, 2001 Ohio App. LEXIS 3319. In that case, the court found that a report that included certain statistics and documents printed from the North Carolina Board of Education website was admissible as a public record under Ohio R. Evid. 803(8), despite the plaintiff's argument that the report constituted inadmissible hearsay. *Id.* at *5. The court held that the report was comprised of "records, statements, and data compilations of a public agency," and that there was no indication of untrustworthiness". *Id.* at *13. Thus, the report was admissible under the "public records" exception to the hearsay rule.

Federal Courts and Courts in Other Jurisdictions Have Admitted Online Information under the "Public Records" Exclusion

Whether Online Information is admissible as "public records" has also been considered by Federal courts.¹ In *EEOC v. E.I. du Pont de Nemours & Co.* (E.D. La. Oct. 18, 2004), No. 03-1605, 2004 U.S. Dist. LEXIS 20753. In that case, the plaintiff attempted to introduce a table of information accessed from the United States Census Bureau website. The defendant argued that a computer printout of information available on the Internet is not trustworthy as required by Rule 803(8) and, therefore, inadmissible hearsay. *Id.* at *3. The court disagreed, holding that because the exhibit contained "official government information," the fact that it was printed from the Internet did not establish that the information lacked trustworthiness. *Id.*

Specifically, the court explained: "Public records and government documents are generally considered not to be subject to reasonable dispute," and "this includes public records and government documents available from reliable sources on the Internet." *Id.* at *3. The U.S. Census Bureau's website, the court concluded, "is one such reliable source." *Id.* at *4. The court further reasoned that "in an age where so much information

¹ Federal R. Evid. 803(8) is substantively the same as the Ohio rule.

is calculated, stored and displayed on a computer, massive amounts of evidence would be inadmissible if the Court were to accept [the defendant's] characterization of all information on the Internet as inherently unreliable." *Id.* Thus, the exhibit did not indicate a lack of trustworthiness and was admissible as a public record under Rule 803(8). *Id.* at *5.

Multiple other courts and authorities have also concluded that documents accessed from a government website are "public records" for purposes of the hearsay exception under Rule 803(8). See e.g. *United States v. New-Form Mfg. Co.* (Ct. Int'l Trade 2003), 277 F. Supp. 2d 1313, 1326 n.15 (statements from the official website of the Office of the Superintendent of Bankruptcy Canada were admissible because they fell within Rule 803(8)); *In re Polygraphix Systems, Inc.* (Bankr. M.D. Fla. 2002), 275 B.R. 408, 418 n.8 (taking judicial notice of the authenticity of information on a county's website and considering the county's annual budget as a "public record" under Rule 803(8)); *Chapman*, 2002 U.S. Dist. LEXIS 18012, at *6 (a printout from the United States Post Office website was an admissible "public record" under Rule 803(8)); Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual Part Four: Internet and E-mail Evidence*, § I[B] ("Businesses and government offices publish countless documents on their websites in ordinary course. Provided that all of the traditional criteria are met, these documents will satisfy the hearsay exception for 'records' of the business or public office involved, under Rule 803(6) or (8).").

Are Documents Obtained from Government Websites Properly Authenticated as Required by the Rules of Evidence?

The "public records" exception may allow a litigant to clear one potential hurdle to the admission of Online Information but we're not home free yet. We must also consider whether Online Information is properly authenticated; i.e., whether the document is what it purports to be. The Tenth District Court of Appeals has held that official publications from government offices are self-authenticating as "official publications" under Ohio R. Evid. 902(5).² *Ohio v. Ohio Housing Finance Agency* (Ohio Ct. App. Dec. 9, 2003), No. 02AP-1147, 2003 Ohio App. LEXIS 5856. In that case, the court adopted the report of Magistrate P.A. Davidson as its own. *Id.* at *3. The Magistrate noted that "government publications may be self-authenticating in some circumstances under Evid. R. 902," but the Magistrate would expect "the proponent of a downloaded document to provide, at a minimum, the web address and path where the document was located, the date and title of the document, the date the document was accessed/downloaded, and a sworn statement that the content of the copy submitted to the court was not altered from the content appearing on the website."³ *Id.* at 24 n.1.

² Ohio R. Evid. 902(5) provides that the following are self-authenticating: "Official publications. Books, pamphlets, or other publications purporting to be issued by public authority."

³ The Board of Tax Appeals has considered, as evidence, information presented at the hearing that was obtained from the Internet. See *JAPADA Limited Partnership v. Ottawa County Bd. Of Revision*, B.T.A. No. 2004-T-379, unreported, 2004 Ohio Tax LEXIS 1357 (Aug. 27, 2004) and *Roth v. Hamilton County Bd. Of Revision*, B.T.A. No. 2004-R-691, 2004 Ohio Tax LEXIS 2016 (Dec. 17, 2004). Note these

It is well established in the federal courts that official documents from government websites are self-authenticating.⁴ For example, in *EEOC v. E.I. du Pont de Nemours & Co.*, *supra*, the court denied the defendant's motion to exclude a table from the website of the United States Census Bureau for lack of authenticity. The court explained: "the webpage is maintained on a government website, and, according to Rule 902(5), 'publications purporting to be issued by public authority' are self-authenticating. The Court thus finds that the EEOC [Equal Employment Opportunity Commission] has provided evidence sufficient to authenticate the exhibit." *Id.* at *5.⁵ See also *Hispanic Broadcasting Corp. v Educ. Media Found.* (C.D. Cal. Nov. 3, 2003), No: CV-02-7134, 2003 U.S. Dist. LEXIS 24804, at *19 n.5 ("Other exhibits which consist of records from government websites, such as the FCC [Federal Communications Commission] website, are self-authenticating."); *Sannes v. Jeff Wyler Chevrolet, Inc.* (S.D. Ohio Mar. 31, 1999), No. C-1-97-930, 1999 U.S. Dist. LEXIS 21748, at *10 n.3 ("The Court finds that the FTC [Federal Trade Commission] press releases attached to Defendant's Motion for Summary Judgment are admissible even though they are not attached to an authenticating affidavit. The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under Rule 902(5) of the Federal Rules of Evidence.").⁶

Conclusion

While there is authority supporting the admission of Online Information as evidence in a proceeding, it is not a slam dunk. Each Court or Tribunal has discretion in determining

(continued...)

cases do not discuss whether Online Information is admissible. However, it is apparent that the Board considered Online Information when making its decision.

The Board, consistent with the court's decision in *Ohio Financing Authority*, has refused to admit Online Information where no witness was presented to testify that the Online Information submitted was a true copy of the original. *Alcoa, Inc. v. Zaino*, B.T.A. No. 1999-G-1401, 2004 W.L. 2414090 (Oct. 22, 2004).

⁴ Ohio R. Evid. 902(5) is identical to Federal R. Evid. 902(5).

⁵ Additionally, the court in *E.I. du Pont* noted that the EEOC submitted sufficient evidence to authenticate the exhibit because the exhibit contained (a) the internet domain address from which the table was printed and (b) the date it was printed. The court also acknowledged that accessing the website using the domain address is a viable method of verifying that the webpage printed existed at that location. *E.I. du Pont*, 2004 U.S. Dist. LEXIS 20753, at *5.

⁶ The relevant legal treaties are also in agreement. See e.g., 7 Moore's Federal Practice, § 37A.34 (Matthew Bender 3d ed. 2004) ("Government websites that publish official documents typically do not present authentication problems as official government reports are self-authenticating."); 6 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 901.08[2] (Matthew Bender ed. 2004) ("The same type of evidence should adequately authenticate or identify information or documents posted to web sites maintained by non-party government agencies, the contents of which ought to be self-authenticating as official publications under rule 902(5) in the absence of affirmative and substantial evidence that the information has been adulterated.").

Also, at least one other state court concluded that Internet publications from government websites are self-authenticating. *Washington v. Bullis* (Wash. Ct. App. Jan. 14, 2002), No. 48164-9-1, 2002 Wash. App. LEXIS 65, at *8 (expenditure sheets the plaintiff submitted from the Washington State Board for Community and Technical Colleges' website were self-authenticating as publications "purporting to be issued by public authority").

the admissibility of evidence. So if you want to use that helpful Online Information at trial, be prepared to give the Court or Tribunal an adequate basis to grant your request.■



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