

IN THE OHIO SUPREME COURT

STATE, ex rel. THE CINCINNATI
ENQUIRER, a Division of GANNETT
SATELLITE NETWORK, INC.
312 Elm Street
Cincinnati, Ohio 45202

Petitioner,

vs.

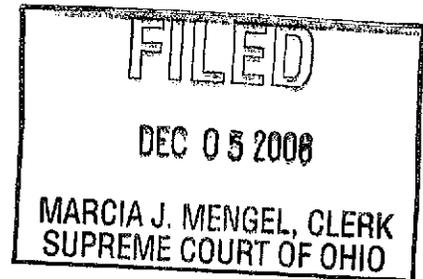
BARBARA RILEY, Director
OHIO DEPARTMENT OF
JOB AND FAMILY SERVICES
30 East Broad Street
Columbus, Ohio 43215-3414

Respondent.

Case No.

06-2239

MEMORANDUM IN SUPPORT
OF COMPLAINT FOR
WRIT OF MANDAMUS



I. STATEMENT OF FACTS

The Enquirer operates and does business as The Cincinnati Enquirer, a newspaper of general circulation in Cincinnati, Hamilton County, Ohio. Respondent Barbara Riley is a public official in the state of Ohio. The Ohio Department of Jobs and Family Services ("ODJFS") is a public body as described by R.C. §149.011(A). Records created, received by or coming under the jurisdiction of the ODJFS constitute public records as defined by R.C. §149.011(G). As the Director of ODJFS, Barbara Riley is the custodian of such records.

On or about September 15, 2006, Gregory Korte, a reporter for The Enquirer, delivered to Barbara Riley, a records request that requested "an electronic copy of the ODJFS database containing the names and addresses of all foster associations, institutions or homes certified by the state under O.R.C. Chapter 5103." (A copy of the request to Ms. Riley is attached as Exhibit A to the affidavit of Gregory Korte, and the requested records will be referred to as "the Foster Records.")

On September 28, 2006, Mr. Korte received a telephone call from Ramesh Thambuswamy, in-house counsel for ODJFS, who informed Mr. Korte that ODJFS would not release the information requested. Mr. Thambuswamy cited 42 U.S.C. §671(a)(8) and *State, ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365 in support of the denial. Mr. Thambuswamy told Mr. Korte The Enquirer was welcome to sue if it disagreed, noting “I believe the Department will fight it and we will win, and you can have that precedent on the books.”

On or about October 30, 2006, Sheila McLaughlin, a reporter for The Enquirer requested from the Respondent the foster care application and home study of Jaysen Bell, a foster care provider currently accused of molesting two foster children in his care (“The Bell Records”).

On November 14, 2006, Ms. McLaughlin was informed that the ODJFS was denying the request for The Bell Records. (A copy of the ODJFS denial of the request for The Bell Records is attached as Exhibit A to the affidavit of Sheila McLaughlin.)

Previously, on October 6, 2006, the ODJFS had produced copies of the Foster Care Application and Home Study for Liz and David Carroll, foster care providers who currently are being held under murder charges in connection with the death of Marcus Fiesel, a child formerly in the Carrolls’ care.

II. ARGUMENT

PROPOSITION OF LAW NO. 1.

THE RECORDS REQUESTED BY THE ENQUIRER ARE PUBLIC RECORDS.

The fundamental right of access to public records is contained in Ohio’s Public Records Law, R.C. §149.43(B) which provides that “All public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours ***.” This provision grants access to “public records.” A public record is defined in R.C. §149.43(A) as “any record that is kept by a public office, including but not limited to state,

county, city, village, township, and school district unites ***.” The Ohio Supreme Court has consistently held that the provisions of the Public Records Act should be construed to provide the broadest access possible to government records.¹

The ODJFS has provided no defensible basis for refusing to produce the Foster Records or the Bell Records. Because the ODJFS has failed to provide any valid excuse for its failure to provide those records, this court must order that the ODJFS produce them.

THE FOSTER RECORDS

In refusing to produce the Foster Records, the ODJFS relies on a federal statute that is inapplicable on its face, and an Ohio Supreme Court case that is factually in opposite.

The federal statute² merely requires generally that states develop a plan for foster care and adoption assistance that “provides safeguards which restrict the use of or disclosure of information concerning individuals assisted.” Nothing in this statute, nor in any Ohio law promulgated thereunder, mandates confidentiality of foster care providers. By definition, a foster care provider is not a person “assisted.”

Similarly, *State, ex rel. McCleary v. Roberts*,³ offers no support. *McCleary* involved disclosure of information about children participating in a photo identification program.⁴ The requested material directly related to the child’s personal information, including the photograph of the child, the child’s name, address, medical information, and emergency contact information.⁵ Thus, the *McCleary* court determined that the database was not a public record and the court declined to analyze the applicability of the public records exception.⁶ The

¹ *Dayton Newspapers, Inc. v. City of Dayton* (1976), 45 Ohio St.2d 107, 341 N.E.2d 576; *State, ex rel. National Broadcasting Co. v. City of Cleveland* (1988), 38 Ohio St.3d 79, 526 N.E.2d 786.

² 42 U.S.C. §671(a)(8).

³ 88 Ohio St.3d 365, 2000-Ohio-345, 725 N.E.2d 1144.

⁴ See *State, ex rel. McCleary v. Roberts*, supra at 365-366.

⁵ See *Id.* at 369-370.

⁶ *Id.*

McCleary court did state in dicta that, even if the information were considered a “record” it would be exempt pursuant to the right of privacy guaranteed by the fourteenth amendment.⁷

Reliance on *McCleary* is misplaced. First, the Foster Records and the Bell Records are, unquestionably, public records. The ODJFS provides certification of foster care providers as part of its function. Who ODJFS certifies, as well as how it undertakes that certification, are directly related to its public function. Thus records – such as the Foster Records and the Bell Records – which document those functions are public records.

Second, unlike *McCleary*, where information relating to the child’s name, address, family history, medical condition, and photograph were explicitly provided in the city’s database, the records here do not contain any private information about children.

The Foster Records disclose only those persons whom ODJFS has certified to provide foster care. Nothing in those records discloses any personally identifiable information regarding children. Similarly, the Bell Records concern Jaysen Bell. They contain nothing that would identify an individual child. In short, *McCleary* has no application here.

THE BELL RECORDS

In addition to the inapplicable *McCleary* citation, the ODJFS also relies on §149.43(A)(2), the confidential law enforcement investigatory record exception (“CLIR”), to justify withholding the Bell Records. The reliance on this exception is completely misplaced. First, the Bell Records were not created as part of any law enforcement investigation. They are essentially Bell’s application to be a foster care provider. At the time of their creation, they did not pertain “to a law enforcement matter.” As such, they do not qualify for the CLIR exception.⁸

⁷ *Id.* at 370-371.

⁸ The fact that law enforcement, as a result of the subsequent molestation charge, may now be looking at the Bell Records, does not transform them into CLIR records. *See, State, ex rel. Beacon Journal Pub. v. Maurer* (2001), 91 Ohio St. 54, 2001-Ohio-282, 741 N.E.2d 511.

Second, even if the Bell Records could possibly be construed as pertaining “to a law enforcement matter,” the ODJFS has not explained how the records satisfy one of the five subsets of the CLIR exception. In order for the CLIR to apply, the party claiming the exception must establish that production of the records would result in one of the following: disclosure of the identity of an uncharged suspect; disclosure of a confidential source; disclosure of a specific investigatory technique; disclosure of investigatory work product; or a risk of physical harm to law enforcement personnel. The very nature of the Bell Records – an application to be a foster care provider – demonstrates that CLIR doesn’t apply.⁹

PROPOSITION OF LAW NO. 2.

MANDAMUS IS THE APPROPRIATE REMEDY FOR A VIOLATION OF R.C. §149.43.

Mandamus is an appropriate remedy to compel a public body to provide records to which a petitioner is entitled.¹⁰ When seeking records under R.C. §149.43, a petitioner need not establish the lack of an adequate remedy.¹¹

An application for a writ of mandamus must demonstrate a clear legal right to the relief sought and a concomitant clear legal duty on the part of the respondent to provide the relief sought.¹² Given the public nature of the requested records, coupled with the failure to demonstrate any “overriding interest,” the ODJFS has a clear legal duty to produce the records.

⁹ The fact that ODJFS previously produced the application and home study of Liz and David Carroll also demonstrates that CLIR does not apply.

¹⁰ *State, ex rel. Beacon Journal*, supra 98 Ohio St.3d at 160, 781 N.E.2d 195, 2002-Ohio-7117, ¶ 49; *Scripps Howard Broadcasting*, supra, 73 Ohio St.3d at 23, 652 N.E.2d at 183; *State, ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 593, 639 N.E.2d 1189, 1195.

¹¹ *Scripps Howard Broadcasting*, supra, 73 Ohio St.3d at 23, 652 N.E.2d at 183.

¹² *State, ex rel. Plain Dealer Publishing Company v. Lesak* (1984), 9 Ohio St.3d 1, 3, 457 N.E.2d 821, 822-23.

PROPOSITION OF LAW NO. 3.

THE REQUESTED RECORDS ARE PUBLIC RECORDS AND THE ENQUIRER IS ENTITLED TO RECOVER ITS ATTORNEY' FEES.

The Enquirer should recover its attorneys' fees in this action. First, R.C. §149.43(C) makes such an award mandatory.¹³ The Enquirer here has satisfied all the criteria necessary to recover fees – it requested public records and it was forced to institute a mandamus action to recover them.

Even if this court decides that the attorneys' fee award is discretionary, it should grant The Enquirer's request for an award of attorneys' fees.¹⁴ In deciding the request, this court should consider the presence of the public benefit to be conferred by the person seeking disclosure, and the reasonableness and good faith of the respondent in refusing to make the information available.¹⁵

Here, the public benefit is clear. The public has the right to examine the manner in which the ODJFS manages the State's foster care process. This process is a matter of vital public interest.

Also, the ODJFS has not acted reasonably in refusing to produce the Foster Records. It is not reasonable to justify a refusal to produce public records based on a federal statute that does not prohibit that production. It is not reasonable to refuse production based on a narrow, fact specific holding by the Ohio Supreme Court in a case with no relevance to the current case.

With respect to the Bell Records, the assertion of the CLIR exception is unreasonable on its face. It is particularly unreasonable given that the ODJFS had previously released the same records relating to another foster care provider within the last month.

¹³ See, the concurring opinion of Justice Douglas in *State, ex rel. Plain Dealer Publishing Co. v. Cleveland* (1996), 75 Ohio St.3d 31, 39, 661 N.E.2d 187.

¹⁴ *State, ex rel. Fairfield Leader v. Ricketts* (1990), 56 Ohio St.3d 97, 103, 564 N.E.2d 486.

¹⁵ *Id.*

A failure to comply with a public records request for invalid reasons justifies an award of attorney fees to the requesting party.¹⁶

The attitude of ODJFS is best summarized by its in-house counsel, who told Enquirer reporter Gregory Korte, The Enquirer would “have to sue” to obtain the records. That arrogant, obstructive attitude is precisely the reason for the attorney fee provision. Having forced this action through its unreasonable conduct, it is the responsibility of the ODJFS to pay The Enquirer’s attorney fees.

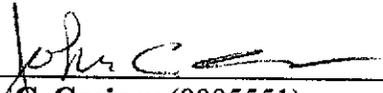
III. CONCLUSION

The facts and the law in this case demonstrate that The Enquirer and the public have a clear legal right to inspect and copy the records at issue, and that the ODJFS has a clear legal duty to permit such inspection. The Enquirer is entitled to a Writ of Mandamus requiring production of the records and an award of its attorney fees.

Respectfully submitted,

Of Counsel:

John A. Flanagan (0018157)
Katherine M. Lasher (0070702)
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836


John C. Greiner (0005551)
Counsel for The Cincinnati Enquirer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

¹⁶ *State, ex rel. Toledo Blade Company v. Ohio Bureau of Workers Compensation* (2005), 106 Ohio St.3d 113, 117, 2005-Ohio-3549 ¶ 24, 835 N.E.2d 723.

PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a copy of this Memorandum in Support of Complaint to the Respondent identified in the caption on page one via U.S. Certified Mail, return receipt requested.



John C. Greiner (0005551)