

IN THE OHIO SUPREME COURT

STATE, ex rel. THE CINCINNATI  
ENQUIRER, a Division of GANNETT  
SATELLITE NETWORK, INC.,

Case No. 06-2239

Relator,

vs.

HELEN JONES-KELLEY, DIRECTOR  
OHIO DEPARTMENT OF  
JOB AND FAMILY SERVICES,

Respondent.

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BRIEF OF RELATOR IN SUPPORT OF  
COMPLAINT FOR WRIT OF MANDAMUS

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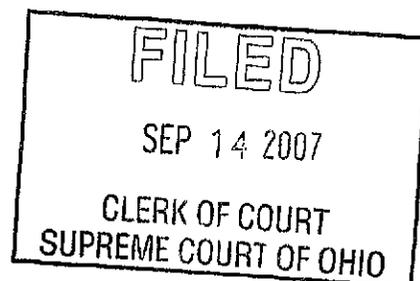
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BRIEF OF RELATOR  
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I. STATEMENT OF FACTS

Relator The Cincinnati Enquirer, a Division of Gannett Satellite Network, Inc. (“The Enquirer”) operates and does business as The Cincinnati Enquirer, a newspaper of general circulation in Cincinnati, Hamilton County, Ohio. Respondent Helen Jones-Kelley is a public official in the state of Ohio.<sup>1</sup> The Ohio Department of Jobs and Family Services (“ODJFS”) is a public body as described by R.C. §149.011(A).<sup>2</sup> Records created, received by or coming under the jurisdiction of the ODJFS constitute public records as defined by R.C. §149.011(G).<sup>3</sup> As the Director of ODJFS, Helen Jones-Kelley is the custodian of such records.<sup>4</sup>

On or about September 15, 2006, Gregory Korte, a reporter for The Enquirer, delivered to Barbara Riley (the predecessor to the current director, Helen Jones-Kelley), a records request that requested “an electronic copy of the ODJFS database containing the names and addresses of

<sup>1</sup> Stipulation of Facts, ¶ 1.  
<sup>2</sup> Stipulation of Facts, ¶ 3.  
<sup>3</sup> Jones-Kelley Deposition, p. 15.  
<sup>4</sup> Stipulation of Facts, ¶ 1.

all foster associations, institutions or homes certified by the state under O.R.C. Chapter 5103.”<sup>5</sup>

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.”<sup>6</sup> Mr. Thambuswamy is authorized to speak on behalf of the ODJFS.<sup>7</sup>

To date the ODJFS has refused to produce the Foster Records.

## II. ARGUMENT

### PROPOSITION OF LAW NO. 1.

#### **THE REQUESTED RECORDS ARE PUBLIC RECORDS.**

The fundamental right of access to public records is contained in Ohio’s Public Records Act, 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

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<sup>5</sup> Exhibit A to the Affidavit of Gregory Korte.

<sup>6</sup> See Affidavit of Gregory Korte.

<sup>7</sup> Jones-Kelley Deposition, pp. 17-18.

consistently held that the provisions of the Public Records Act should be construed to provide the broadest access possible to government records.<sup>8</sup>

The ODJFS has provided no defensible basis for refusing to produce the Foster 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.

1. The Original Defenses Lack Merit.

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

The federal statute<sup>9</sup> 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.”<sup>10</sup>

Similarly, *State ex rel. McCleary v. Roberts*,<sup>11</sup> offers no support. *McCleary* involved disclosure of information about children participating in a photo identification program.<sup>12</sup> 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.<sup>13</sup> Thus, the *McCleary* court determined that the database was not a public record

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<sup>8</sup> *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.

<sup>9</sup> 42 U.S.C. §671(a)(8).

<sup>10</sup> Jones-Kelley Deposition, p. 10.

<sup>11</sup> 88 Ohio St.3d 365, 2000-Ohio-345, 725 N.E.2d 1144.

<sup>12</sup> See *State ex rel. McCleary v. Roberts*, supra at 365-366.

<sup>13</sup> See *Id.* at 369-370.

and the court declined to analyze the applicability of the public records exception.<sup>14</sup> The *McCleary* court did state in dicta, however, that even if the information were considered a “record” it would be exempt pursuant to the right of privacy guaranteed by the fourteenth amendment.<sup>15</sup>

Reliance on *McCleary* is misplaced. First, the Foster Records are, unquestionably, public records. The ODJFS provides licensure 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.<sup>16</sup> Thus records – such as the Foster 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 the ODJFS has licensed to provide foster care. Nothing in those records discloses any personally identifiable information regarding children.<sup>17</sup> In short, *McCleary* has no application here.<sup>18</sup>

The argument asserted here by the ODJFS is similar to the unsuccessful argument made by the Respondent in *State ex Rel. Cincinnati Enquirer v. Daniels*.<sup>19</sup> In that case, the Respondent argued that it could not produce records of property owners cited for maintaining properties with unhealthy lead levels for fear that someone could use the citations to discover the names and

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 370-371.

<sup>16</sup> Jones-Kelley Deposition, p. 15.

<sup>17</sup> Jones-Kelley Deposition, pp. 22-23.

<sup>18</sup> According to the ODJFS’s own manual on public records, the names and addresses of foster care givers were unquestionably public record prior to the *McCleary* decision. (Ex. 4 to Jones-Kelley Deposition, p. 0053.) And, according to that same manual, the ODJFS does not believe that the *McCleary* decision provides clear guidance on this point. (*Id.*) Moreover, the manual nowhere suggests that 42 U.S.C. §671(a)(8) shields that information.

<sup>19</sup> (2006), 108 Ohio St.3d 518, 2006-Ohio-1215, 844 N.E.2d 118.

addresses of children who may have been diagnosed with unhealthy levels of lead in their bloodstream. In that case, as in this case, there was no mention of the children's names (or any other identifying information) in the requested records. Wisely, the Court in the *Daniels* case rejected the Respondent's attempts to expand the *McCleary* holding beyond its facts. The court noted:

“..., the facts here are in sharp contrast with those in our decision in *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365, 725 N.E.2d 1144, for example, where the city database at issue contained specific identifiable information, including names, addresses, phone numbers, family information, photographs, and medical information of children, that we determined was exempt from public disclosure; we held there that the information did not constitute a public record because it did not document the operation of an office ... we nonetheless recognize that none of the specific identifiable information referred to in *McCleary* is part of the information contained in the lead-citation notices or risk-assessment reports prepared by the health department and requested by the Enquirer in this case. *Id.* at ¶ 17.

This case presents the same facts as *Daniels* – the alleged sensitive information is not contained in the Foster Records, and the information sought is nothing like the sensitive information in *McCleary*. This Court should reject the ODJFS's invitation to expand *McCleary*, just as this Court rejected the same invitation in *Daniels*.

## 2. The Post-Filing Defenses Lack Merit.

Following the filing of this Mandamus action, the ODJFS has asserted more recently discovered additional grounds that, according to the ODJFS, require it to conceal the Foster Records. None of these alleged justifications have merit. And the effort to put forward the sheer mass of inapplicable, irrelevant citations is evidence of the intention of the ODJFS, expressed by Mr. Thambuswamy, to fight the production of the Foster Records at all costs.

In its Answer to the Complaint in this action, the ODJFS contended that “duties under state and federal law” precluded it from producing the Foster Records. But, the ODJFS did not

specifically identify which state or federal laws which it was referring. Finally, however, in response to interrogatories, the ODJFS set out a lengthy list of Ohio statutes and sections of the code of federal regulations prohibit it from releasing the names and addresses of foster care providers.<sup>20</sup> But none of these statutory provisions or regulations prevent disclosure of the requested information.

R.C. §5101.30, §5101.27, §5101.271, §5101.28 and §5101.29 concern information which relates to public assistance recipients. In her deposition, ODJFS Director Helen Jones-Kelley acknowledged that foster care parents are paid for their services, but that such payments are not deemed public assistance.<sup>21</sup> Therefore, because foster parents are not public assistance recipients, these statutes do not apply.

Similarly, R.C. §3107.17 and §3107.42 concern adoption records. Because adoption is a wholly separate function from foster care,<sup>22</sup> the confidentiality provisions contained in these sections have no bearing on the records at issue in this matter.

R.C. Sections 5153.16 and 5153.17 deal with the powers and duties of and the records maintained by the public children services agency (PCSA). The Enquirer did not request records from the PCSA. Therefore, these statutes are not applicable to the Enquirer's records request. Additionally, the records maintained by the PCSA relating to foster homes concern investigations of foster homes. The Enquirer has not requested records concerning foster home investigations. The names and addresses of foster care providers are routinely collected as part of the licensing process, separate and apart from any investigation.<sup>23</sup>

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<sup>20</sup> R.C. §5101.27, §5101.271, §5101.28, §5101.29, §5101.30, §3107.17, §3107.42, §5153.16, §5153.17, §5101.13, §5101.131, §5101.132, §5101.133, §5101.134, 42 C.F.R. §431.306, 42 C.F.R. §1355.30, 45 C.F.R. §205.50, 42 U.S.C. 671, O.A.C. 5101: 1-37-01.1, and R.C. 149.43.

<sup>21</sup> Jones-Kelley Deposition, p. 10.

<sup>22</sup> Jones-Kelley Deposition, p. 49.

<sup>23</sup> Jones-Kelley Deposition, p. 29.

42 CFR § 431.306 and O.A.C. 5101: 1-37-01.1 concern the release of information of Medicaid recipients. Because Medicaid is a function entirely separate from foster care, the confidentiality provisions contained in either 42 CFR §431.306 or O.A.C. 5101: 1-37-01.1 have no bearing on the Foster Records.

42 C.F.R. §1355.30 simply lists which sections are applicable only to the programs funded under titles IV-B and IV-E of the Social Security Act, and do not concern the Foster Records.

45 C.F.R. §205.50 is entitled “Safeguarding Information For the Financial Assistance Programs.” In her deposition, Ms. Jones-Kelley acknowledged that foster care parents are paid for their services but that such payment is not deemed public assistance.<sup>24</sup> Under R.C. §5101.26, financial assistance is included within the definition of public assistance. Therefore, 45 C.F.R. §205.50 does not pertain to the Foster Records.

42 U.S.C. §671 discusses the requisite components of a state plan for foster care and adoption assistance. With respect to confidentiality, the section requires only that a state plan provide safeguards which restrict the disclosure of information concerning individuals assisted under the plan. Foster care providers are not individuals assisted under the plan. Rather, the individuals assisted are the children on whose behalf the payments are made.

42 U.S.C. §675(4)(A) defines foster care maintenance payments as payments to cover the cost of “food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the child’s home for visitation.” And 42 U.S.C. §672, which concerns the conditions under which a child may qualify for receipt of foster care maintenance payments, refers only to children as recipients of the

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<sup>24</sup> Jones-Kelley Deposition, p. 10.

payments. The Enquirer has not requested any information concerning children in this matter. Therefore, 42 U.S.C. §671 is not applicable to the records requested.

R.C. §5101.13, §5101.131, §5101.132, §5101.133, and §5101.134 concern information contained in the uniform statewide automated child welfare information system. R.C. §5101.131 states that information contained in or obtained from the uniform statewide automated child welfare information system (SACWIS) is confidential. Respondent apparently contends that the names and addresses of licensed foster homes fall under this broad blanket of confidentiality. They do not.

SACWIS is a comprehensive case management system containing various information concerning children and families including information regarding investigations of children and families and the care and treatment provided to them. Under R.C. §5101.13, the department of job and family services is charged with maintaining Ohio's SACWIS. When a public children services agency (PCSA), a private non-custodial agency (PNA), a private child placing agency (PCPA), or a children services agency (CSA) is determining whether to recommend a foster home for certification it requests the ODJFS to conduct a search of the SACWIS. The search results in a summary report which, pursuant to Ohio Administrative Code (OAC) 5101:2-33-22 (G), contains the following information:

“(1) The summary report shall contain a chronological list of abuse and neglect determinations or allegations of which a person seeking to become a foster caregiver of a child or seeking to adopt is subject and in regards to which a PCSA has done one of the following:

- (a) Determined that abuse or neglect has occurred;
- (b) Initiated an investigation, and the investigation is ongoing;
- (c) Initiated an investigation, and the agency was unable to determine whether abuse or neglect occurred.”

The name or address of the potential foster parent is not obtained from SACWIS and is not a part of the summary report. Rather, that information is provided by the agency seeking the summary report. And the agency obtains the name and address from the prospective foster parent. Therefore, R.C. §5101.131's requirement of confidentiality does not apply to information concerning the names and addresses of foster parents.

In short, not one of the myriad of state and federal regulations cited by ODJFS provide what ODJFS says they do. None of them preclude production of the Foster Records.

3. Statutory Construction Compels Disclosure.

In addition, basic statutory construction demonstrates that the ODJFS argument is meritless. Thus, the concept of "Expressio Unius Est Exclusio Alterius" provides that the expression of one thing is the exclusion of another. Several Ohio Revised Code sections expressly provide that certain records maintained by ODJFS are exempt from the Public Records Act.<sup>25</sup> None of those provisions exempt the names and addresses of foster care records.

The fact that the Revised Code expressly lists those foster care records that are exempt from the Public Records Act means that those records not included in that list are not exempt. The names of foster care providers are nowhere to be found on that list. They are not exempt.

4. The ODJFS Policy Arguments Are Irrelevant And Inaccurate.

In addition to the specious legal arguments it offers to justify its refusal to produce the Foster Records, the ODJFS also argues that as a matter of policy it should not produce the Foster Records. This argument is inherently flawed because the ODJFS has no policy making authority under the Public Records Act. In addition, common sense demonstrates that there is no

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<sup>25</sup> R.C. §5101.31, §5104.011(c)(3), §3121.899(A), §5101.61(F) and §5111.61(B) provide express exemptions for certain records maintained by the ODJFS.

factual basis for this argument. Also, as a matter of fact, the ODJFS's actions and internal policies completely belie the asserted policy reasons for refusing production.

The ODJFS argues that if it reveals the names of licensed foster care providers, disgruntled natural parents will use that information to track down those foster care providers who are caring for their children and harm them. Putting aside for a moment the enormous factual flaws in this argument, it is utterly irrelevant. The ODJFS has no authority to decide whether or not it is a good idea to produce public records. The **sole** responsibility for a public body when responding to a public records request is to determine whether the records fall under an applicable exception. If no exemption applies, the public body must promptly produce them. The authority to make policy determinations as to whether records should be exempt resides solely with the Ohio legislature. Whether or not the ODJFS policy argument has merit, it is being presented to the wrong branch of the Ohio government.

The ODJFS policy argument also lacks common sense. The Foster Records would reveal only the names and addresses of foster care providers. They would not reveal the names of any children in foster care, nor would they identify which foster care providers are caring for which children at any given time. The gist of the ODJFS policy argument is that the release of the names and addresses would provide a data pool from which disgruntled natural parents could use a process of elimination to ultimately determine where their children are located. There are **9985** licensed foster care providers in the state of Ohio!<sup>26</sup> The notion that release of this pool of information would inevitably lead to danger is simply not plausible.

The policy argument argument is further eviscerated by the fact that the ODJFS does not shield the identities of foster care givers from natural parents, and in fact, encourages interaction

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<sup>26</sup> Stipulation of Facts, ¶ 9.

between the foster care givers and the natural family. In those situations where there is a perceived threat to the child, ODJFS relies on law enforcement to provide necessary protection.

**Q. And could that be any individual home, or are there in those circumstances where the need is, you know – where there is a perceived need to keep the child away from a natural parent or guardian who is a threat, would there be foster caregivers that are specifically trained for those types of circumstances?**

**A. Not necessarily. The least restrictive setting is for the child is what is considered. It is law enforcement's job to keep the parent away. So the child would be placed with a family that would have the ability to provide for that child's needs in terms of getting them to school or whatever the child's needs might be.**

**Q. Okay. And you rely on the police to provide protection?**

**A. That is correct.<sup>27</sup>**

The ODJFS policy to encourage interaction between foster children and natural families is set forth in any number of official ODJFS publications. For example, the ODJFS "Family Decision Making Model" encourages placing the foster child in "close proximity" to the natural parent.<sup>28</sup> Similarly, the ODJFS "Preservice Training Manual For Foster Caregivers" states that the goal of foster care is to reunify children with their families.<sup>29</sup> That same manual provides "foster families are expected to communicate with the birth parents of all children."<sup>30</sup> In her deposition testimony, Ms. Jones-Kelley reiterated this policy:

**Q. What do you mean the ideal situation?**

**A. This is where a child is able to be placed with the family being part of that decision making for the child's own best interests. The family works with the foster family either for reunification or for eventual termination of rights, but still having family involved in that child's life. That's when there's no risk of harm to the child.**

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<sup>27</sup> Jones-Kelley Deposition, p. 42.

<sup>28</sup> Jones-Kelley Deposition, Exhibit 5, p. 268.

<sup>29</sup> Jones-Kelley Deposition, Exhibit 6, p. 1075.

<sup>30</sup> Jones-Kelley Deposition, Exhibit 6, p. 1318; see also Jones-Kelley Deposition, Exhibit 7, p. 0857.

**Q. And outside of the scenario where there is risk of harm to the child, is it the policy of the Department of Job and Family Services to encourage a placement that is in close proximity to the natural family?**

**A. Yes.**

**Q. And again, outside the scenario where there's risk of harm to the child, is it the policy of the Department of Job and Family Services to encourage ongoing interaction with the natural family while the child is in foster care?**

**A. Yes.<sup>31</sup>**

**Q. Let me ask you to take a look, please at page 1076. The first full paragraph on 1076 says, "However, in the vast majority of case situations, the agency will make sincere and reasonable efforts to strengthen the child's own family and reunite the child with his or her family prior to filing for permanent custody." Does that statement accurately reflect the policy of the Ohio Department of Job and Family Services?**

**A. It reflects the law.**

**Q. Okay. Take a look at the heading on that same page, 1076, towards the middle that says, "To promote team building among the foster parent, birth parent, adoptive parent, agency staff, and community resources." It indicates child welfare is a team effort. Is it the policy of the Ohio Department of Job and Family Services to promote a concept of team building among the foster parent, the birth parent, adoptive parent, the agency staff, and community services?**

**A. Absolutely, In those ideal situations, absolutely.<sup>32</sup>**

It is also the policy of the ODJFS to maintain as much as possible the foster child's status quo. Thus, the ODJFS makes a concerted effort to keep the child in the same school after placement as before.

**Q. Okay. Subsection D on page 0268 – did I say D? I meant E. I'm sorry. Subsection E on page 0268 says, "When selecting a substitute care placement setting, describe how the agency considered proximity to the school in which the child was enrolled prior to placement." Again, this question is directed to the team as you described?**

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<sup>31</sup> Jones-Kelley Deposition, pp. 45-46.

<sup>32</sup> Jones-Kelley Deposition, pp. 49-50.

A. Uh-huh.

Q. Correct?

A. Yes.

Q. **And it is the Department of Job and Family Services' goal, again except for the circumstances where there is a risk to the child, to keep the child in the same school, if at all possible?**

A. Yes.

Q. **And given the desire to keep the child in the same school to place that child in a location that is in close proximity – in as close proximity to the school as possible, correct?**

A. **In those ideal situations. Yes.**<sup>33</sup>

It is undisputed that the ODJFS maintains a policy of encouraging interaction between the natural parents and the foster family, as well as a policy of continuing the pre-placement activities of the foster child, including continued enrollment in the child's school. In this light, it is inaccurate, if not disingenuous, for the ODJFS to argue that the names and addresses of licensed foster care providers need to be withheld from the public in order to shield that information for natural parents. Those natural parents, per ODJFS policy, **have** that information!

The ODJFS's fear mongering also rings hollow given the fact that in its training materials for prospective foster care providers, the ODJFS stresses the need for foster care providers to involve the natural parents in lives of the foster children.<sup>34</sup> Those same materials characterize as "myth" the notion that foster care providers are at risk of harm from natural parents:

Q. **It says here [Jones-Kelley Deposition, Exhibit 6, p. 1313], under Trainer Instructions, "trainer should begin by collecting homework assignments." Then the next sentence says, "The trainer should stress that adoptive, foster, and kinship caregivers must acknowledge and fully understand the importance of birth families to children in care." Do you agree that this statement accurately reflects Ohio Department of Job and Family Services' policy?**

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<sup>33</sup> Jones-Kelley Deposition, pp. 46-47; See also Jones –Kelley Deposition, Exhibit 5, p. 268.

<sup>34</sup> Jones-Kelley Deposition, Exhibit 6, p. 1076.

A. Yes.<sup>35</sup>

Q. Let me ask you to take a look at page 1317, please. There appears to be a set of Myths and Realities laid out actually beginning on page 1316 and carrying over to page 1318. Would you agree that at least based on these training materials that the Ohio Department of Job and Family Services characterizes the following as a myth: "Most parents are violent, dangerous people who pose a threat to the foster family's caring for their children"?

A. Yes. That's true.

Q. That would be a myth?

A. That would be a myth.

Q. And you would agree that the Department of Job and Family services considers the reality to be the following statement: "Some birth parents have a history of violence or mental health problems that indicate risk for caregivers. Most birth parents, however, can build a collaborative relationship with foster or kinship parents that can be invaluable in the rapid reunification of the family." You agree that that is reality?

A. That is reality.

Q. Okay. Please take a look at page 1318. Would you agree that the following statement reflects the reality, at least for purposes of the Ohio Department of Job and Family Services, and that is, "Foster families are expected to communicate with the birth parents of all children," correct?

A. Correct.<sup>36</sup>

Also as part of its training materials, the ODJFS provides to prospective foster care givers a document entitled "Continuum of Contact for Foster Parents" which encourages foster caregivers to "call [the] child's parents on the phone"; and "welcome [the] child's parents into your home."<sup>37</sup> The ODJFS endorses the suggestions on set forth on that document:

Q. You pointed out that is prepared at least by the Cuyahoga Department of Children and Family Services. But is there anything

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<sup>35</sup> Jones-Kelley Deposition, pp. 51-52.

<sup>36</sup> Jones-Kelley Deposition, pp. 52-53.

<sup>37</sup> Jones-Kelley Deposition, p. 54, Exhibit 6, page 1345.

**on here, and please take a minute to look at that, that from your position as Director of the Ohio Department of Job and Family Services that you would disagree with?**

**A. Not in the ideal situation, no. I wouldn't disagree.<sup>38</sup>**

The ODJFS cannot in good faith argue to this court that foster families would be put at risk by release of their names and addresses, while in its training materials characterize such a statement as a myth. By its own estimation, in the overwhelming majority of cases, interaction between foster families and natural families is encouraged. In those isolated instances where there is some risk, appropriate steps are taken to provide protection. Release of the Foster Records is mandated by the Ohio Public Records Act, and the release of that information will not put care providers or children at risk.

Just how isolated are those cases involving a risk of harm to foster families is illustrated by the evidence submitted by the ODJFS. The ODJFS has submitted evidence concerning four instances (going back as far as 1995) where a natural parent or guardian harassed a foster caregiver. One of these cases involved a situation where the child was placed in "kinship care" – that is, with a blood relative. In each of these cases, disturbed people took desperate action. That is a tremendously sad, but, in all likelihood, inevitable occurrence in certain rare situations. There is no evidence that public availability of the names and addresses of foster caregivers would increase the instances of disturbed people acting out. According to the ODJFS, prior to the *McCleary* decision, the names and addresses of foster care providers were publicly available. The ODJFS presents no evidence that such instances decreased following the *McCleary* decision. This court should not ignore the clear dictates of the Ohio Public Records Act based on isolated acts of disturbed individuals. As ODJFS Director Helen Jones-Kelley testified, that is the job of law enforcement.

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<sup>38</sup> Jones-Kelley Deposition, p. 54.

And, again, if fear of harm to foster caregivers dictates a change to the Public Records Act, that is a job for the Ohio Legislature, not this court.<sup>39</sup>

Finally, although “policy” questions should not be at issue here, public policy favors disclosure of the Foster Records. Foster care providers serve the needs of the most vulnerable members of our society – abused and neglected children. **Who** the ODJFS licenses to perform this task, and **how well** the ODJFS performs this task are matters of grave public interest. The public has a right to know if their tax dollars, which are used to compensate these providers, are being properly spent. The public, and public watchdogs, cannot accurately assess the performance of the ODJFS if that agency is permitted to conduct its affairs behind closed doors. The ability to monitor the performance of government lies at the heart of a democratic society and is the basis for the Public Records Act. This court must reject the attempt by the ODJFS to shield its performance from public scrutiny.

### **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.<sup>40</sup> When seeking records under R.C. §149.43, a petitioner need not establish the lack of an adequate remedy.<sup>41</sup>

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

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<sup>39</sup> Similarly, the concern that fewer people will sign up to be foster care providers (expressed in the Affidavit of Thomas M. Roelant) does not permit the ODJFS to withhold public records. If that concern requires a change in the law (and it doesn't), that too is a job for the legislature.

<sup>40</sup> *State ex rel. Beacon Journal v. Bond* (2002), 98 Ohio St.3d 146, 160, 781 N.E.2d 180, 195, 2002-Ohio-7117, ¶ 49; *State ex rel. Scripps Howard Broadcasting v. Cuyahoga Co. Court of Common Pleas* (1995), 73 Ohio St.3d 19, 23, 652 N.E.2d 179, 183; *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 593, 639 N.E.2d 1189, 1195.

<sup>41</sup> *Scripps Howard Broadcasting*, supra, 73 Ohio St.3d at 23, 652 N.E.2d at 183.

sought.<sup>42</sup> 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.

**PROPOSITION OF LAW NO. 3.**

**THE REQUESTED RECORDS ARE PUBLIC RECORDS AND THE RELATOR 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.<sup>43</sup> 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.<sup>44</sup> In considering the request, this court should weigh 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.<sup>45</sup>

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.

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<sup>42</sup> *State ex rel. Plain Dealer Publishing Company v. Lesak* (1984), 9 Ohio St.3d 1, 3, 457 N.E.2d 821, 822-23.

<sup>43</sup> 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.

<sup>44</sup> *State ex rel. Fairfield Leader v. Ricketts* (1990), 56 Ohio St.3d 97, 103, 564 N.E.2d 486.

<sup>45</sup> *Id.*

And it is particularly not an exercise in good faith to assert an alleged policy justification for the refusal to produce the records when the actual day to day policy of the ODJFS is in direct contradiction of that asserted policy.

A failure to comply with a public records request for invalid reasons justifies an award of attorney fees to the requesting party.<sup>46</sup>

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 the filing of 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,

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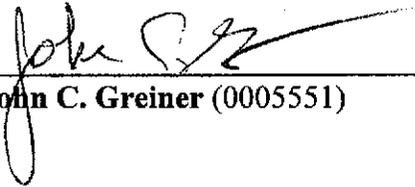
  
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<sup>46</sup> *State ex rel. Toledo Blade Company v. Ohio Bureau of Workers Compensation* (2005), 106 Ohio St.3d 113, 117, 2005-Ohio-3549 ¶ 24, 835 N.E.2d 723.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by regular U.S. Mail, postage prepaid, this 13<sup>th</sup> day of September, 2007, upon the following:

Henry G. Appel, Esq.  
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