

In the
Supreme Court of Ohio

STATE ex rel. THE CINCINNATI
ENQUIRER, A Division of The Gannett
Satellite Network,

Case No. 06-2239

Relator,

v.

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

Respondent.

**BRIEF FOR HELEN JONES-KELLEY,
DIRECTOR OF THE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

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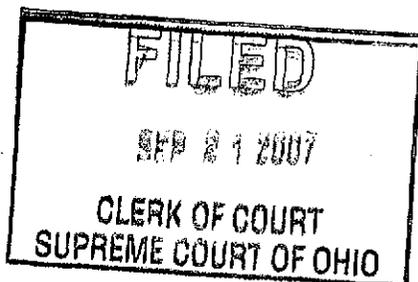


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INTRODUCTION

Every year, juvenile courts and child welfare agencies across Ohio remove thousands of children because of suspected abuse, neglect, or dependency caused by their birth parents and other household members. Because their birth parents are unwilling or unable to provide them a safe environment, many of these children are placed with one of the nearly 10,000 certified foster parents in Ohio. Children in general are among Ohio's most vulnerable citizens, and foster children even more so.

To protect the well-being of foster children and the foster parents who have opened their homes and hearts to help them, state and county agencies have kept the identities and addresses of foster parents confidential. And, in some circumstances, the agencies do not tell even biological parents where and with whom their children are staying. Despite these precautions, there have still been incidents of violence inflicted by biological parents on foster parents.

The General Assembly has recognized this danger and created a swath of protections for foster and adopted children. Foster children's names and locations are confidential. So are the names and addresses of adoptive parents and children.

Relator the Cincinnati Enquirer ("Enquirer") asserts that a database including foster parents' names and addresses should be treated as public record. This is incorrect for at least three reasons. First, the information is confidential under both state and federal law, because foster parents are beneficiaries of Title IV-E of the Social Security Act. R.C. 5101.27; 45 C.F.R. § 205.50.

Second, foster parent information is confidential once it is placed into a new statewide child welfare database known as the state automated child welfare information system (SACWIS) under R.C. 5101.131. The confidentiality in the statute is only triggered once information is placed into the database, and not all counties have yet been included. If the

Enquirer's request had been issued a few months from now, the SACWIS database would be fully operational in all 88 counties and the exception for those records would protect the names and addresses of every foster parent in Ohio. It would be illogical and ill-advised to release some names and not others, simply because of the happenstance of which counties have or have not yet been placed on the database. Therefore, ODJFS requests that the Court protect all names and addresses that will eventually be placed in SACWIS.

Third, to the extent that any statutory confidentiality provisions do not apply, the Court should apply the "good sense" exception to protect foster children (and the foster parents who care for them) from adults who are a threat. *State ex rel. Keller v. Cox*, 85 Ohio St. 3d 279, 282, 1999-Ohio-264; *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 370, 2000-Ohio-345. If the names and addresses of foster parents are public, a biological parent could use the information to track down the child and his current caregivers.

Finally, because ODJFS acted in good faith in withholding the requested documents, the Court should not award attorney fees.

STATEMENT OF THE CASE

On September 15, 2006, reporter Gregory Korte demanded, first from personnel in the Office of Communications, then from the Office of Legal Services, that ODJFS release the names and addresses of all foster parents and agencies in Ohio. ODJFS did release the names and addresses of private agencies and institutions certified to perform foster functions, but refused to release the names and addresses of individuals who act as foster parents because of the danger to foster children and their caregivers, citing *McCleary*.

On December 5, 2006, the Enquirer filed an original action in this court seeking to hold, *inter alia*, that all foster parent names and addresses are public information. ODJFS filed a timely answer. On January 23, 2007, this Court referred the case to mediation. The parties were

able to settle a second, unrelated portion of the lawsuit, and this case returned to the active docket on May 31, 2007.

This Court granted an alternative writ on July 25, 2007, ordering the parties to submit evidence and file briefs. The parties have completed discovery. After obtaining a stipulated extension of time, the parties filed their evidence on September 4, 2007. This briefing followed.

STATEMENT OF FACTS

A. Foster parents in Ohio care for thousands of children and frequently adopt the foster children in their care.

As of August 1, 2007, Ohio had 9,985 certified foster homes. Stipulation paragraph 9 (“Stip. ¶9”), State’s Exhibit J, ¶4 (“St. Exh. J, ¶4”). Approximately 80% of all foster parents have had a foster placement in the previous year. St. Exh. J, ¶18.

The foster and adoptive systems in Ohio are deeply intertwined. Foster parents in Ohio are frequently also prospective adoptive parents; 61.35% of foster parents are certified to adopt. St. Exh. J, ¶6. In federal fiscal year 2006, Ohio foster parents adopted 1,011 children. St. Exh. J, ¶6.

Much of the process for applying to be a foster parent is identical to the process for applying to be an adoptive parent. The prospective adoptive or foster parent fills out an “Application for Child Placement” (ODJFS form 01691). St. Exh. B. The applicant can check the “foster” box and/or the “adoption” box. St. Exh. B at 1. The prospective adoptive/foster parent also fills out a form indicating what types of children she is willing to have in her home. Child Characteristic Checklist for the Foster Care and/or Adoption, St. Exh. B. The county public children services agency (or, in some cases, a private agency) will complete a form detailing the homestudy entitled “Assessment for Child Placement,” which can be used to approve either a foster care or adoption application. (ODJFS form 01673). St. Exh. A at 9.

The Director of ODJFS explained that “the practice is to place children in foster care with an eye towards that foster parent possibly becoming the adoptive parent.” Jones-Kelley Deposition at 24 (“Jones-Kelley Dep. at 24”). If someone is approved to be a foster parent, “it is likely” that person will be certified to be an adoptive parent if they so request. Jones-Kelley Dep. at 76.

B. Many biological parents are threats to their children even when the child is placed in a secret location.

Every year, juvenile courts and children services agencies¹ remove many children from their biological parents and put them into foster care. Often, children services agencies must keep the child’s location a secret from the biological parents for safety reasons.

There are three major triggers for this level of protection. In some situations, the “natural parent might be a threat – an active threat to the safety of the child[.]” Jones-Kelley Dep. at 40; 64. In other cases, the threat might be from a non-family member, but the family members cannot be trusted to keep the child’s location a secret. Jones-Kelley Dep. at 65. Finally, sometimes family members try unduly to influence the testimony of a child. Jones-Kelley Dep. at 66. In these situations, the children services organization keeps the location of the child a secret from the natural parent. Jones-Kelley Dep. at 64. Ms. Jones-Kelley testified that such situations happen “often.” Jones-Kelley Dep. at 63.

Even with the precaution of keeping a foster child’s location a secret, sometimes a dangerous person will discover the child’s location. Investigation revealed at least four examples

¹ In some counties, there are independent public children services agencies. In other counties, they are part of the county department of job and family services. For the purposes of this brief, any reference to a children services agency will make no distinction between the two different ways of organizing child welfare duties.

where, despite the confidentiality of the caregivers' identity and/or location, natural parents and others were able to find foster children with tragic results.

1. Sexually abusive stepfather tracks down his stepdaughter, leading to a shootout with police.

In one incident, a sexually abusive stepfather discovered where his stepdaughter was living and appeared with a handgun, leading to a shootout with police. St. Exh. E. Elmer Kindle and his wife lost custody of a 17 year old girl due to sexual abuse. *Id.* at ¶4. The girl, N.W., moved in with Terry Nichols, a foster parent in Bellefontaine, Ohio. *Id.* at ¶3. Kindle discovered that N.W. frequently visited her foster grandparents' home on Sundays and surreptitiously moved into the rental property next door. *Id.* at ¶6.

One evening when Nichols and N.W. were sitting on the front porch with friends and family, Kindle approached carrying a pistol and ordered everyone off of the porch. *Id.* at ¶¶8, 9. When Nichols tried to comfort N.W., Kindle said, "Oh, so he's the one you're sucking now." *Id.* at ¶14. Kindle then showed a bowie knife in his belt and fired his pistol, striking the porch swing. *Id.* at ¶¶15, 16.

After Nichols refused a second order to get off of the porch, Kindle placed the barrel of the pistol against Nichols' head. *Id.* at ¶26. Two police cars approached and there was a shootout with the police. *Id.* at ¶¶27-33. Kindle was shot three times but survived, and later pleaded guilty to crimes related to the incident. *Id.* at ¶¶33, 36.

2. Distraught mother bites and maces caregiver in unsuccessful attempt to kidnap her children.

In another incident, a deranged biological mother attacked the 20-year-old caregiver who was watching her children. The foster children were living with their aunt, Roxanne Wilson, at a location kept secret from the mother. St. Exh. G, ¶¶3-5. During the summer of 2006, Wilson's daughter Christy looked after the two children, A.H. and N.H.. St. Exh. G, ¶7.

On August 15, 2006, the biological mother, Janet Rutherford, confronted Christy and the children outside Wilson's apartment. St. Exh. F, ¶5. Rutherford grabbed the children by their wrists and dragged them to a nearby van. *Id.* at ¶7. Christy was able to pull A.H. out of Rutherford's grasp and successfully got the children out of the van. *Id.* at ¶7. Rutherford and Christy struggled, and Rutherford bit Christy's arm, punched her in the face, and sprayed her with mace. *Id.* at ¶10. Rutherford fled. *Id.* at ¶¶13-14.

Rutherford was later arrested and pleaded no contest to an abduction charge. St. Exh. G, ¶14. Rutherford has written a letter stating that "next time will be worse" and that she will "bring a gun and not mace." St. Exh. F, ¶19. She is scheduled to be released on October 17, 2007. St. Exh. G, ¶17.

3. Biological mother holds caseworker at gunpoint and kidnaps child.

One biological mother discovered the location of her child by holding a children services' worker at gunpoint. Michelle Williams discovered the address of Kathy Wielinski, an employee of Lucas County Children Services. St. Exh. H, ¶¶5-9. Williams wore a disguise and pretended to deliver flowers to Wielinski's home. *Id.* at ¶6. Wielinski and her daughter Beth quickly became suspicious and tried to close the door. *Id.* at ¶8. However, Williams had a handgun and demanded, "tell me where my baby is." *Id.* at ¶¶9-10.

Wielinski did not know where Williams' four-year-old daughter was, so she was forced at gunpoint to call the Lucas County Children Services office. *Id.* at ¶¶16-18. Williams left Wielinski and Beth tied with duct tape and masking tape to chairs. *Id.* at ¶¶15, 23-25. Beth broke free and called the police. *Id.* at ¶26. Before the police could secure the child, Williams seized her daughter from the foster family at gunpoint. *Id.* at ¶28. Williams was later arrested at a motel and the child was found unharmed. *Id.* at ¶29.

4. Biological parents overcome “level one visitation” and successfully kidnap three children from foster care.

Lalita and James Muhammad lost custody of three children due to unsafe living conditions. St. Exh. I ¶5. They were placed on “level one visitation” because Lalita threatened to kidnap the children from foster care. *Id.* at ¶6. In Lucas County, “level one visitation” means that biological parents are not permitted to know the location of their children and all visitation occurs in the presence of a security guard. *Id.* at ¶7.

In November 1999 the Muhammads located the foster parents and sent them a letter on county agency letterhead purportedly setting up a pickup time for the three children to be taken for psychological evaluations. *Id.* at ¶8. An unknown person with fake county identification picked up the children. *Id.* at 9. The children were not located until 2006—almost seven years later. *Id.* at ¶12.

ARGUMENT

ODJFS’s Proposition of Law One:

Names and addresses of certified foster parents in the possession of ODJFS and other public and private children services or placement agencies are exempted from public records disclosure.²

Names and addresses of certified foster parents should not be disclosed in response to a public records request. Revised Code 149.43(A)(1)(v) exempts from disclosure any record “the release of which is prohibited by state or federal law.” In this case, both state and federal law prohibit the release of the names and addresses of foster parents. Specifically, foster parents are paid reimbursement for the cost of care of foster children, and are therefore the beneficiaries of a

² This proposition is in response to the Relator Enquirer’s propositions of law 1 and 2, which read: “The requested records are public records,” and “Mandamus is the appropriate remedy for a violation of R.C. §149.43.”

government program. Information about such beneficiaries is confidential under both federal and Ohio law.

In addition, information on the State’s new SACWIS database—which currently includes the names and addresses of foster parents in most Ohio counties—is confidential under the law.

Finally, to the extent that foster parents’ information is not exempted from release under specific state and federal provisions, ODJFS urges the Court to exempt it under the “good sense” exception articulated in *Keller* and *McCleary*.

A. The names and addresses of foster parents are exempted from disclosure under both federal and state law because the foster parents are beneficiaries of a government program.

Documents containing the names and addresses of foster parents are exempted from disclosure under both state and federal law, because the foster parents are beneficiaries of a government program. Financial assistance is one of the foundations of the foster care system. Foster parents receive money from county agencies or private child placement agencies—“foster care maintenance.” This money reimburses foster parents for various costs of keeping and raising foster children, including housing, food, clothing, and “personal incidentals.” R.C. 5101.141(C)(1). The foster care maintenance program is a form of public assistance under Ohio law. As a result, information regarding recipients of foster care maintenance is confidential under R.C. 5101.27. Moreover, the information is also confidential under 45 C.F.R. 205.50.

1. The names and addresses of foster parents are confidential under R.C. 5101.27.

“Information regarding a public assistance recipient” is confidential under R.C. 5101.27. “[N]o person or government entity shall solicit, disclose, receive, use, or knowingly permit, or participate in the use of any information regarding a public assistance recipient for any purpose not directly connected with the administration of a public assistance program.” R.C. 5101.27.

Foster care maintenance fits the definition of a form of public assistance under R.C. 5101.26. “Public assistance” is defined as “financial assistance, medical assistance, or social services provided under a program administered by the department of job and family services or a county agency pursuant to Chapter . . . 5101 . . . of the Revised Code.” R.C. 5101.26(F).

Foster care maintenance meets all of these requirements.³ The foster care maintenance program is administered under Chapter 5101 of the Revised Code, specifically, R.C. 5101.141. ODJFS administers the program because it acts “as the single state agency to administer federal payments for foster care and adoption assistance made pursuant to Title IV-E [of the Social Security Act].” R.C. 5101.141(B). The types of assistance provided are the quintessential forms of financial and social services that Ohio provides to its most needy citizens: “food, clothing, shelter, daily supervision and school supplies[.]” R.C. 5101.141(C)(1)(a).

Contrary to the Enquirer’s arguments, foster care maintenance payments are made to foster parents, not to children. Jones-Kelley Dep. at 10. In Ohio, foster care maintenance payments are passed through a county or private child placing agency, and to the foster parents. OAC § 5101:2-47-11(F)(2).

In short, foster parents are recipients of public assistance under R.C. 5101.27. As a result, their names and addresses are confidential under Ohio law and documents containing them cannot be disclosed in response to a public records request. Moreover, R.C. 5101.99 makes the release of this confidential information without proper authorization a first degree misdemeanor.

³ The Enquirer cites the Director as testifying that foster care maintenance payments are not a type of public assistance. The Director was mistaken in her interpretation. A witnesses’ interpretation of a statute is not relevant to the court’s legal interpretation of that statute. *Pinchot v. Charter One Bank F.S.B.* (2003), 99 Ohio St. 3d 390, 396.

2. The names and addresses of foster parents are confidential under federal law.

Under federal law, foster care parents are deemed to be recipients of foster care maintenance payments because they receive money “on behalf” of the children in their care. 42 U.S.C. §672(b). Therefore, federal law also precludes ODJFS from providing the names and addresses of foster parents.

The foster care maintenance program is established under Title IV-E of the Social Security Act. 42 U.S.C. §670 *et seq.* Ohio has adopted all “rules governing financial and administrative requirements . . . that provide Title IV-E reimbursement placement services[.]” R.C. 5101.141(B).

The States are required to limit use or disclosure of “information concerning applicants and recipients” of benefits under Title IV-E. 45 C.F.R. §205.50(a)(1)(i)(A). Releasing the information requested by the Enquirer is forbidden under federal law because it involves a list of “names and addresses of applicants and recipients,” which are to be “safeguarded[.]” 45 C.F.R. §205.50(a)(2)(i)(A). Moreover, the “[p]ublication of lists or names of applicants and recipients will be prohibited.” 45 C.F.R. 205.50(a)(1)(iv).

Thus, federal law also mandates that the names and addresses of foster parents be kept confidential, and therefore documents containing them are exempted from disclosure under R.C. 149.43(A)(1)(v).

B. The names and addresses of foster parents entered into SACWIS are protected by R.C. 5101.131.

In addition, the names and addresses of foster parents are confidential under R.C. 5101.13(A) (the SACWIS provision). SACWIS is a “statewide mechanized data collection and informational retrieval system[.]” that is authorized and partially funded by the federal government. 42 U.S.C. §674(a)(3)(C). Revised Code 5101.13(A) expressly incorporates all

federal requirements. And 42 U.S.C. §674(c) expressly authorizes the States to include maintenance payments to foster parents in statewide computer systems. Ohio has done so; foster care maintenance payments are processed through SACWIS under OAC § 5101:2-47-15(A).⁴

Under R.C. 5101.131, any information entered into the SACWIS database becomes confidential: “Except as provided in section 5101.132 of the Revised Code, information contained in or obtained from the information system established and maintained under section 5101.13 of the Revised Code is confidential and is not subject to disclosure pursuant to section 149.43 or 1347.08 of the Revised Code.” R.C. 5101.131.

The names and addresses of all Ohio foster parents are (or will soon) be entered into SACWIS, because this information is central to the “care and treatment provided to children and families.” R.C. 5101.13. Because the SACWIS database contains the names and addresses of foster parents, those names and addresses in the database are “confidential and [are] not subject to disclosure pursuant to section 149.43 or 1347.08 of the Revised Code.” R.C. 5101.131.

To be sure, the protection offered by R.C. 5101.131 currently applies only to *some* of the foster parents in Ohio. SACWIS is being rolled out on “a county by county basis” and is not required to be fully functional until January 1, 2008. R.C. 5101.13(B). The Director testified on August 28, 2007 that “it’s in the process of being rolled out to the last couple of counties now.” Jones-Kelley Dep. at 79. Thus, some names and addresses are not yet protected under R.C. 5101.13.

⁴ Foster care maintenance is defined as “payments made on behalf of a child eligible for title IV-E foster care to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel for a child’s visitation with family, or other caretakers.” 45 C.F.R. §1355.20(a).

However, it makes little sense to disclose some names and addresses and not others based on which counties happen to be on the database at a particular time. The legislature has clearly expressed its intent that the entire contents of the database be confidential. ODJFS therefore requests that the Court prevent disclosure of foster parent names and addresses (and any other pertinent information) both on and not yet on SACWIS.

C. Even if other exceptions do not apply, the names and addresses of foster parents should be held confidential under the “good sense” rule.

Even if the public assistance and SACWIS confidentiality provisions do not apply to the names and addresses of foster parents, the Court should still prohibit their disclosure under the “good sense” exception articulated in *Keller* and *McCleary*.

The Court limited the disclosure of information under R.C. 149.43, even when there is no clear statutory exemption, in *State ex rel. Keller v. Cox* when it concluded that the “good sense” rule” barred a criminal defendant from obtaining the personnel records of a police detective.

The Court applied the “good sense” rule again in *State ex rel. McCleary v. Roberts*. A person requested the application information from children enrolled in Columbus’ Recreation and Parks photo identification program. This information included names, home addresses, and phone numbers of all children using city swimming pools and recreation centers. A requester asked for the electronic database that contained all the personal information of children in the program. This Court concluded that the release of this information would place the children “at risk of irreparable harm” and imperiled the children’s “right to be free from physical, sexual and other abuses.” 88 Ohio St. 3d at 371 (citation and punctuation omitted). The *McCleary* Court excepted the information from disclosure despite the conclusion that the risk to children was “attenuated” and that there was no indication that the requester was a threat. *Id.*

The current case is an even stronger candidate for the “good sense” exception than either *Keller* or *McCleary*. Unlike *Keller*, the request more directly implies a risk to children. And unlike *McCleary*, the risk to foster children and foster parents from some biological parents is more direct.

1. Disclosure of the names and addresses of foster parents will place foster children and foster parents “at risk of irreparable harm.”

Children Services agencies do not remove children from their homes without a good reason. Often, there is physical or sexual abuse. Some biological parents will seek to intimidate their children into changing testimony or recanting allegations. Indeed, the prevalence of witness intimidation was one of the reasons that this Court limited public records disclosures in criminal cases. *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 429.

As demonstrated in the four examples described above, it is hardly conjecture that some biological parents will attempt to kidnap or harm their children. And if there is a foster parent in the way, then that foster parent is also in danger.

Moreover, the ruling the Court issues in this case will not be limited in its application to the Cincinnati Enquirer. If foster parents’ names and addresses must be disclosed upon request, then anyone can get the information, including an estranged biological parent.

The danger to foster parents and children is most acute in the smaller counties. As of December 15, 2006, 49 counties in Ohio had 50 or fewer foster homes. St. Exh. J, ¶3. Noble County had only five. *Id.* A determined parent could employ canvassing and surveillance on a few dozen homes to find a particular child with only moderate difficulty. As is obvious from the examples described above, the parent’s intent might be to kidnap the child or force the child to recant an allegation of mistreatment. And any foster parent or foster parent family member in the way would also be in danger.

Simply put, if public agencies are required to provide the names and addresses of foster parents upon request, Ohio's most vulnerable citizens will be in danger. The Court should respect foster children's "right to be free from physical, sexual and other abuses" and foster parents and their families' right to be free from danger, and hold that the good sense rule applies here. *McCleary*, 88 Ohio St. 3d at 371 (citation and punctuation omitted).

2. Releasing a list of foster parents would hamper agencies' attempts to maintain stability for foster children and encourage their adoption.

As noted above, 61.35% of all foster parents are also approved to be adoptive parents. St. Exh. J, ¶6. Indeed, agencies encourage foster parents to adopt the children in their care. St. Exh. J, ¶17. "[T]he plan is that you bring them into a foster home that may become an adoptive placement for them, if they are not able to be successfully returned to their own family." Jones-Kelley Dep. at 70. Adoption is encouraged in part to minimize the number of times that agencies move foster children from home to home. St. Exh. J, ¶14. In addition, foster parents "already approved for adoption expect privacy because they are contemplating adopting foster children in their care." St. Exh. J, ¶16. Thus, the reasons underlying the confidentiality of adoptive parents' records extend to foster parents who may adopt. If foster parents' information becomes public, the twin goals of adoption and continuity would suffer.

The names and addresses of prospective adoptive parents are confidential under R.C. 3107.17(B)(1). Indeed, R.C. 3107.17 and 3107.99 set forth in great detail protective mechanisms, including criminal penalties, designed to ensure that adoption records and the information contained in them remain confidential. For this reason, and because adoption is a locally administered process, ODJFS has no easy way to determine which foster parents may be in the process of adopting at any given time, and therefore no way to easily redact those names from a

list or database. Therefore, all foster parent names and addresses should be treated as confidential under state adoption law. See R.C. 3107.17, 3107.42, 3107.99, 3705.09(G), and 3705.12.

Moreover, if a biological parent is able to discover the location of a secretly placed child, the “placing agency will usually have to transfer the child to a new foster home.” St. Exh. J, ¶15. For example, in the Bellefontaine incident, Elmer Kindle discovered the location of his stepdaughter, leading to a shootout with police. St. Exh. E. Terry Nichols, the foster father, said that he had a great relationship with N.W.—the foster child. *Id.* at ¶37. “She was great – she called me ‘dad’ and called my wife ‘mom.’ I felt very close to her. She felt like a real daughter to both of us. She treated our son Matt like a brother. She was our favorite foster child during our twenty years of foster parenting.” *Id.* Once Elmer Kindle discovered her location, she had to be immediately placed in another foster home for safety reasons. *Id.* at ¶39.

And for every incident that leads to bloodshed or violence, there are many other incidents where there are merely threats or improper contact. Even without violence, the child will usually be transferred to a new foster home. St. Exh. J, ¶15. This is disruptive to the child, who will need to become acquainted with a new set of foster parents and a new environment.

In addition, disclosure discourages appropriate families from becoming foster and adoptive parents, because many would not feel comfortable knowing that the biological parents—or a newspaper—could discover their whereabouts. Ohio has had great difficulty in recruiting and retaining enough foster parents for abused and neglected children entering care. St. Exh. J, ¶7. If foster parents’ names and addresses become public records, it will be even more difficult to recruit and retain them. By current policy and practice foster parents are usually informed that their records are not public. If the information becomes public, it will deter foster caregivers from entering or remaining in the system. St. Exh. J, ¶¶12 & 13.

In short, if the names and addresses of foster parents are released, the twin goals of stability and adoption of foster children would be undermined.

3. ODJFS encourages contact and mentoring of biological parents by foster parents, but only where it does not present a potential risk of harm to the child.

In an “ideal” foster situation “the family works with the foster family either for reunification or for eventual termination of rights, but still having the family involved in that child’s life.” Jones-Kelley Dep. at 45. The Enquirer challenges ODJFS’s policy arguments because the agency generally encourages the foster family to work with a child’s biological family. However, this mentoring occurs “when there’s no risk of harm to the child.” Jones-Kelley Dep. at 45.

Sadly, not all foster placements are in “ideal situations.” The Director testified that the need to establish confidentiality “happens often.” Jones-Kelley Dep. at 63. And what appears to be a good situation with a family can change quickly. “You don’t know when someone’s going to snap, for the lack of a better term.” Jones-Kelley Dep. at 78. ODJFS does not contend that all or even most biological parents are dangerous. In fact, ODJFS does not know which ones are or might become so. St. Exh. J, ¶9. But there clearly are circumstances under which the secrecy of foster children must be maintained.

It is impossible for ODJFS to limit the disclosure of names by excluding foster parents who are (or may) care for children whose parents do not know their locations. ODJFS does not know which foster parents in Ohio are currently caring for children whose location is being kept secret from family members, because counties and private foster care agencies are not required to notify ODJFS. St. Exh. J, ¶9. Likewise, ODJFS does not know in advance which foster parents will be caring for children whose locations must be kept secret. Jones-Kelley Dep. at 77-78.

And, while ODJFS encourages mentoring on the part of foster parents, it also trains foster parents that “[s]ome birth parents have a history of violence or mental health problems that indicate risk for caregivers.” Enquirer Exhibit 6, p. 1317 (“Enq. Exh. 6 at 1317”). ODJFS explains that there is a “continuum of openness” and that the “agency will not expect foster families to place themselves at risk when working with birth families.” Enq. Exh. 6, at 1317. On one end of the spectrum, a foster parent may communicate with birth families solely through a journal. Enq. Exh. 6, at 1318. Indeed, foster parents are shown a case study where a biological parent “has made threats to ‘kidnap’ the children from placement.” Enq. Exh. 6, at 1105. In the case study, “[t]he mother, in fact, does not know where her two youngest children are in placement.” Enq. Exh. 6, at 1106. Foster parents are trained to communicate with this family without releasing the location of the child. Enq. Exh. 6, at 1105-06.

In short, ODJFS asks the Court to apply the “good sense” exception to releasing the names and addresses of foster parents.

D. Because the names and addresses of foster parents should be held confidential under Ohio and federal law, the Court should deny a writ of mandamus.

As explained above, the names and addresses of foster parents are protected under state and federal law because they are recipients of public assistance. In addition, all information in the SACWIS database, including the names and addresses of foster parents are confidential. And the “good sense” exception articulated in *Keller* and *McCleary* also dictates that the names and addresses of foster parents be kept confidential. Therefore, because the Enquirer has no “clear legal right” to the database it requested and ODJFS has no “clear legal duty” to produce it, the Court should deny the requested writ of mandamus.

ODJFS's Proposition of Law Two:

*Attorney fees are not appropriate in a matter of first impression where counsel makes colorable, non-frivolous arguments.*⁵

ODJFS respectfully requests that the Court deny the request for attorney fees. If the Court agrees that the names and addresses cannot be disclosed, then the attorney fee request should be rejected because the Enquirer will not be a prevailing party.

However, even if the Enquirer is a prevailing party, the Court should not assess attorney fees. In a case of first impression, where the agency acts reasonably in declining to release records, the Court will not “punish[] parties for taking a rational stance on an unsettled legal issue.” *State ex rel. Cincinnati Enquirer v. Daniels* (2006), 108 Ohio St. 3d 518, ¶32 (citations omitted). Whether a public agency is permitted to disclose the names and addresses of foster parents is a “justiciable unsettled legal issue.” *Id.* at syllabus ¶ 3 (2006).

ODJFS has taken a “rational position” in this case, because foster parents are paid for caring for foster children and the payments are a form of public assistance. Revised Code 5101.27 holds that information about recipients of public assistance is confidential. In addition, at least *some* foster parent records will be protected because they are also adoptive parents or because they are on the SACWIS database. R.C. 3107.17(B)(1); R.C. 5101.131.

Finally, ODJFS has provided substantial evidence that there are a dangerous minority of biological parents who cannot be trusted with the location of their children, and might harm the children and foster parents if their locations are known. It is reasonable for ODJFS to ask the Court to apply the “good sense” exception to R.C. 149.43.

⁵ This proposition is in response to Relator Enquirer’s proposition of law 3, which reads: “The requested records are public records and the Relator is entitled to recover its attorney’ fees.”

Simply put, ODJFS should not be “punish[ed]” for “taking a rational position on a justiciable unsettled legal issue.” 108 Ohio St. 3d at syllabus ¶ 3. The Court should deny attorney fees.

CONCLUSION

For the above reasons, the Court should deny the petition for mandamus and the request for attorney fees.

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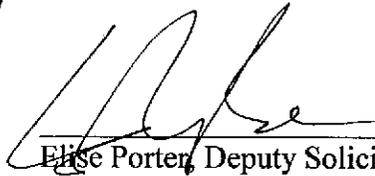
Helen Jones-Kelley, Director,

Ohio Department of Job and Family Services

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Respondent was served by U.S. mail, postage prepaid, this 21st day of September, 2007, on the following counsel:

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