

IN THE SUPREME COURT OF OHIO

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
AND FAMILY SERVICES,

Respondent.

REVISED AMICUS BRIEF OF PUBLIC CHILDREN SERVICES ASSOCIATION OF
OHIO AND COUNTY COMMISSIONERS' ASSOCIATION OF OHIO URGING
DENIAL OF THE REQUESTED WRIT OF MANDAMUS AND IN SUPPORT OF
RESPONDENT, HELEN JONES-KELLY, DIRECTOR, OHIO DEPARTMENT OF JOB
AND FAMILY SERVICES

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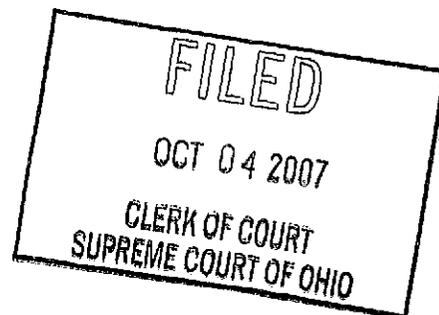


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I. STATEMENT OF FACTS

For the purpose of this Brief, the Public Children Services Association of Ohio (hereinafter “PCSAO”) and the County Commissioners’ Association of Ohio (hereinafter “CCAO) incorporates, in its entirety, the Statement of the Facts as set forth by the Respondent, Helen Jones-Kelly, Director of the Ohio Department of Job and Family Services.

PCSAO is a private, non profit, proactive coalition of Public Children Services Agencies that promotes the development of sound public policy and program excellence for safe children, stable families, and supportive communities. In the pursuit of its vision for children, families and communities, PCSAO advocates on behalf of Children Services Agencies, conducts research, training, and consultation, as well as provides technical assistance to its member agencies.

As part of its mission, PCSAO seeks to assist Public Children Services Agencies in minimizing the risk to children in their care, many of whom have already undergone significant trauma. PCSAO has developed and advocated for sound policy which protects the personal information of Ohio’s foster caregivers who have opened their hearts and homes to provide temporary care for vulnerable children who have been maltreated.

CCAO represents Ohio's 87 Boards of County Commissioners and the Summit County Executive and Council. CCAO promotes best practices in county government administration and management; advocates on behalf of counties at the state and federal level; provides training and technical assistance programs, and, provides cost saving service programs for Ohio counties.

II ARGUMENT

OHIO LAW PROHIBITS THE RELEASE OF THE RECORDS SOUGHT BY RELATOR

Ohio's Public Records Act¹ requires that all public records be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.² However, that same statute also establishes exceptions to this general rule and requires public agencies to maintain the confidentiality of certain documents. The statutory mechanism to distinguish between records which must be released and those which must be kept confidential is to exclude certain enumerated documents or categories of documents from the definition of "public record".³

The earliest version of R.C. 149.43 enacted over forty years ago contained very few specifically exempted documents from the definition of "public record."⁴ Clearly, with the expansion of the "information age" the original drafters of this law could not have anticipated all the types of records which would be invented in the future or the various fact patterns which could arise under the law. It is not surprising, therefore, that over the years, the General Assembly has added categories of documents to be excluded as the need has arisen. Generally, the need arises when circumstances present themselves which were not, nor could not have been, anticipated at the time of the initial drafting of the statute.

For example, in 1995, the Public Records Act was amended to exclude DNA databases from public disclosure.⁵ DNA databases did not exist at the time of the original drafting of the statute. It was again amended in 1996 to protect higher education donor profiles and to keep

¹ R.C. 149.43(A)(1)(v).

² R.C. 149.43(B)(1).

³ R.C. 149.43(A)(1)(a) through (y).

⁴ See 1993 H 152 (effective 7-1-93).

⁵ See 1995 H 5 (effective 8-30-1995)

intellectual property secure.⁶ Amendments such as these were reactions to real life situations in which a strict application of the statute would have rendered undesirable results.

Although the majority of the corrections and improvements to the Public Records Act have originated through the legislative process, legislative amendments are not the only way to further refine our understanding of R.C. 149.43. There have been at least two separate instances in recent history where this Court has made refinements to the Public Records Act. These opportunities have involved circumstances which the General Assembly did not and could not have reasonably anticipated at the time they passed the statute. In both cases, this Court analyzed the intent of the legislators in passing the statute, applied sound reasoning and ultimately arrived at a result which was subsequently codified by the General Assembly.

For example, in 1998, an Assistant Federal Public Defender sent a written request under the existing version of R.C. 149.43 seeking to obtain all personnel and internal affairs records relating to an Ohio police officer.⁷ Those records included the police officer's name, home address and other personal information. This Court held that the release of the officer's personal information was otherwise prohibited by state law⁸ despite the fact that, at the time, no provision other than R.C. 149.43 existed which specifically prohibited the release of the information sought.⁹ In reaching this conclusion, this Court first announced its "good sense" rule when it stated:

"But based on *Kallstrom v. Columbus* (C.A.6, 1998), 136 F.3d 1055, the requested records are exempt because they are protected by the constitutional right of privacy. Police officers' files that contain the names of the officers' children, spouses, parents, home addresses, telephone numbers, beneficiaries, medical information, and the like should not be available to a

⁶ See 1996 S 277 (effective 7-1-1997)

⁷ *State ex rel. Keller v. Cox*, (1999), 85 Ohio St.3d 279

⁸ *Keller v. Cox*, (1999), 85 Ohio St.3d 279

⁹ See Substitute House Bill Number 539, 123rd General Assembly.

defendant who might use the information to achieve nefarious ends. This information should be protected not only by the constitutional right of privacy, but, also, **we are persuaded that there must be a “good sense” rule when such information about a law enforcement officer is sought by a defendant in a criminal case.**” (emphasis added).¹⁰

In determining that release of these records was prohibited by law, this Court did not limit its interpretation of the phrase “state or federal law” to merely codified, statutory law. Clearly, this Court interpreted the phrase “state or federal law” to also include state common law, constitutional law and federal law.

In the same year, this Court considered a public records request to obtain information maintained by the City of Columbus regarding recreational activities of certain minor children.¹¹ In *McCleary*, the City of Columbus implemented a photo identification program which required parents of children who use its city pools and other recreational facilities to provide certain personal information regarding their children.¹² The names and home addresses of the children were among the information collected and maintained by the City.¹³ Relator, Cornell McCleary, sued the City to obtain those records.¹⁴ The City defended stating that the information which McCleary sought was exempt from disclosure under the Public Records Act.¹⁵ Specifically, Respondents relied upon that section of the statute which excepted any record from the definition of a “public record” if state or federal law prohibited its release.¹⁶ As in *Keller*, at the time, no statutory provision existed which specifically exempted information pertaining to the recreational activities of a person under the age of 18 from release.¹⁷

¹⁰ *Keller*, Supra at 282.

¹¹ *State ex rel. McCleary v. Roberts*, (1999), 88 Ohio St.3d 365

¹² *McCleary*, Supra at 365

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ At the time, this was R.C. 149.43(A)(1)(p) which is now R.C. 149.43(A)(1)(v).

¹⁷ See Substitute House Bill Number 539, 123rd General Assembly.

In holding that the information should be protected, this court reaffirmed the “good sense” rule and stated:

“The information sought in this case at bar is no different from that information prohibited from disclosure in *Keller* and *Kallstrom*, *supra*. The officer’s personnel files in *Keller* and *Kallstrom* contained essentially the same type of information. *i.e.* home addresses, phone numbers, names of family members, and medical records, as that contained in the Department’s database. As did the situations in *Keller* and *Kallsrom*, a release of the requested information by the Department in this matter places those who are the subject of the records request at risk of irreparable harm, albeit not necessarily by appellee.”¹⁸

Relator cites the concept of “Expressio Unius Est Exclusio Alterius” for the proposition that if the Ohio Revised Code expressly lists some records that are exempt yet fails to mention others, those which are not mentioned are not exempt.¹⁹ However, in neither *McCleary* nor *Keller* did this Court did allow itself to become paralyzed by such a narrow view. In both cases, this Court recognized that the law does not exist in statute alone. This Court is free to and, in fact is, charged with determining the current state of the law. The fact that the legislature has not yet contemplated a particular fact pattern does not present a barrier to this court discerning the rationale of the legislative intent of a particular statute and extending that intent to its logical conclusion.

And, as it turns out, in doing just that, this Court was correct. In 2000, the Ohio General Assembly codified the results reached by this Court in both *McCleary* and *Keller*.²⁰

The next step is to apply the logic and principles of *McCleary* and *Keller* to the facts of this case. On September 15, 2006, Relator promulgated a written request, under the Ohio

¹⁸ *McCleary*, *Supra* at 371.

¹⁹ Relator’s Brief in Support of Complaint for Writ of Mandamus, p. 9.

²⁰ Substitute House Bill Number 539, 123rd General Assembly, created what is now R.C. 149.43(A)(1)(r) which specifically excludes from the definition of a public record those documents which pertain to the recreational activities of a person under the age of eighteen. It also created what is now R.C. 149.43(A)(1)(p) which protects Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information.

Public Records Act, seeking to obtain an electronic copy of the ODJFS database containing the names and addresses of all foster associations, institutions or homes certified by the state under R.C. Chapter 5103.²¹ For the purposes of this litigation, Relator later narrowed that demand to request only the names and address of individuals licensed to provide foster care in the State of Ohio (hereinafter “the Foster Records”).²² Relator does not seek information regarding the identity of any child placed in one of those homes.²³

There is no question that Respondent collects and maintains the information sought pursuant to its proprietary duty to license and certify foster care providers.²⁴ The question is, however, are the records to be considered “public records” as contemplated by R.C. 149.43? Even if there is no specific federal or state statute specifically requiring that the requested records be confidential, R.C. 149.43 nonetheless states that the definition of a public record does *not* include records the release of which is prohibited by state or federal law.²⁵ This is the precise section of the Public Records Act relied upon by this Court to reach its conclusions in both *McCleary* and *Keller*.

In order to answer the question of whether the release of the Foster Records is prohibited by state or federal law, this Court must apply the “good sense” rule as articulated in *McCleary* and *Keller*. Both cases, as does this case, involved the protection of the personal information, including the names and home addresses, of certain classes of individuals. In *McCleary*, it was the names and home addresses of minors who utilized the recreational services of the City of

²¹ Stipulation of Facts, Exhibit A.

²² Jones-Kelly Deposition, pp 21-22.

²³ Jones-Kelly Deposition, p. 22.

²⁴ Jones-Kelly Deposition, p. 15.

²⁵ R.C. 149.43(A)(1)(v)

Columbus.²⁶ In *Keller*, it was the names and home addresses of undercover police officers.²⁷ In this case, it is the names and home addresses of foster parents.

In both *McCleary* and *Keller*, this Court noted that the release of the requested information would likely place those who are the subject of the records request at risk of irreparable harm, albeit not necessarily by the person or persons making the request.²⁸ Just as in *McCleary* and *Keller*, the foster parents who are the subject of this request would be subject to irreparable harm should their personal information be disclosed. In support of that conclusion, Respondent has filed with this Court, affidavits from individuals who have sheltered abused and neglected children and have received serious injuries when their location was discovered.²⁹ It should be noted that in most cases recited, injuries have been inflicted on the foster children as well.³⁰ These are the very children the system was designed to protect.

In one instance, a step-father and a natural parent discovered the location of the foster parent providing substitute care for the child.³¹ While at the foster parent's residence and in the presence of the child, the stepfather pointed a loaded pistol at the foster parent and threatened kill him.³² The stepfather then fired a number of shots before he was shot several times by the police. Again, all of this occurred in the presence of the minor child.³³ The child experienced such psychological trauma that she remained in a fetal position on the porch during the entire event and afterwards. She ultimately required hospitalization.³⁴

²⁶ See *McCleary*, *supra*.

²⁷ See *Keller*, *supra*.

²⁸ *McCleary* at 373.

²⁹ See Respondent's evidence, Exhibits E, F, G, and H.

³⁰ *Id.*

³¹ Exhibit E, p. 1 of Respondent's evidence.

³² *Id.* at p. 2

³³ *Id.* at p. 3.

³⁴ *Id.*

In 2005, a relative who was kind enough to open her home to her minor cousins was severely injured when the biological parents determined the location of the children and attempted to abduct them.³⁵ During the failed abduction attempt, the relative caregivers received serious injuries including bite wounds and chemical burns from having been sprayed with mace.³⁶ One of the subject children was caught in the middle of the fight and sustained cuts and bruises.³⁷ Relator states, very unsympathetically, that this is irrelevant because these individuals provide kinship care and are not paid foster parents.³⁸ However, it is not the degree of relationship that is instructive here, it is the degree of danger which people who have been deprived of custody of their children present to those who provide substitute care. This is not “fear mongering” as Relator suggests in its brief³⁹ — this is reality.

Relator suggests that the incidents related by Respondent are isolated and should be ignored by this Court.⁴⁰ Fortunately, this Court has not been so callous and unsympathetic to children nor to those people kind enough to open their hearts and homes to our most vulnerable citizens. This Court said it very well in *McCleary*:

“Furthermore, any perceived threat that would likely follow the release of such information, **no matter how attenuated**, cannot be discounted. * * * We live in a society where children all too often fall victim to abuse, it is necessary to take precautions to prevent, or at least limit, any opportunities for victimization.” (emphasis added)⁴¹

There can be no question that Ohio law protects these innocents and those who care for them.

³⁵ Exhibit F, p. 1-2 of Respondent’s evidence.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Brief of Relator in Support of Complaint for Writ of Mandamus, p. 15.

³⁹ Brief of Relator in Support of Complaint for Writ of Mandamus, p. 13.

⁴⁰ Brief of Relator in Support of Complaint for Writ of Mandamus, p. 15.

⁴¹ *McCleary*, at 374.

Relator suggests that the Respondent is being “disingenuous” when it states that there is a need to maintain confidentiality regarding the names and addresses of licensed foster care providers.⁴² Relator apparently bases this conclusion on the fact that it is clearly the preferred policy of ODJFS to involve foster families in reunification efforts with birth families.⁴³ Relator further cites to many materials in which ODJFS recognizes that **MOST** birth parents can build a collaborative relationship with foster parents and that **MOST** biological parents do not present a risk to foster families.⁴⁴

During her deposition, Director Jones-Kelly attempted multiple times to inform Relator’s counsel that these notions apply in ideal situations.⁴⁵ It is naïve, shortsighted and potentially dangerous to ignore the fact that **some** natural parents **do** present a risk to their children as well as to the foster placements in which their children temporarily reside. Unfortunately, given the subjective nature of this field, it is impossible to predict with any degree of certainty which birth parents will ultimately cause harm to their children and those who will not. As such, any threat, **no matter how attenuated**, can not be ignored. In light of this, sound public policy requires the law to err on the side of caution and not subject these children to further abuse.

The need to protect those who provide a valuable civil service is not new. *Keller* and *Kallstrom* are two excellent examples. However, the legislature has done its part as well. On January 8, 2001, the Ohio General Assembly approved H.B. 412, 123rd General Assembly, which declared the residential addresses of any officer or employee of a public children services agency to be confidential information that is not subject to disclosure and is not attainable as a

⁴² Brief of Relator in Support of Complaint for Writ of Mandamus, p. 13.

⁴³ See Brief of Relator in Support of Complaint for Writ of Mandamus.

⁴⁴ *Id.*

⁴⁵ Jones-Kelly Deposition, pp. 46-47 and 49-52.

public record.⁴⁶ This bill was subsequently enacted as R.C. 2151.142 and became effective on April 10, 2001.

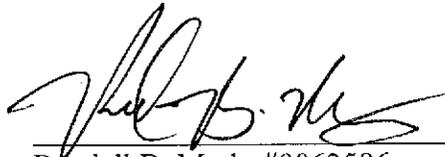
Of course, under Ohio law, foster parents are clearly not “officers or employees” of a public children services agency, however, the analogy does survive that fine legal distinction. The same perceived threat that would likely follow the release of a social worker’s home address, applies (maybe even more so) to a foster care provider. As such, this threat, **no matter how attenuated** cannot be discounted.

⁴⁶ 2000 H 412, eff. 4-1-01

III CONCLUSION

The facts and law in this matter demonstrate that the release of the information sought by the Relator is prohibited by state and federal law. As such, the same is not considered a public record and its dissemination is not permitted. Therefore, this Court should deny Relator's request for a Writ of Mandamus.

Respectfully submitted,



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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 2nd day of October, 2007, upon the following:

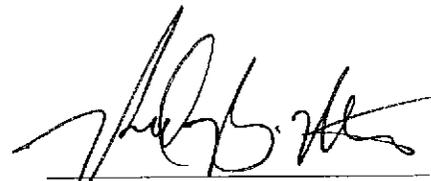
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