

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.

REPLY BRIEF IN OPPOSITION TO 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-KELLEY,
DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

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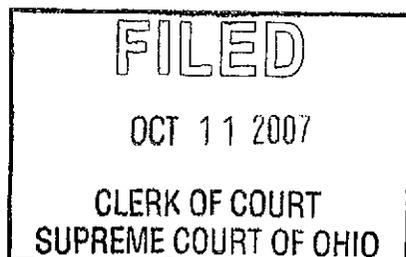


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I. STATEMENT OF FACTS

The Public Children Services Association of Ohio (PCSA) and the County Commissioners' Association of Ohio ("CCAO") ("Amicus Parties")¹ urge this Court to apply a "good sense" rule in this matter rather than the rule of law.² Such an approach would not only invalidate the letter and spirit of the Ohio Public Records Act, it would be completely unwarranted given the record in this case. The "good sense" rule that the Amicus Parties request is really a blank check by which public offices substitute their judgment for the General Assembly's on an unchecked, ad hoc basis. This Court should use "good sense" and deny this request.

¹ Amicus Brief of Public Children Services Association, p. 7.

² Id.

II. ARGUMENT

1. THE “GOOD SENSE” RULE WHICH THE AMICUS PARTIES ADVOCATE USURPS THE GENERAL ASSEMBLY’S AUTHORITY.

The Amicus Parties contend that “good sense” permits a public office to withhold requested records if, in the public office’s unfettered judgment, release would result in potential harm.³ According to the Amicus Parties, “good sense” permits withholding the records even if no statutory exception applies and no matter how “attenuated” the potential harm.⁴

The Amicus Parties seek to usurp the power of the Ohio General Assembly. The Public Records Act is a creation of the Ohio General Assembly. The Act reflects the General Assembly’s weighing of the policy concerns surrounding the availability of public records in Ohio. In declining to expand the “good sense” rule beyond the very unique facts in *State ex. Rel. Keller v. Cox*⁵ the Tenth District Court of Appeals held:

[W]e decline to apply a generalized public-policy-based balancing advocated by respondent. Thomas, *supra*, 71 Ohio St.3d at 249, 643, N.E.2d at 130 (noting that “in enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public’s right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure,” quoting *State ex rel. James v. Ohio State Univ.* (1994), 70 Ohio St. 3d 168, 172, 637 N.E.2d 911, 913-914).⁶

The General Assembly did not exempt the identities of foster care providers from the Public Records Act. It **did**, however, expressly exempt the other foster care records. By those acts the General Assembly weighed the competing policy concerns and concluded that the identities of foster care providers are **not** exempt from the Public Records Act. The Ohio

³ Amicus Brief of Public Children Services Association, p. 10.

⁴ *Id.*

⁵ (1999), 85 Ohio St.3d 279, 707 N.E.2d 931.

⁶ *State ex. Rel. Beacon Journal Publishing Company v. Bodiker* (1999), 134 Ohio App.3d 415, 430-431, 31 N.E.2d 245.

Department of Jobs and Family Services (“ODJFS”) cannot be permitted to veto this decision on an ad hoc basis.

The Amicus Parties’ attempt to justify the “good sense” rule because of “changing circumstances” is unavailing, and in fact, supports the Cincinnati Enquirer’s position.⁷ For example, the Amicus Parties note that “in 1995, the Public records Act was amended to exclude DNA databases from public disclosure. DNA databases did not exist at the time of the original drafting of the statute.”⁸

By contract, the foster care system existed at the time of the original drafting of the Public Records Act. It also existed as of March 29, 2007, when the General Assembly passed major amendments to the Public Records Act. To suggest that circumstances have changed too rapidly for the General Assembly to react is absurd. The opposite is true – the General Assembly’s failure to exempt these records means they are subject to the Public Records Act without question.

2. THE “GOOD SENSE” RULE IS CONTRARY TO THE CULTURE OF OPEN ACCESS WHICH THE PUBLIC RECORDS ACT PROMOTES.

The Public Records Act is to be interpreted liberally in favor of disclosure.⁹ Where the decision whether to disclose a record is a close call, a public office should disclose it. Additionally, the exemptions to the Public Records Act, should be narrowly construed.¹⁰ If a record does not clearly fit within an exemption, the public office must disclose the record.

The expanded “good sense” rule advocated by the Amicus Parties is completely contrary to this rule of law. The “good sense” rule essentially permits the public office to withhold

⁷ Amicus Brief of Public Children Services Association, p. 3.

⁸ Id.

⁹ *State ex rel Warren Newspapers v. Hutson* (1994), 70 Ohio St.3d 619, 640 N.E.2d 174.

¹⁰ Id.

records that are subject to the plain terms of the Public Records Act. Such an approach is the polar opposite of a liberal construction.

Conversely, the “good sense” rule permits the public office to exempt records that are not exempt by the Act’s plain terms. This is a **liberal** construction of the Act’s exemptions, not a narrow one.

Ohio’s public offices are the subject of the Public Records Act. Those offices are bound by the Act’s terms. But the “good sense” rule advocated by the Amicus Parties would allow the regulated party to decide whether it should be bound by those regulations. Allowing inmates to run the asylum is never “good sense.”

3. THE “GOOD SENSE” RULE HAS BEEN LIMITED BY SUBSEQUENT DECISIONS.

The two cases in which the Ohio Supreme Court discussed the “good sense” rule presented very unique and difficult fact patterns. As the Tenth Appellate District noted, “[the good sense] rule appears to be inextricably intertwined with the facts of *Keller*, which involved requests by criminal defendants for personal information about law enforcement personnel.”¹¹ And in *Conley v. Correctional Reception Center*¹² the Court held that *Keller*’s “good sense” rule was limited to those situations where the record supported an affirmative showing of a high probability of damages.¹³ “Mere speculation” is insufficient to justify withholding records.¹⁴

¹¹ *State ex rel. Beacon Journal Publishing Company v. Bodiker* (1999), 134 Ohio App.3d 415, 430-431, 731 N.E.2d 245.

¹² (2001), 141 Ohio App.3d 412, 416, 751 N.E. 528.

¹³ Id.

¹⁴ Id.

*State ex rel. McCleary v. Roberts*¹⁵ too resulted directly from the unique facts presented and particularly from the fact that the requested information concerned intimate information about children.¹⁶

In *State ex rel. Cincinnati Enquirer v. Daniels*¹⁷, the Supreme Court explicitly refused to expand *McCleary's* reach. In *Daniels* the respondent argued that intimate information regarding children could be extrapolated from the requested information, even though the requested information itself contained none of the information at issue in *McCleary*.¹⁸ The Court rejected respondent's argument, noting that "none of the specific identifiable information referred to in *McCleary* is part of the information ... requested ... in this case."¹⁹

In this case, as in *Daniels*, The Enquirer has requested none of the *McCleary* information. As in *Daniels*, this Court should not expand *McCleary's* reach.

4. THE RECORD DOES NOT JUSTIFY APPLICATION OF THE "GOOD SENSE" RULE.

The "good sense" rule applies only when release of particular information to a particular request creates a "high probability of damages as a matter of law."²⁰ As the Court noted in *Kallsrom v. City of Columbus*²¹ the rule applies only where release of the information creates a "substantial risk of serious bodily harm, even death, from a perceived likely threat."²²

By requiring a specific, highly probable threat resulting from the release of specific information, courts have implicitly, if not explicitly, rejected the argument advanced by the Amicus Parties. The Amicus Parties speculate that the release of names and addresses of foster

¹⁵ (2000), 88 Ohio St.3d 365, 725 N.E.2d 1144.

¹⁶ *Id.* at 369.

¹⁷ (2006), 108 Ohio St.3d 518, 844 N.E.2d 1181, 2006-Ohio-1215.

¹⁸ *Id.* at ¶ 17.

¹⁹ *Id.*

²⁰ *Conley v. Correctional Reception Center* (2001), 141 Ohio App.3d 412, 416, 751 N.E. 528.

²¹ (S.D. Ohio 2001), 165 F.Supp.2d 686.

²² *Id.* at 695.

care providers could result in harm if biological families were able to use that information to ultimately identify the care giver responsible for their child.²³ This speculation does not justify withholding public records.

Of course, the records actually requested by The Enquirer here do not contain the information giving rise to the hypothetical fear. And of course, the Amicus Parties point to no particular, current situations that present “a substantial risk of serious bodily harm” resulting from the release of the records.

Recognizing the inherent, fundamental weakness of their argument, the Amicus Parties latch on to the portion of *McCleary* where the Court states: “[A]ny perceived threat that would likely follow the release of such information, no matter how attenuated, cannot be discounted.”²⁴ The Amicus Parties believe this passage permits a public office to withhold records in any situation where the public office can envision a problem. And, according to the Amicus Parties, this rule should apply even if the requested record contains none of the information identified in the Supreme Court’s previous “good sense” cases.

But *McCleary*’s “no matter how attenuated” language refers to the perceived threat that arises directly from the information released. Thus, in *Keller* the requested record actually contained personally identifiable information about the “targeted” police officers. In *McCleary* the requested record actually contained personally identifiable information about specific children.

In this case, however, the requested records do not contain the information that would create the alleged risk. The records do not disclose the location of children. And it is location information that concerns the Amicus Parties. As the Supreme Court held in *Daniels*, where the

²³ Amicus Brief of Public Children Services Association, p. 8-9.

²⁴ 88 Ohio St.3d at 371.

requested records could only potentially lead to personally identifiable information it is not covered by *McCleary*.²⁵

McCleary also does not cover the requested records because they are different in nature from the records requested there. As the *McCleary* court noted:

Moreover, the personal information requested is not contained in a *personnel* file. At issue here is information regarding children who use the City's swimming pools and recreational facilities. The subjects of appellee's public records request are not employees of the government entity having custody of the information. They are children – private citizens of a government, which has, as a matter of public policy, determined that it is necessary to compile private information on these citizens. It seems to us that there is a clear distinction between public employees and their public employment personnel files and files on private citizens created by government. To that extent the personal information requested by appellee is clearly outside the scope of R.C. 149.43 and not subject to disclosure. See *State ex rel. Dispatch Printing Co. v. Wells* (1985), 19 Ohio St.3d 382, 385, 18 OBR 437, 439 481 N.E.2d 632, 634-635.²⁶

Foster care providers – who seek out that responsibility and who are paid public dollars – are much more similar to public employees than they are to the *McCleary* children.

Finally, the “good sense” rule is particularly inapplicable here, given that the perceived risk – interaction between the child's natural family and the foster care provider – is the standing policy of the ODJFS. The Amicus Parties cannot seriously contend that the risk posed by interaction between natural families and foster care providers is pervasive enough to justify a blanket rule prohibiting release of the requested records, when the ODJFS has a blanket rule **encouraging** that very interaction.

The evidentiary record establishes that even the perceived damage threatened here reflects isolated, exceptional circumstances. There is no need to address isolated, exceptional

²⁵ 2006-Ohio-1215 at ¶ 17.

²⁶ 88 Ohio St.3d at 369.

circumstances with an all encompassing blanket approach. That approach is not "good sense," it is "over reaction."

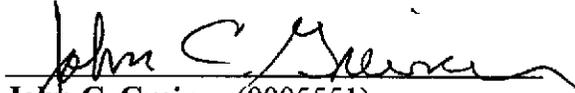
III. CONCLUSION

In the name of "good sense," the Amicus Parties urge this Court to circumvent the letter and spirit of the Ohio Public Records Act to prevent interaction which the ODJFS encourages as a matter of policy. This Court should indeed invoke "good sense" and reject the Amicus Parties' argument in its entirety.

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 10th day of October, 2007, upon the following:

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