

IN THE OHIO SUPREME COURT

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

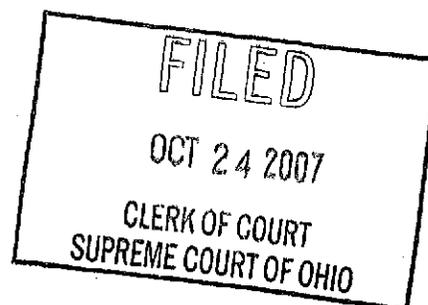
Relator,

vs.

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

Respondent.

Case No. 06-2239



REVISED REPLY BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE
IN SUPPORT OF RESPONDENT BY OHIO ASSOCIATION OF CHILD CARING
AGENCIES AND OHIO FAMILY CARE ASSOCIATION AND 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

John C. Greiner (0005551)

Counsel of Record

Jeffrey B. Allison (0080586)

GRAYDON HEAD & RITCHEY LLP

1900 Fifth Third Center

511 Walnut Street

Cincinnati, Ohio 45202

(513) 621-6464

Counsel for Relator The Cincinnati Enquirer

Kathleen M. Trafford (0021753)

PORTER WRIGHT MORRIS & ARTHUR LLP

41 South High Street

Columbus, OH 43215

(614) 227-1915

*Counsel for Ohio Association of Child
Caring Agencies and Ohio Family Care
Association*

Henry G. Appel (0068479)

Senior Assistant Attorney General

Holly N. Deeds Martin (0076383)

Assistant Attorney General

30 East Broad Street, 26th Floor

Columbus, OH 43215

(614) 466-8600

*Counsel for Respondent Director of
Ohio Department of Job and Family Services*

Randall B. Muth (0063596)

The Kinney Building

2534 Burbank Road

Wooster, OH 44691

*Counsel for Public Children Services
Association of Ohio and County
Commissioners' Association of Ohio*

TABLE OF CONTENTS

| | <u>Page</u> |
|---|--------------------|
| TABLE OF AUTHORITIES | ii |
| I. STATEMENT OF FACTS..... | 1 |
| II. ARGUMENT..... | 2 |
| <u>PROPOSITION OF LAW NO. 1.</u> | |
| THE ODJFS ACKNOWLEDGES THAT THE PAYMENTS ARE NOT "PUBLIC ASSISTANCE" PAYMENTS..... | 2 |
| <u>PROPOSITION OF LAW NO. 2.</u> | |
| FOSTER CARE PROVIDERS ARE NOT THE RECIPIENTS OF ANY "PUBLIC ASSISTANCE." | 2 |
| <u>PROPOSITION OF LAW NO. 3.</u> | |
| THE IDENTIFICATION OF PERSONS AS FOSTER CARE PROVIDERS DOES NOT IDENTIFY ANY PERSON AS A RECIPIENT OF PUBLIC ASSISTANCE. | 3 |
| <u>PROPOSITION OF LAW NO. 4.</u> | |
| THE "GOOD SENSE" RULE WHICH THE AMICUS PARTIES ADVOCATE USURPS THE GENERAL ASSEMBLY'S AUTHORITY..... | 4 |
| <u>PROPOSITION OF LAW NO. 5.</u> | |
| THE "GOOD SENSE" RULE IS CONTRARY TO THE CULTURE OF OPEN ACCESS WHICH THE PUBLIC RECORDS ACT PROMOTES..... | 6 |
| <u>PROPOSITION OF LAW NO. 6.</u> | |
| THE "GOOD SENSE" RULE HAS BEEN LIMITED BY SUBSEQUENT DECISIONS..... | 7 |
| <u>PROPOSITION OF LAW NO. 7.</u> | |
| THE RECORD DOES NOT JUSTIFY APPLICATION OF THE "GOOD SENSE" RULE..... | 8 |

| | |
|-------------------------------------|-----------|
| III. CONCLUSION | 10 |
| CERTIFICATE OF SERVICE | 11 |

TABLE OF AUTHORITIES

| <u>Cases:</u> | <u>Page</u> |
|--|--------------------|
| <i>Conley v. Correctional Reception Center</i> (2001), 141 Ohio App.3d 412, 416, 751 N.E. 528..... | 7, 8 |
| <i>Kallsrom v. City of Columbus</i> (S.D. Ohio 2001), 165 F.Supp.2d 686..... | 8 |
| <i>State ex rel. Beacon Journal Publishing Company v. Bodiker</i> (1999), 134 Ohio App.3 415, 430-431, 731 N.E.2d 245..... | 5, 7 |
| <i>State ex rel. Cincinnati Enquirer v. Daniels</i> (2006), 108 Ohio St.3d 518, 844 N.E.2d 1181, 2006-Ohio-1215..... | 7 |
| <i>State ex rel. Keller v. Cox</i> (1999), 85 Ohio St.3d 279, 707 N.E.2d 931..... | 5 |
| <i>State ex rel. McCleary v. Roberts</i> (2000), 88 Ohio St.3d 365, 725 N.E.2d 1144..... | 7, 8, 9, 10 |
| <i>State ex rel Warren Newspapers v. Hutson</i> (1994), 70 Ohio St.3d 619, 640 N.E.2d 174..... | 6 |
| <u>Statutes:</u> | |
| 42 U.S.C. §672(a)(1)(B)..... | 3 |
| R.C. 149.43..... | 1 |
| R.C. 5101.27..... | 2, 3 |

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.

REVISÉD REPLY BRIEF IN
OPPOSITION TO BRIEF OF
AMICI CURIAE IN SUPPORT
OF RESPONDENT BY OHIO
ASSOCIATION OF CHILD CARING
AGENCIES AND OHIO FAMILY
CARE ASSOCIATION AND 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

I. STATEMENT OF FACTS

The Amicus brief of the Ohio Association of Child Caring Agencies (“OACCA”), while no doubt well meaning, is so flawed factually and legally that this court should simply disregard it. The OACCA contends that because certain foster care providers receive “public assistance” payments the names and addresses of all foster care providers should be shielded from production under R.C. 149.43. This contention must fail for the following reasons:

1. It has been refuted by Helen Jones Kelley, the Director of the Ohio Department of Jobs and Family Services (“ODJFS”);
2. Foster Care Providers are not the recipients of any “public assistance;” and

3. The identification of persons as foster care providers does not identify any person as a recipient of public assistance.

The Public Children Services Association of Ohio (PCSA) and the County Commissioners' Association of Ohio ("CCAO") ("The Amicus Associations")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 Associations 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.

II. ARGUMENT

1. THE ODJFS ACKNOWLEDGES THAT THE PAYMENTS ARE NOT "PUBLIC ASSISTANCE" PAYMENTS.

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.³ Given this admission by the Director of the ODJFS, it is difficult to understand why the OACCA makes this argument. The payments are not public assistance payments, and the identities of foster care givers are not shielded by R.C. 5101.27.

2. FOSTER CARE PROVIDERS ARE NOT THE RECIPIENTS OF ANY "PUBLIC ASSISTANCE."

The OACCA would like this court to believe that all foster care providers receive "Title IV – E" payments. This is not the case. Title IV-E payments (the payments that allegedly trigger the confidentiality provisions of R.C. 5101.27) are made only to children who qualify for

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

² *Id.*

³ See Deposition of Helen-Jones Kelley, p. 10.

such payments. And the only children who qualify for the payments are those children who would have been eligible for AFDC payments “while in the home.” 42 USC §672(a)(1)(B). This discussion points up two fallacies in the OACCA argument. First, payments are not made to **all** foster children. Only certain, eligible children receive the payments. Yet, OACCA asks this court to shield production of the identities of **all** foster care providers. There is no basis for any such action.

Second, and more important, because the Relator’s request is for the identities of foster care providers and not the identities of foster children, no one has requested the identity of recipients of the payments. It is the eligible foster child, not the foster care provider, who is the recipient of the funds. The federal statute provides that the Title IV - E payments are made “on behalf of the child.” And, the eligibility for the payments is based solely on the child’s needs. The notion that the “recipient” is anyone who happens to pick up the payments, as OACCA contends, is an example of hair splitting that this court should disregard. It is certainly not consistent with a liberal construction mandated by the Ohio Public Records Act.

Moreover, the OACCA’s contention that the “recipient” is not the “beneficiary” would lead to the absurd result that the names of the children on whose behalf the payments are made are public record, but the identities of the foster care providers are not. That conclusion makes no sense.

3. THE IDENTIFICATION OF PERSONS AS FOSTER CARE PROVIDERS DOES NOT IDENTIFY ANY PERSON AS A RECIPIENT OF PUBLIC ASSISTANCE.

The OACCA’s final argument is that, because foster care providers are recipients of “public assistance” and because the identities of such recipients are shielded by R.C. 5101.27, those identities can never be revealed, under any circumstances. This is not the case. Even if R.C. 5101.27 applied here (and it does not) it would shield only an identification that would

disclose precisely that a person is a recipient of public assistance. It would not preclude the identification of a foster care provider that itself did not reveal whether that individual was a public assistance recipient. For example, there could be any number of public records that identify an individual as a foster care giver, such as court pleadings or police incident reports. Under the OACCA's argument, since those records identify the individual as a foster care provider, and since that foster care provider **could** be a public assistance recipient, those records would be shielded from production. That is clearly not the law.

To the extent the identities of public assistance recipients are confidential, that confidentiality extends only to records that identify the person as a public assistance recipient. Even under the OACCA's tortured reading of the law, not all foster care providers are public assistance recipients. Thus, identifying someone as a foster care provider does not reveal whether that person is a public assistance recipient, and therefore, does not violate any confidentiality provisions.

4. THE "GOOD SENSE" RULE WHICH THE AMICUS ASSOCIATIONS ADVOCATE USURPS THE GENERAL ASSEMBLY'S AUTHORITY.

The Amicus Associations 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.⁴ According to the Amicus Associations, "good sense" permits withholding the records even if no statutory exception applies and no matter how "attenuated" the potential harm.⁵

The Amicus Associations 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

⁴ Amicus Brief of Public Children Services Association, p. 10.

⁵ Id.

Ohio. In declining to expand the “good sense” rule beyond the very unique facts in *State ex. Rel. Keller v. Cox*⁶ 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).⁷

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

The Amicus Associations’ attempt to justify the “good sense” rule because of “changing circumstances” is unavailing, and in fact, supports the Cincinnati Enquirer’s position.⁸ For example, the Amicus Associations 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.”⁹

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

⁶ (1999), 85 Ohio St.3d 279, 707 N.E.2d 931.

⁷ *State ex. Rel. Beacon Journal Publishing Company v. Bodiker* (1999), 134 Ohio App.3d 415, 430-431, 31 N.E.2d 245.

⁸ Amicus Brief of Public Children Services Association, p. 3.

⁹ *Id.*

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.

5. 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.¹⁰ 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.¹¹ 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 Associations is completely contrary to this rule of law. The “good sense” rule essentially permits the public office to withhold 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 Associations 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.”

¹⁰ *State ex rel Warren Newspapers v. Hutson* (1994), 70 Ohio St.3d 619, 640 N.E.2d 174.

¹¹ *Id.*

6. 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.”¹² And in *Conley v. Correctional Reception Center*¹³ 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.¹⁴ “Mere speculation” is insufficient to justify withholding records.¹⁵

*State ex rel. McCleary v. Roberts*¹⁶ too resulted directly from the unique facts presented and particularly from the fact that the requested information concerned intimate information about **children**.¹⁷

In *State ex rel. Cincinnati Enquirer v. Daniels*¹⁸, 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*.¹⁹ 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.”²⁰

¹² *State ex rel. Beacon Journal Publishing Company v. Bodiker* (1999), 134 Ohio App.3d 415, 430-431, 731 N.E.2d 245.

¹³ (2001), 141 Ohio App.3d 412, 416, 751 N.E. 528.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ (2000), 88 Ohio St.3d 365, 725 N.E.2d 1144.

¹⁷ *Id.* at 369.

¹⁸ (2006), 108 Ohio St.3d 518, 844 N.E.2d 1181, 2006-Ohio-1215.

¹⁹ *Id.* at ¶ 17.

²⁰ *Id.*

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.

7. 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."²¹ As the Court noted in *Kallsrom v. City of Columbus*²² the rule applies only where release of the information creates a "substantial risk of serious bodily harm, even death, from a perceived likely threat."²³

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 Associations speculate that the release of names and addresses of foster 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.²⁴ 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 Associations 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 Associations 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

²¹ *Conley v. Correctional Reception Center* (2001), 141 Ohio App.3d 412, 416, 751 N.E. 528.

²² (S.D. Ohio 2001), 165 F.Supp.2d 686.

²³ *Id.* at 695.

²⁴ Amicus Brief of Public Children Services Association, p. 8-9.

discounted.”²⁵ 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 Associations, 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 Associations. As the Supreme Court held in *Daniels*, where the requested records could only potentially lead to personally identifiable information it is not covered by *McCleary*.²⁶

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

²⁵ 88 Ohio St.3d at 371.

²⁶ 2006-Ohio-1215 at ¶ 17.

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, 634-635.²⁷

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

III. CONCLUSION

This case presents a vivid example of how people of good faith can differ dramatically over a policy issue. The OACCA believe strongly that public policy demands that the identities of foster care providers remain private. But one’s public policy position does not justify twisting the language and intent of statutes to accomplish policy aims. The Ohio Public Records Act makes the requested records public. The OACCA’s arguments to the contrary are erroneous.

In the name of “good sense,” the Amicus Associations urge this Court to circumvent the letter and spirit of the Ohio Public Records Act to prevent interaction which the ODJFS

²⁷ 88 Ohio St.3d at 369.

encourages as a matter of policy. This Court should indeed invoke “good sense” and reject the Amicus Parties’ argument in its entirety.

Respectfully submitted,

Of Counsel:

Jeffery B. Allison (0018157)
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

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

Wu Fate
(0061731)

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 24th day of October, 2007, upon the following:

Henry G. Appel, Esq.
Senior Assistant Attorney General
30 East Broad Street, 26th Floor
Columbus, OH 43215

Kathleen M. Trafford, Esq.
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, OH 43215

Randall B. Muth, Esq.
The Kinney Building
2534 Burbank Road
Wooster, OH 44691

Wu Fate

Lisa Wu Fate (0061731)