

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.

SUPPLEMENTAL BRIEF SUBMITTED BY RELATOR THE CINCINNATI
ENQUIRER

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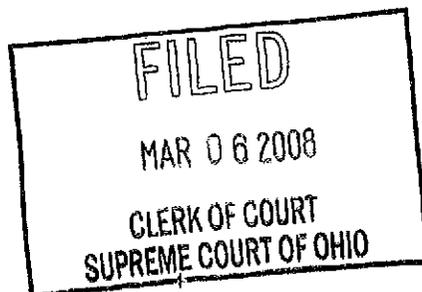


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I. STATEMENT OF FACTS

On February 19, 2008, Respondent filed a Notice Of Supplemental Authority citing House Bill 214 as additional authority to be considered in this case. HB 214 provides in pertinent part:

(D)(1) Except as otherwise provided in division (D)(2) of this section, names, documentation, and other identifying information regarding a foster caregiver or a prospective foster caregiver, including the foster caregiver application for certification under section 5103.03 of the Revised Code and the home study conducted pursuant to section 5103.0324 of the Revised Code.

On February 28, 2008, this Court ordered both parties to file supplemental briefs “addressing what implication, if any, House Bill 214 has on the issues in the issues in this case.” This Court should not consider the supplemental authority because it is not relevant to any issue in this case. In addition, by its terms, HB 214 does not apply to requests made before its enactment. Moreover, the Ohio Constitution precludes retroactive application of HB 214. Finally, application at HB 214 would reward Respondent for its bad faith.

II. ARGUMENT

A. HB 214 Is Not Relevant Authority For Purposes of Supreme Court Rule IX.

Court Rule IX, Section 9 provides:

Unless ordered by the Supreme Court, the parties shall not tender for filing and the Clerk shall not file any additional briefs or other materials relating to the merits of the case after the case has been orally argued. If a relevant authority is issued after oral argument, a party may file a citation to the relevant authority but shall not file additional argument (emphasis added).

According to the rule, parties may only file a citation to relevant authority in the event such authority is issued after oral argument. HB 214, is not relevant because it was signed into law 17 months after the Enquirer made its records request. HB 214 does not, and cannot apply

retroactively to The Enquirer's request pursuant to Ohio Revised Code Section 1.48 and Section 28, Article II of the Ohio Constitution. It is therefore, not relevant.

B. HB 214 Does Not Expressly State That It Applies Retroactively.

Ohio Revised Code Section 1.48 provides that statutes are presumed to be prospective unless they are *expressly* made retroactive. Therefore, a statute cannot be applied retroactively unless the court finds that the legislature expressed a clear intent that it so apply.¹ Additionally, the Ohio Supreme Court has held that if a statute is silent as to whether it has retroactive application, it can only be applied prospectively.²

In this case, HB 214 expressly states that it applies "to the public record status of indentifying information of current and prospective foster caregivers."³ Therefore, by its express language, the Bill applies only to information regarding current foster caregivers and future foster caregivers. The Bill does not apply to persons who were foster caregivers at the time the Enquirer made its September 15, 2006 public records request. Therefore, HB 214 does not impact, and is not relevant to the issues in this case.

C. Section 28, Article II Of The Ohio Constitution Prohibits Retroactive Application Of HB 214.

If HB 214 was intended to apply retroactively to The Enquirer's request, the Bill would violate Section 28, Article II of the Ohio Constitution.⁴ In *Bielat v. Bielat*, the Ohio Supreme Court explained that Section 28, Article II of the Ohio Constitution "prohibits the General Assembly from passing retroactive laws."⁵ A retroactive law is one that is "made to affect acts

1 *State v. Cook* (1998), 83 Ohio St.3d 404, 410.

2 *State v. Williams*, 103 Ohio St.3d 112, 113, 814 N.E.2d 88 (2004).

3 House Bill No. 214.

4 *See Bielat v. Bielat*, 87 Ohio St.3d 350, 352-53, 721 N.E.2d 28 (2000).

5 *Id.* at 352 quoting *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 99, 566 N.E.2d 154.

or facts occurring, or rights accruing, before it came into force.”⁶ The “retroactivity clause nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].”⁷

A retroactive statute is unconstitutional under Section 28, Article II of the Ohio Constitution if it impairs or affects a substantive right.⁸ R.C. 149.43 (B)(1) expressly provides that “all public records . . . shall be promptly prepared and made available . . . to any person.” The right of access conferred by R.C. 149.43 (B)(1) is a substantive right.⁹

In this case, HB 214 cannot reach back to prevent The Enquirer from enforcing the rights expressly granted to it by R.C. 143.43. Therefore, HB 214 has no impact on, and is not relevant to the issues in this case.

D. HB 214 Demonstrates That The Records Were Not Exempt When Requested.

To the extent that HB 214 is at all relevant, it is only relevant to show that, at the time of The Enquirer’s request, the records were **not** exempt. It is a well settled principle under the rules of statutory construction that when the General Assembly amends a statute, it is “presumed that the legislation is not mere meaningless wordage.”¹⁰ Section 5101.29, as amended by HB 214, now specifically provides that the names and other identifying information concerning foster caregivers are not public record. If, as Respondent has argued, these records were already exempted, then the amendments by HB 214 are meaningless wordage. Therefore, HB 214’s inclusion of this express exemption demonstrates that these records were **not** previously exempted.

⁶ *Id.* at 353 citing Black’s Law Dictionary (6 Ed.1990) 1317.

⁷ *Id.* at 352-53 quoting *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E.2d 749.

⁸ *Id.* at 354.

⁹ *See State ex rel. Beacon Journal Publishing Co. v. Waters* (1993) 67 Ohio St.3d 321 citing *Krause v. State* (1972) 31 Ohio St.2d 132, 144-145 (1972).

¹⁰ *Clark v. Clark* (1956), 165 Ohio St. 457, 458, 136 N.E.2d 52.

E. Retroactive Application of HB 214 Would Reward Respondent's Bad Faith.

The underlying story of this case is the fact that, since the time The Enquirer made its request, Respondent has determined that it would be bad policy to release the records. Of course, that is not Respondent's call, but that inconvenient truth did not slow down its cover up efforts. The strategy was simple -- deny the request and allege any conceivable exemption (however meritless) that might justify its illegal actions. This allowed Respondent to delay the proceedings as long as possible, so it could simultaneously lobby the General Assembly to pass a law that actually does make the information exempt from the Public Records Act. If this Court decides that the recently passed legislation applies to a public records request made 17 months **before** that legislation was enacted, it will not only be ignoring the Ohio Constitution's prohibition of ex post facto laws, it will be providing a blueprint for Ohio agencies to follow whenever they seek to cover up records that will likely expose that agency's misfeasance. That would be a shameful result, beneath the dignity of this Court.

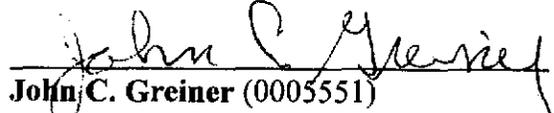
III. Conclusion

HB 214, which accomplishes by statute the result Respondent has implemented by illegal fiat, does not and cannot apply to The Enquirer's outstanding, public records request. Assuming this Court finds that the records requested by The Enquirer are public records, then Respondent should produce those records as they existed on February 12, 2008 - the date prior to the date HB 214 was signed into law.

Respectfully submitted,

Of Counsel:

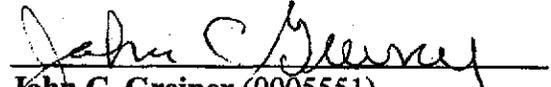
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by regular U.S. Mail, postage prepaid, this 5th day of March, 2008, upon the following:

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