

In the
Supreme Court of Ohio

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

Petitioner,

v.

BARBARA RILEY, DIRECTOR OF OHIO
DEPARTMENT OF JOB AND FAMILY
SERVICES,

Respondent.

Case No. 06-2239

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

JOHN C. GREINER (0005551)
JOHN A. FLANAGAN (0018157)
KATHERINE M. LASHER (0070702)
Graydon Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157
513-629-2734
513-651-3836 fax

Counsel for Petitioner
The Cincinnati Enquirer

MARC DANN
Attorney General of Ohio

WILLIAM P. MARSHALL (0038077)
Solicitor General
ELISE PORTER (0055548)
Deputy Solicitor
HENRY G. APPEL* (0068479)
Assistant Solicitor

**Counsel of Record*
JEFFREY W. CLARK (0017319)
Senior Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
happel@ag.state.oh.us

Counsel for Respondent
Helen Jones-Kelley, Director,
Ohio Department of Job and Family
Services

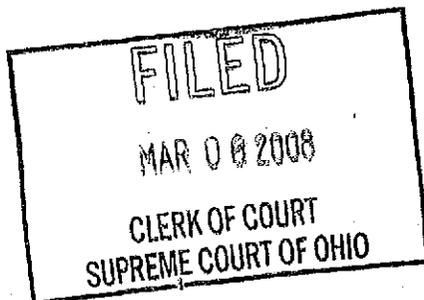


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INTRODUCTION

This case asks whether the names and addresses of foster parents are public records, and the Ohio Department of Job and Family Services (ODJFS) urges the Court to find that they are not. ODJFS has already explained that several state and federal laws provide that this information is not a public record. ODJFS has also argued, in the alternative, that the information should be shielded from release under the “good sense” exception explained in *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 370, 2000-Ohio-345. This exception applies here because release of the information could threaten the safety of foster children and foster parents alike. While this case has been pending, the General Assembly has been watching, and it has confirmed ODJFS’s view. The Assembly has now amended R.C. 149.43 and R.C. 5101.29 to expressly state that foster parents’ identifying information is not a public record.

The Assembly’s decision to shield these records from the public means that the Court should reject the Cincinnati Enquirer’s demand for the records. First, the Assembly’s action here clarifies the legislative intent that these records were never meant to be public. The Court has long recognized that changes in law can be clarifying changes, rather than changes from one approach to another, and this is one of those cases. Indeed, the Court has previously adopted this approach in the public records context, and that makes perfect sense. It is hard to see why the Assembly would want this information shielded only after the law’s effective date, especially when the information will be the same before and after that date.

Second, if there is any remaining doubt on the issue, the new law’s passage strongly bolsters the case for the applying the *McCleary* “good sense” exception to cover this one request and bridge the gap until the new law is effective. The General Assembly has now unmistakably adopted a policy of protecting foster parents’ information, so it does not make good sense to allow one massive release of that information before the window closes. Again, this is not a law

that deals with a category of documents, such that the new law could at least apply to protect other documents within that category. Rather, the law applies to one list, and one list alone, and it changes only slowly as people enter and leave the program. Releasing the documents now would therefore destroy privacy irrevocably for all those currently on the list, making the new law worthless for current foster parents. It makes no sense, let alone good sense, to leave the law meaningless except as to new foster parents who join the list after the law's effective date. That approach would mean that the Assembly had engaged in a classic case of closing the barn door after the horse has bolted.

For these reasons, and for the others in ODJFS's original brief, the Enquirer's mandamus request should be denied, and foster parents' privacy should be protected, as the General Assembly intended.

ARGUMENT

A. The Ohio General Assembly has expressly shielded foster parents' identifying information from the public records law.

The Ohio General Assembly, having learned of the *possibility* that foster parents' confidentiality might be lost, stepped forward and passed Am. Sub. H. B. No. 214 (House Bill 214) to shield such records from release. The Legislative Service Commission's Bill Analysis expressly refers to this case and outlines ODJFS's and the Enquirer's legal arguments. See <http://www.lsc.state.oh.us/analyses127/h0214-rs-127.pdf>. Thus, the Assembly was aware of this case. The Ohio Senate unanimously passed the measure on February 5, 2008. Governor Ted Strickland signed House Bill 214 into law on February 13, 2008, and it will go into effect on May 13, 2008.

House Bill 214 amended R.C. 5101.29 by adding a new subsection. This provision now establishes that "names, documentation, and other identifying information regarding a foster

caregiver or a prospective foster caregiver” will not be public records. R.C. 5101.29(D)(1). The General Assembly also established two exceptions to this new provision—that is, it created two situations in which foster parent information will become a public record. First, “non-identifying foster care statistics” are public records. R.C. 5101.29(D)(2)(b). Second, the General Assembly stripped public record protections from any foster parent who has been charged or convicted of a disqualifying offense or whose foster parent certificate was revoked by ODJFS. R.C. 5101.29(D)(2)(a). In House Bill 214, the General Assembly also enacted, in the public records statute, a cross-reference to these provisions. R.C. 149.43(A)(1)(z). Thus, these provisions, by newly mandating a limited release, will act as a specific exception to the general provision of confidentiality already established in R.C. 5101.26 and R.C. 5101.27.

B. The new law clarifies the General Assembly’s previous intent to protect foster parents’ identifying information from being publicized.

This new law changes nothing. As ODJFS has argued all along, foster parents are recipients of public benefits, so their information is confidential under R.C. 5101.26 and .27. The General Assembly did not change that statute, leaving that already-established confidentiality provision in place. If, however, the Court concludes that the previous law was not clear enough in shielding these records from release, the new law clarifies the Assembly’s intent that these records should not be made public, and the Assembly had never intended otherwise.

The Court has already held that a statutory amendment may be intended to clarify previously ambiguous law, and it has expressly rejected the notion that an amendment to a statute means that the law must have been different before the amendment. *Bartlett v. Nationwide Mut. Ins. Co* (1973), 33 Ohio St.2d 50, 54. Although “every amendment to a statute is made to effect some purpose,” the Court in *Bartlett* explained that an amendment may

“represent[] a legislative intent to clarify, rather than alter, existing law.” *Id.* To be sure, in some cases the Court has found that certain amendments to statutes were meant to change previous law, showing that the old law had been something different from the new. See, e.g., *Lynch v. Gallia*, 79 Ohio St. 3d 251, 1997-Ohio-392. The question in each case is which approach is the appropriate one. And here, as in similar public records cases, it makes greater sense to read the Assembly’s action as a clarifying amendment rather than as a change in direction.

Amendments to public records law, such as the one here, are best viewed as clarifying old law when the records involved are the same records, or essentially the same records, before and after the amendment. That approach is sensible because the Assembly’s intent to shield the records has little value if the records are released in the period before the law goes into effect, making the “new” shield irrelevant for all the records that now exist. That is true in any case involving any records, but it is especially so when the records involve the privacy of citizens, as opposed to merely the inner workings of government.

By contrast, it makes sense to view an amendment as a true change in law when the old law will govern past situations and the new law will govern new situations, with a clear break between the old and new scenarios. For example, laws governing tort or contract could easily apply a new law to new cases, while continuing to apply older law, where the Assembly intends, to cases involving old torts, etc. The same is true of laws that confer or alter power on public officials. In *Lynch*, for example, a statutory amendment provided that certain budget authority belonged to county veteran service commissions, not to county commissioners. *Lynch*, 79 Ohio St. 3d at 253-54. The Court concluded that this change really did transfer authority, so that certain authority under the pre-amendment budget law remained with county commissioners. *Id.* at 254-55. The new law gave only future budget control, but not old budget control, to the

veteran service commissions. That interpretation made sense because budgets are a cyclical event, so it is both possible and practical to allow the old system to play out until the new law is effective. The *Lynch* scenario contrasts sharply with the records situation, where it makes no sense to apply the new law only to “new facts,” as the fact of the requester may change, but the underlying documents are the same. If the records are released under the waning days of the “old” system, the new law becomes ineffective, too, for a long time to come. Thus, it makes more sense to read the amendment as clarifying, not changing, the law.

Indeed, the Court took a similar approach in a previous public records case that involved a statutory amendment while a case was pending. See *State ex rel. Rea v. Ohio Dept. of Education*, 81 Ohio St.3d 527, 1998-Ohio-334. In *Rea*, the Court addressed a public records request for previous versions of the Twelfth Grade Proficiency Test. While a mandamus action was pending, the General Assembly passed a new law that that would, beginning in 1999, make proficiency tests available to the public the year after they have been administered. *Id.* at 531.

This Court considered this change in the law in evaluating legislative intent regarding the existing law. The Court explained that “the recent passage of” a law making the records public after 1999 supported making them public before then, too, because “the legislature has made it clear its intent that parents, students and citizens have access to these tests in order to foster scrutiny and comment on them free from restraint.” *Id.* at 531-532. In other words, when the new law said that future records would be public, the Court used that as an interpretive tool to confirm that even present records, not formally subject to the new law yet, would also be public, as the Assembly favored openness in that context. In *Rea*, the new law clarified openness, but the principle is the same, and indeed, is even stronger when the clarification is in the direction of confidentiality. That is so because records that are newly made public could eventually all be

seen, even if someone must formally wait for an effective date. By contrast, records released cannot be recaptured; privacy breached cannot be restored.

Consequently, the Court should view these amendments as confirming what the Assembly intended all along: that foster parent's names and addresses should be protected from disclosure.

C. The new amendment strengthens the case for applying the *McCleary* “good sense” exception, as it does not make good sense to allow one release of all foster parents’ information just before an express protection of their privacy goes into effect.

Even if the Court finds that the statutory amendments do not clarify that the information at issue was always exempt from disclosure as a matter of statute, the Court can and should still look at the new law as another reason to apply the “good sense” exception to disclosure that the Court explained in both *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 370, 2000-Ohio-345 and *State ex rel. Keller v. Cox*, 85 Ohio St. 3d 279, 1999-Ohio-264. As ODJFS previously argued, in those cases the Court found that it violated good sense to release records when such release might cause harm to those whose privacy was breached. Here, the new amendments bring this case even closer to *McCleary* and *Keller* and further strengthen the already strong case for applying the “good sense” rule here. In both of those cases, the General Assembly ultimately amended the relevant statutes, after the Court’s decisions, to confirm that the records that the Court protected would stay protected. See R.C. 149.43(A)(1)(p) & (r). Thus, in retrospect, when the Assembly in effect codified the Court’s own approach, the Court’s decisions served to “bridge the gap” until the Assembly could act. Here, where the Assembly has acted while the case is still pending, the case for applying the good sense rule is even stronger, as at most the Court will be bridging the gap for a few scant weeks, and it does not make good sense to release such records just before the Assembly’s privacy shield applies.

1. **The “good sense” exception is most appropriate where, as here, protecting the information will serve to bridge the gap, if there is one, until the confidentiality protections will undoubtedly apply.**

In both *McCleary* and *Keller*, the Court protected records when it would violate good sense to release them, and thus to threaten the safety of the people whose information was released. One way of viewing those decisions is that, in saying that common sense would support non-disclosure, the Court was essentially saying that the General Assembly would plainly have wanted to protect the information if it had addressed it explicitly. Thus, the Court’s decisions in both cases protected that information until the Assembly had time to act. The Assembly then adopted the same view that the Court had, so that the Court’s decisions in effect had bridged the gap in the meantime. And in both cases, the Assembly’s swift action after the decisions confirmed that the Court made the right choice. Here, again, the General Assembly acted even sooner than it did in the *Keller* and *McCleary* cases, passing the law while the current case was pending. Thus, the Court knows that the Assembly “will” confirm its decision, because it has already done so.

Indeed, given that *Keller* and *McCleary* involved the strong possibility that the Assembly would act, it seems hard to deny that the “good sense” exception applies with even stronger force when everyone knows that there will be, at most, a short window where the information will be deemed public. Again, as explained in Part B above, the best reading of the Assembly’s action is that it actually confirms the already-existing statutory intent. But if there is any doubt on that score, then the “good sense” exception should fill the gap, as the release of this information could cause harm, and at most several weeks are left before the Assembly’s undoubted protection of foster children and foster parents will plainly apply.

In sum, the Assembly plainly wants to protect this information, and the Ohio Senate's unanimity in passing the law shows that the consensus is broad. It makes good sense to allow that protection now, if there is any doubt, rather than risking harm from one release now.

- 2. It is not "good sense" to release the exact information that will soon be protected, as the new privacy protections would then be worthless for all current foster parents, as the released information cannot be recalled and confidentiality cannot be restored.**

The good sense argument above applies even when the records at issue involve a *category* of public documents, such as records of police officers or of children using swimming pools. The argument is even stronger when the information at issue is not a category of information, but is one comprehensive set of data, as is the case here. That is, the Enquirer does not seek information regarding certain parents, or parents in Hamilton County. Rather, it seeks the names and addresses of every foster parent in the State of Ohio. Consequently, the good sense exception applies here not only as a legal doctrine, but as a matter of common sense: if the Court orders the release of all current foster parents' information, that data will remain public indefinitely, despite the Assembly's attempt to protect it, once the cat is out of the bag.

This scenario, involving one set of data rather than a case involving a category of records that extends beyond the case at hand, contrasts with *Keller* and *McCleary* in a way that favors confidentiality here. If the Court had ordered release in either of those cases, the Assembly could not have restored the confidentiality of *that* police officer's file, or of the City of Columbus's swimming pool lists. But at least the Assembly's responsive legislation would have protected all other police officers and children using city pools or recreation centers in all other cities. Here, by contrast, only one set of data is at issue, so once it is released, it cannot be retrieved. That would mean the Assembly's decision to protect foster parents would negatively

“grandfather out” every current foster parent, leaving privacy protection to accrue slowly to new parents only as they join the list. Surely that is not good sense.

No one doubts that information, once released, stays public forever, and that is more true than ever in the Internet era. As the Court explained in *McCleary*, “it is not beyond the realm of possibility that the information at issue herein might be posted on the Internet and transmitted to millions of people.” *McCleary*, 88 Ohio St.3d at 371. Indeed, the danger of wide dissemination of information was a major factor in this Court’s reasoning in *McCleary*, as the issue is ultimately the risk of harm, and that risk grows with greater exposure of the data. Thus, even a one-time release of data will be permanent for everyone who is now a foster parent in Ohio.

In sum, the Ohio General Assembly has plainly established its desire to protect foster parents and foster children from having this information released. Some may disagree with that as a policy matter, but going forward, the Assembly has adopted a policy of confidentiality. The Court has already applied the good sense exception in cases where the Assembly has not yet acted, and in cases in which, if the Court did order release, the Assembly’s later acts could at least matter for other cases. Here, where the Assembly has acted while the case is pending, and where only one set of information is at issue, the case for applying the good sense exception is stronger than ever before.

Not only does it make good sense to protect this information, but it makes no sense to release it. The Assembly did not pass a law protecting this information intending for it all to be released on the eve of the effective date, making its efforts at protection worthless for a long time to come.

CONCLUSION

For the reasons above and in ODJFS's prior briefing and oral argument, the Court should deny the petition for mandamus and the request for attorney fees.

Respectfully submitted,

MARC DANN
Attorney General of Ohio


WILLIAM P. MARSHALL (0038077) *by spc*

Solicitor General

ELISE PORTER (0055548)

Deputy Solicitor

HENRY G. APPEL* (0068479)

Assistant Solicitor

**Counsel of Record*

JEFFREY W. CLARK (0017319)

Senior Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

happel@ag.state.oh.us

Counsel for Respondent

Helen Jones-Kelley, Director,

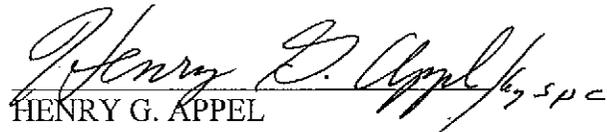
Ohio Department of Job and Family

Services

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Brief was sent by U.S. Mail on this 6th day of March, 2008, upon the following counsel:

John C. Greiner
John A. Flanagan
Katherine M. Lasher
Graydon Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157


HENRY G. APPEL