

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE <i>ex rel.</i> DAVID QUOLKE,	:	
	:	CASE NO. 2013-1809
Relator-Appellee,	:	
	:	
vs.	:	
	:	On Appeal from the Cuyahoga
STRONGSVILLE CITY SCHOOL	:	County Court of Appeals,
DISTRICT BOARD OF EDUCATION, <i>et al.</i>	:	Eighth Appellate District
	:	
Respondents- Appellants.	:	Case No. CA 13 099733

BRIEF OF AMICI CURIAE
OHIO COALITION FOR OPEN GOVERNMENT AND OHIO EMPLOYMENT
LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE DAVID QUOLKE

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I. STATEMENT OF INTEREST

The Ohio Coalition for Open Government (OCOG) is a 501(c)3 organization operated under the oversight and control of the Ohio Newspapers Foundation. It is operated for charitable and educational purposes to conduct and support activities seeking to ensure compliance with the laws of the State of Ohio and the United States that mandate public access to governmental meetings, proceedings and records, including, but not limited to, participation in relevant litigation.

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA and OELA strive to protect the rights of their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

As an organization focused on protecting the interests of employees on all sides of public- and private-sector workplace disputes, including issues of civil rights, collective bargaining, and employment contracts, OELA has an interest in ensuring the free flow of information to the public regarding political issues that affect employee rights. OELA files this amicus brief to emphasize the importance of an informed public when it comes to issues affecting both the rights of Ohio workers and the public interest.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

In *State ex rel. Keller v. Cox*, this Court recognized a narrow exception to the Ohio Public Records Act, Revised Code Section 149.43, to protect the constitutional privacy rights of police officers who would be placed in mortal danger by the disclosure of personal information including their home addresses, the identity of their children and family members, their medical records, and other similarly sensitive information. This Court has since applied the same rule to information about minor children whose information was collected by a public agency, in *State ex rel. McCleary v. Roberts*, due to the danger of exploitation these children would face. And most recently, in *State ex rel. Cincinnati Enquirer v. Craig*, this Court relied on substantial evidence of the extreme danger from public disclosure when it upheld a police department's refusal to release names of officers who had shot a leader of a violent motorcycle gang.

Respondents Strongsville City School District Board of Education, *et al.* (hereinafter collectively "Strongsville"), now seek to extend the protection afforded to police officers targeted by violent felons and children at risk from predators to replacement teachers involved in a routine—though intense—political dispute between a union and a public school district. Such a vast expansion of the "privacy" exception to the Public Records Act would deal a crushing blow to Ohioans' right to access information pertinent to issues of public importance. Here, it would deny parents the right to know who is teaching and working around their own children—ironically undermining the very safety concerns at issue in *McCleary*, and creating a sharp contrast with the extensive information parents can usually glean from public records about the credentials, performance, and criminal history of those permitted in public classrooms. In the future, the same rule could be used to deny access to information about virtually any unpopular public servant embroiled in a public controversy, scandal, or dispute, or even a heated election.

According to Strongsville’s reasoning, all it would take is a few aggressive actions—an angry constituent letter, an anonymous death threat, or a sign on a public figure’s lawn—and suddenly, a veil of secrecy will fall over information the public would otherwise have a right to access until the controversy is safely over (or longer). Strongsville has put a great deal of energy into creating a record of “threats” against its replacement workers, but the sad reality is that given the state of our discourse, this sort of record could easily be generated with respect to any public controversy. The topics provoking threats of violence and murder on any given day range from politics and religion to celebrity feuds or a bad result in the big game. Using Strongsville’s standard would mean that instead of public officials performing their mandatory duty to distinguish between public and non-public records, every unstable or overzealous participant in a public debate would be given de facto veto power over everyone else’s right to public records.

This Court should draw a line here to protect the public’s right to information needed to make informed judgments about political controversies, even, and perhaps especially, when those controversies are intense enough to provoke inappropriate outbursts, overheated rhetoric, or conflict. Strongsville’s standard would jeopardize public access to information about public employee hiring (if a sit-in to protest discrimination results in fights between unruly protestors and counter-protestors), taxes (given the violent anti-tax rhetoric used by some activists), or practically any other issue—the more important and widely debated the issue, the more likely access will be limited. A teacher strike simply does not raise the same safety concerns as a shooting war between police officers and a violent gang, and the names of employees on the public payroll do not need the same privacy protections as the names of police officers’ children.

III. STATEMENT OF FACTS AND THE CASE

Amici curiae OCOG and OELA adopt the Appellee’s Statement of Facts and the Case.

IV. LAW AND ARGUMENT

PROPOSITION OF LAW: The Privacy Protections Afforded to Those Who Would Truly Be Placed in Clear, Direct, and Imminent Danger by the Disclosure of Public Records, Such as Targeted Police Officers or Vulnerable Minors, Should Not Extend to Ordinary Public Servants Involved in a Contentious Public, Legal, or Workplace Controversy.

A. The Privacy Exception to the Public Records Act Was Created to Protect Those Exposed to a Substantial Risk of Serious Bodily Harm, Including a Small Class of Law Enforcement Officers Facing Known Threats and Minors Who Are Particularly Vulnerable to Exploitation and Violence.

The constitutional privacy exception this Court has recognized in public records cases is narrow, as it must be. Ohioans have a compelling interest in access to the records of their public offices, including records (like the payroll records here) that document the employment of public servants. That interest is outweighed by privacy concerns only in the face of substantial evidence of imminent, tangible harm to an identified person that would result from disclosure.

This Court has analyzed the exception in situations where the context made it obvious that a substantial risk of serious bodily harm would result from the release of the records at issue. In *State ex rel. Keller v. Cox* (1999), 85 Ohio St. 3d 279, 707 N.E.2d 931, a criminal defendant's attorney requested the complete personnel file of a police officer involved in a drug prosecution. The officer had been directly threatened by the defendant and an associate, and the department's personnel files included "the names of the officers' children, spouses, parents, home addresses, telephone numbers, beneficiaries, medical information, and the like." *Id.*, 85 Ohio St. 3d at 282.

In *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St. 3d 365, 725 N.E.2d 1144, the same exception was applied to clearly sensitive information, including names, photos, addresses, and medical history of children using public swimming pools. Notably, the Court concluded the information requested did not even qualify as a public record, eliminating the need to even weigh the interest in disclosure against the children's privacy. *Id.*, 88 Ohio St. 3d at 369-70.

Most recently, in *State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St. 3d 68, 2012-Ohio-1999, 969 N.E.2d 243, the Court concluded that the privacy exception warranted the withholding of the names of officers involved in the shooting death of a leader of a violent motorcycle gang. There, the nature of the officers' duties and an extensive history of felonious violence by the gang, together with testimony confirming that the officers would face retaliation if their names were released, justified the application of the exception. *Id.*

Importantly, the privacy exception did not initially arise from a public records mandamus case. Instead, it arose from *Kallstrom v. City of Columbus* (6th Cir. 1998), 136 F.3d 1055, where the federal Sixth Circuit considered whether undercover police officers' entire personnel files, including the names of their children, home addresses, and other obviously sensitive information should be allowed to fall into the hands of a violent criminal gang. The officers alleged that the city had released these records and brought a civil rights action for damages. The Sixth Circuit permitted the damages action to proceed on the theory that the public interest in disclosure did not outweigh the officers' constitutional privacy rights.¹ In other words, whether the privacy exception applies is not a simple question of whether someone has made a threat. It is a question of whether the proven danger from disclosure is so serious that those whose information is released would have immediate damages claims against a public office that releases it.

Even in *Kallstrom*, the trial court determined on remand that the imminent threat of harm to the officers was not supported by the record and did not entitle the officers to damages, in part because the key information was never actually released, and in part because no harm had

¹ Notably, in *Kallstrom*, the undercover officers were promised explicitly that the information the city released would never be released to the public. Although a public office cannot shield documents from disclosure through a private agreement, this factor is pertinent for constitutional purposes, as it sheds light on whether the employees have an expectation of privacy. Here, where there was no such promise, and the replacement teachers knew there was an ongoing heated controversy when they were hired, any expectation of privacy was decidedly weaker.

resulted to the officers after the release of the disputed records. *Kallstrom v. City of Columbus* (S.D. Ohio 2001), 165 F. Supp. 2d 686, 701-03. The *Kallstrom* case thus establishes two principles relevant here: the need for the person whose privacy is at issue to show he or she will be in tangible, imminent, and serious danger if the records are released, and the need for courts to conduct a searching examination to ensure records are not withheld based on claimed threats that are not as severe or immediate as they appear at first glance.

B. The Public’s Interest in Knowing the Identities of Replacement Teachers Outweighs the Attenuated Risks Faced by the Teachers.

1. The Risk of Harm to the Strongsville Replacement Teachers Does Not Rise to the Same Level as the Risks Posed in Past Cases.

There is no question that the Strongsville teachers’ strike was a heated controversy, and that some of the union members involved in the strike engaged in harassment of the replacement teachers hired by the school district. Labor strikes provoke intense feelings on all sides. See, e.g., *Linn v. United Plant Guard Workers of America* (1966), 383 U.S. 53, 58 (noting that “[l]abor disputes are ordinarily heated affairs *** characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions,” and cautioning against judicial overreaction under such circumstances). Those who cross picket lines do so knowing they may face hostility from the union members who feel they have betrayed their movement. But that does not compare to the tangible, likely risks faced by undercover police officers or officers involved in a long-running war with a violent criminal gang, and the vulnerability of replacement workers does not match the vulnerability of children to violent sexual predators, which has engendered a host of legal protections for minors’ privacy.

The record presented by Strongsville contains an ugly string of incidents directed toward the school district and those who crossed the picket line—including petty vandalism, name-

calling, and vague threats of future employment retaliation. It also shows, in a strike that involved hundreds of union members and hundreds of replacement workers, two isolated incidents that could be called “violent”—one near-fender-bender that resulted in a traffic citation and one uncorroborated claim that a union member or sympathizer threw an object at a replacement teacher’s vehicle. These incidents, if they occurred as described, were wrong and likely criminal. But there were no death threats, no replacement teacher suffered even minor bodily harm, and nothing in the record suggested that this would change if more replacement teachers were identified. In fact, since at least some replacement teachers were known by name and even by address (as some nonviolent protests evidently occurred in the teachers’ neighborhoods), none of whom were harmed, it was hardly inevitable that disclosing additional names would place the named individuals in danger. See *Kallstrom* (S.D. Ohio 2001), 165 F. Supp. 2d at 702-03 (on remand, rejecting undercover officers’ showing of a substantial risk of serious bodily harm because no such harm had actually resulted during the time since the violent gang members gained access to the officers’ file information).

There is no question replacement workers face some risk of public ridicule, hostility, and confrontation when they cross a picket line. Unfortunately, these are common features of many types of public controversies. It is understandable that the replacement teachers here would desire their identities to be kept secret. But this desire pales in comparison to the pressing need for privacy in *Kallstrom*, *Keller*, and their progeny. The police officers in those cases did not face a nebulous risk that prior, minor incidents might escalate into more serious actions. They faced immediate, mortal threats, based on a history of serious violence and explicit death threats from individuals known to be violent. The replacement teachers here faced a nebulous threat of hostility from political foes who were aggressive, but certainly not murderous.

2. *The Public Interest in Accessing the Records Here Is Far Stronger than the Public Interest at Issue in Prior Cases Addressing Privacy.*

It is important to note that the test used in prior cases does not rely entirely on an analysis of the threat of violence at issue. Instead, this Court has applied a balancing test, consistent with the Sixth Circuit's conclusion that individuals' rights to privacy can, in some cases, be overcome by the compelling interest of the state in providing access to important public records. See *Kallstrom*, 136 F.3d at 1064-65 (acknowledging potential compelling interest arising from Public Records Act). This balancing test was simplified in *Keller*, *McCleary*, and *Craig*, and in *Kallstrom* itself, by the fact that the records at issue were of little or no public importance.

In *McCleary*, as noted above, the records at issue containing personal information about vulnerable minors were determined by the Court not to even rise to the status of public records. This made it easy for the Court to conclude the children's privacy rights trumped the public's right to know. In *Keller* and *Kallstrom*, the portions of the personnel files at issue, containing irrelevant data about the police officers' homes and families, were of no interest to anyone except the officers themselves (and, as the courts recognized, those who might seek to harm them). *Kallstrom*, 136 F.3d at 1064-65; *Keller*, 85 Ohio St. 3d at 282 (concluding that officers' personal information should be withheld, in contrast to important information, such as disciplinary or performance information about the officers). And in *Craig*, this Court concluded that the public's interest in learning about the officers who shot the gang leader could be served without providing the names of the officers, since the redacted records would still inform the public about the officers' performance and disciplinary history. *Craig*, 2012-Ohio-1999, at ¶ 21.

Not so here. In this case, the public's interest in learning the names of the teachers Strongsville invited into its classrooms in place of the striking union members (whose information was wholly public) could hardly be stronger. Unlike in *Craig*, where a great deal of

information could be gleaned from the police department's redacted files even without the officers' names being included, the names of the replacement teachers were the only way to learn anything about them. Other than payroll information, the district did not appear to have any background information on the teachers. But if it had provided these names, parents and other community members could have learned, through sources like the Ohio Department of Education website, whether the individuals who now had unmonitored access to and responsibility for the children of Strongsville were qualified to teach the subjects they were teaching, had prior or existing sanctions on their teaching licenses, and whether they had passed the criminal background checks ordinarily applicable to full-time teachers. It is hard to imagine a more compelling interest than the interest of parents in access to public information touching on the education and safety of their children. Indeed, because of that interest, and because of the long, sordid history of public scandals involving violence and exploitation toward schoolchildren, parents generally have access to a wealth of information, through the Ohio Department of Education and their own school districts, to the credentials, disciplinary history, and criminal backgrounds of the teachers and other public employees who work with their children.

Kallstrom and its analogs in this Court strike a balance between personal safety and the public interest in open records. The correct balance here is clear: the interest of parents in access to information affecting the safety and education of their children is compelling enough to overcome any interest of public school employees in concealing their identities from the public.

C. Expanding the Privacy Exception Would Jeopardize the Public's Right to Basic Information in a Broad Range of Political Controversies, Undermining the Core Purpose of the Public Records Act.

If this Court strikes a different balance, and holds that the threats at issue here were serious enough to outweigh the interests of parents and the community in knowing who was

teaching in Strongsville's schools, it will endanger the very concept of public access to records. This Court has always understood that the core purpose of the Public Records Act is to protect the functioning of Ohio's democratic form of government, e.g., *Kish v. Akron*, 109 Ohio St.3d 162, 2006 -Ohio- 1244, 846 N.E.2d 811, at ¶¶ 15-17:

A fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government's work and decisions. *** Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance. *** [Statutes such as] those constituting R.C. Chapter 149 reinforce the understanding that open access to government papers is an integral entitlement of the people, to be preserved with vigilance and vigor.

If access to records is "essential" to public scrutiny of government action, it follows that such access is even more vital when a government action is of particular public interest and importance. In an ideal world, the energy driving our most critical public debates might all be directed toward a civil, open discussion of the pros and cons of each government action at issue. That has hardly been the case. American politics has never been entirely devoid of incivility or violence, but now, with the speed and anonymity of the internet, uncivil and even violent rhetoric has intruded upon our public discourse on both sides of every possible issue. When angry crowds gather on the statehouse lawn, it is impossible to guarantee there will be no name-calling, no threats, and no pushing, shoving, or throwing things. This is even more likely when crowds gather online. There is no filter that can weed out every idle threat or obscenity posted in the "comments" section of a controversial news story. What is worse, the more important the issue, and the more attention it receives, the more likely it is that some unstable or desperate individual, fueled by the online echo chamber, will cross the line from incivility to outright violence.

The fact that our politics is increasingly ugly cannot be allowed to cast a veil of secrecy over the functioning of our government. It is one thing to provide limited protection to the personal information of police officers, whose jobs are already inherently dangerous, when they are targeted by violent gangs. It is quite another to provide the same protection to any person who becomes involved in a heated political controversy. Using the principles espoused by Strongsville, a public office could withhold vital information regarding practically any political controversy until after the controversy has passed (or longer, since Strongsville insists that it should not have to provide the records even now, nearly a year after the end of its teacher strike).

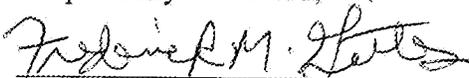
In a controversy over discrimination in municipal hiring, any time a single protestor from a non-discrimination group shoves a counter-protestor from an employee group, the city could refuse to provide the records needed to show the public that the hiring was discriminatory. In a public corruption scandal, anonymous online threats against the mayor of a small town could be used to deny access to records showing that the mayor hired an unqualified relative or campaign contributor to run the town's sewer department. If overzealous activists occupy a gas drilling site and try to sabotage its equipment, the state could refuse to turn over the records showing who has been granted key mineral leases or licenses. If an anti-government militia member attacks a Department of Taxation office, the identity of every employee of the department could become a state secret. In short, instead of government officials fulfilling a mandatory obligation to distinguish between public and non-public information, those officials will be providing every unstable, impulsive, or malicious individual with veto power over every other citizen's right to access important public records. In fact, even imaginary villains will have such a veto, since Strongsville's claims include the sort of uncorroborated and anonymous threats that could easily be fabricated by unscrupulous officials seeking to deny access to records.

If the handful of threats and incidents supporting the privacy exception sought here supplant the concrete, mortal danger previously required to establish a constitutional privacy claim, there is no situation where the public can be guaranteed access to the information it needs. The more important the issue, the less likely the public can inspect the records it rightfully owns. And, under *Kallstrom*, nearly all public employees whose records are released will have claims for damages against their employers for endangering their lives. The public will no longer have the right to know whose salaries their tax dollars are funding, or the ability to uncover those individuals' qualifications, political connections, or criminal histories. That is not consistent with either the federal constitutional right at issue or the core purpose of the Public Records Act. This Court should draw a line in this case protecting the public's right to know.

V. Conclusion

For the reasons stated above, *amici curiae* OCOG and OELA urge this Court to affirm the decision of the court below to grant the Relator's petition for a writ of mandamus.

Respectfully submitted,



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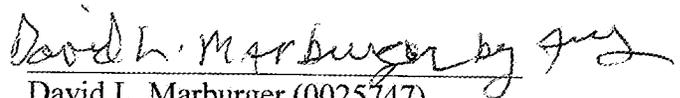
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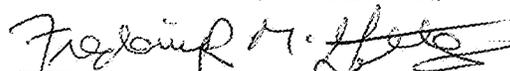
Ohio Coalition for Open Government

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April 2014, a copy of the Brief of Amici Curiae the Ohio Coalition for Open Government and the Ohio Employment Lawyers Association in Support of Appellee David Quolke was served by postage-paid U.S. Mail upon the following:

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