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IN RE BARZAK: ACCESS TO CHILDREN SERVICES BOARD FILES

by

DAVID HAZELKORN*

In the recent court decision, *In re Barzak*,¹ the Trumbull County Court of Appeals ruled that parents in child abuse, neglect, or dependency proceedings have a right of reasonable access to Children Services Board investigation files.² While this was a case of first impression in Ohio, it puts state law in line with that of other jurisdictions.

BACKGROUND

The *Barzak* case began when the Trumbull County Children Services Board filed a complaint in juvenile court alleging that Veta Barzak was a dependent child as defined in Ohio Rev. Code § 2151.04(C)³. During the proceedings, it quickly became obvious that the board's records would be among the most relevant evidence in the case. The agency referred to its own records in the amended complaint. Consequently, a praecipe for a subpoena *duces tecum* was filed requesting that those records be produced. Children Services officials filed a motion to quash, contending that, under Ohio Rev. Code § 5153.17⁴ and 45 C.F.R. § 205.50⁵, the records in question were confidential and that, pursuant to Ohio Rev. Code § 2151.421⁶, any employee of the board who revealed them without authorization was subject to criminal prosecution.

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¹*In re Barzak*, No. 3456 (Trum. Co. Ct. App. Jun. 24, 1985), motion to certify overruled and appeal dismissed. 21 Ohio Off. Rep. Adv. Sh. No. 4, p. A-5 (Case No. 85-1325, Dec. 18, 1985). This case has been selected for publication.

²"While recognizing the sensitive nature of child abuse reports in investigations, counsel for the appellant should have had [the right of] reasonable access to the files of in order to use those parts which were relevant to the issues being presented to the court." *Id.* slip op. at 11.

³*Id.* at 4. "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'dependent child' includes any child: (c) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship. OHIO REV. CODE ANN. § 2151.04 (C) (Page 1976).

⁴ The county children services board or county department of welfare shall prepare and keep written records of investigations of families, children, and foster homes, and of the care, training, and treatment afforded children, and shall prepare and keep such other records as are required by the department of public welfare. Such records shall be confidential, but shall be open to inspection by the board or department of public welfare, the director of the county department of welfare, and by other persons, upon the written permission of the executive secretary.

OHIO REV. CODE ANN. § 5153.17 (Page 1981).

⁵45 C.F.R. § 205.50 requires that a state plan for financial assistance under to the IV-A of the Social Security Act establish procedures for safeguarding information concerning applicants and recipients.

⁶That statute reads, in part, "Any report made under this section is confidential, and any person who permits or encourages the unauthorized dissemination of its contents is guilty of a misdemeanor of the fourth degree." OHIO REV. CODE ANN. § 2151.421(C) (Page 1976). See also OHIO REV. CODE ANN. § 2151.99(B) (Page 1976).

The agency asked the juvenile court to hold the record privileged.⁷ The court granted the motion and quashed the subpoena.

During the trial, the Children Services Board's only witness testified at great length as to the contents of the agency records, often in response to questions from the board's attorney specifically requesting such disclosure. Upon cross examination, the parents' counsel attempted to elicit certain information from the file, but was unable to satisfactorily obtain it. He then moved to put the entire file into evidence. The motion was denied⁸. The parents' lawyer then objected to the introduction of any testimony or evidence regarding the "confidential" records, yet this also proved unsuccessful.⁹

The Trumbull County Court of Appeals reversed the judgment of the juvenile court and entered a final judgment for the parents.¹⁰ Numerous other courts have reviewed these issues, and have reached the same result as the Trumbull County Court of Appeals. An appeal was taken to the Ohio Supreme Court which, after reviewing the issues, denied a motion to certify the record and dismissed the appeal "*sua sponte* for the reason that no substantial constitutional question exists therein."¹¹ This article discusses some of the reasons these courts have articulated in support of their decisions.

PURPOSE OF OHIO REV. CODE SECTION 5153.17

The Trumbull County Children Services Board argued that it was prevented from releasing any of its papers or records under the mandates of Ohio Rev. Code § 5153.17¹². The history of this statute goes back forty years,¹³ yet there has never been a published case which has cited it.¹⁴ The statute's purpose is to organize the administrative departments of the state and of local governments, while regulating their relations with the general public.¹⁵

Children Services Board files are "public records" as such records are de-

⁷See *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 386 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

⁸See *In re Chandler*, 230 Or. 452, 457, 370 P.2d 626, 629 (1962).

⁹*Barzak*, at 13.

¹⁰*Id.* at 14.

¹¹*In re Barzak*, 21 Ohio Off. Rep. Adv. Sh. No. 4, p. A-5 (Case No. 85-1325, Dec. 18, 1985).

¹²OHIO REV. CODE ANN. § 5153.17 (Page 1981).

¹³1946 Ohio Laws 538, 544 (H.B. 418, eff. 1/1/46); recodified as 5153.17 1957 Ohio Laws 1012, 1018 (Am.Sub. H.B. 927, eff. 9/14/57); amended to change the name of the county "child welfare board" to "children services board" and replace references to the "division of social services" (which was abolished July 1, 1966) with references to the "department of public welfare" 1969 Ohio Laws 72 (S. 49, eff. 8/13/69).

¹⁴Research has failed to disclose any unpublished cases, although it is difficult to research such cases which are more than five years old. *But see* 46 Ohio Att'y Gen 114 (1946) which referred to this section's predecessor, General Code § 3070-18, but did not explain or discuss it. *Id.* at 120.

¹⁵See *Parkhurst v. Cleveland*, 77 N.E.2d 735, 736 (Cuy. Co. C.P., 1947).

fined by state law.¹⁶ They are maintained by a governmental unit and are specifically required to be kept by law.¹⁷ The phrase "required to be kept" has been held to mean "any record which but for its keeping the governmental unit could not carry out its duties and responsibilities; that the *raison d'être* of such record is to assure the proper functioning of the unit."¹⁸ "It is difficult to conceive of more necessary records"¹⁹ for the proper functioning of a Children Services Board than those detailing its investigations, counseling, and other duties.

Public policy in Ohio favors general public access to government records.²⁰ Ohio Rev. Code § 5153.17, however, is designed to insure a degree of protection for Children Services Board papers. Such laws are not intended to protect government agencies, but rather to protect the constitutional right of privacy²¹ of the individuals who are the subjects of the files.²² Thus, such statutes "are not intended to affect the authority of courts of general jurisdiction in the state of Ohio, nor to modify the statutes of Ohio which pertain to the production of documents upon subpoena duces tecum or in an action for discovery."²³

USE IN JUVENILE COURT

There is a need for every Children Services Board "to exercise every

¹⁶State *ex rel.* Stephan v. Harder, 230 Kan. 573, 579-80, 641 P.2d 366, 372 (1982); *See* Wells v. Lewis, 12 Ohio Dec. 170, 173-74, (Cincinnati Super. Ct. 1901); Stivahtis v. Juras, 13 Or. App. 519, 522, 511 P.2d 421, 423 (1973); OHIO REV. CODE ANN. 149.40 (Page 1984).

¹⁷State *ex rel.* Mothers Against Drunk Drivers v. Gosser, 20 Ohio St. 3d 30, 32 (1985); State *ex rel.* Plain Dealer Pub. Co. v. Lesak, 9 Ohio St. 3d 1, 2, 457 N.E.2d 821, 822 (1984); State *ex rel.* Citizens Bar Ass'n v. Gagliardo, 55 Ohio St. 2d 70, 378 N.E.2d 153 (1978); State *ex rel.* Milo's Beauty Supply Co. v. State Bd. of Cosmetology, 49 Ohio St. 2d 245, 361 N.E.2d 444 (1977); Curran v. Board of Park Comm'rs, 22 O.Misc. 197, 198-99, 259 N.E.2d 757, 759 (1970).

¹⁸Gosser, 20 Ohio St. 3d at 32.

¹⁹*Id.*

²⁰State *ex rel.* Witworth Bros. Co. v. Dittley, 12 Ohio N.P. (n.s.) 319 (Franklin Co. C.P. 1911); Kritchenger v. Wilson, 3 Ohio N.P. (n.s.) 179, 183 (Darke Co. C.P. 1905); Wells v. Lewis, 12 O.Dec. at 175-80; *see also* Stivahtis, at 523, 511 P.2d at 424.

²¹McDonald v. United States, 335 U.S. 451, 453 (1948).

²²Michigan Welfare Rights Organization v. Dempsey, 462 F.Supp. 227, 237 (E.D. Mich. 1978); Fears v. Burris Mfg. Co., 436 F.2d 1357, 1361 (5th Cir. 1971) *aff'g* 48 F.R.D. 91 (N.D. Miss. 1969); United States v. McDaniels, 355 F.Supp. 1082, 1087 (E.D. La. 1973); *In re Cager*, 251 Md. 473, 482, 248 A.2d 384, 390 (1968); *See* Ohio Civil Rights Comm. v. Campbell, 46 Ohio App. 2d 110, 113, 345 N.E.2d 438, 441 (1975); *compare* OHIO REV. CODE ANN. § 5153.17 (Page 1981) and 45 C.F.R. § 205.50(a)(2)(iii) (1985); *see also* OHIO ADMIN. CODE § 5101:2-35-27(B); Recchie & Weyland, *Ohio's Privacy Act: An Analysis*, 10 U. TOL. L. REV. 159, 188-89 n. 185.

²³Parkhurst v. Cleveland, 77 N.E.2d 735, 736 (Cuyahoga Co. C.P. 1947). *See also*, United States v. Phoenix Union High School Dis., 681 F.2d 1235 (9th Cir. 1982), *cert. denied*, 459 U.S. 1191 (1983); Marine Welding & Repair Works, Inc. v. NLRB, 492 F.2d 526, 530 (5th Cir. 1974); Bogard v. Cook, 60 F.R.D. 508, 510 (N.D. Miss. 1973); Bell v. Bankers Life & Casualty Co., 327 Ill. App. 321, 330, 64 N.E.2d 204, 208 (1945); Maine Sugar Indus. Inc. v. Maine Indus. Bldg. Auth., 264 A.2d 1, 6 (Me. 1970); Marceau v. Orange Realty, Inc., 97 N.H. 497, 498-99, 92 A.2d 656, 657, (1952); State *ex rel.* Washington v. Church, 35 Wash. 2d 170, 173-74, 211 P.2d 701, 702-3 (1949); *but see* *In re Cager*, 251 Md. 473, 482, 248 A.2d 384, 390 (1968); State *ex rel.* Haviland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1946).

precaution against disclosure" of its files.²⁴ Its employees should be given wide latitude in investigating and supervising abuse, neglect, and dependency cases. Such records sometimes contain information which could be psychologically damaging, including mental health assessments, psychological examinations, and clinical judgments. Citizens (especially family members and the professionals listed in Ohio Rev. Code § 2151.421)²⁵ should feel free to report cases of suspected abuse and neglect and to cooperate in the subsequent investigations without fear of retaliation.

Despite these considerations, Ohio Rev. Code § 5153.17 does not apply to situations involving the administration of juvenile court matters²⁶. Reliable and competent papers which elucidate points in issue should not be withheld from the court²⁷. Juvenile courts have inherent powers to compel the production of such papers. "Without such powers, courts would cease to function and causes presented to them could not be conducted."²⁸ This principle is recognized by Ohio administrative regulations which refer to use of the reports "for the purpose of judicial testimony," even without the "written consent of the complainant/referral source" or others.²⁹

STATUTORY INTERPRETATION

Courts have set forth two legal principles to be applied in interpreting laws such as Ohio Rev. Code § 5153.17. The first principle is that any statute restricting disclosure of public records is to be strictly construed against the custodian of the records.³⁰ This is because the withholding of public records is the exception to the general rule in favor of public access, and hence is not authorized unless specifically provided by statute. Such laws are in derogation

²⁴*Smythe*, at 169, 169 P.2d at 710.

²⁵Professionals listed in Ohio Rev. Code § 2151.42.1 include

(A)ny attorney, physician, including a hospital intern or resident, dentist, podiatrist, practitioner of a limited branch of medicine or surgery as defined in section 4731.15 of the Revised Code, registered or licensed practical nurse, visiting nurse, or other health care professional, licensed psychologist, speech pathologist or audiologist, coroner, administrator or employee of a child day-care center, or administrator or employee of a certified child care agency or other public or private children services agency, school teacher or school authority, social worker, or person rendering spiritual treatment through prayer in accordance with the tenets of a well recognized religion, acting in his official or professional capacity.

OHIO REV. CODE ANN. § 2151.42.1 (Page 1981).

²⁶*Id.* See *Carr*, 431 F.2d at 389-90, *In re Clear*, 58 Misc. 2d 699, 705, 296 N.Y. Supp. 2d 184, 190, *rev'd on other grounds*, 32 A.D.2d 915 (N.Y. Family Ct. 1969); OHIO ADMIN. CODE § 5101:2-35-07(B), § 5101:2-35-32(D)(6) (1985).

²⁷*Zimmerman v. Poindexter*, 74 F.Supp. 933, 935 (D. Hawaii 1947).

²⁸*Smythe*, at 167, 169 A.2d at 710.

²⁹OHIO ADMIN. CODE § 5105:2-35-07 (1985). See also OHIO ADMIN. CODE § 5101:2-35-32(D)(6) (1985).

³⁰*Marceau*, at 499, 92 A.2d at 657; *State ex rel. Plain Dealer Pub. Co. v. Lesak*, 9 Ohio St. 3d 1, 4, 457 N.E.2d 821, 823 (1984) (Celebrezze, C.J., concurring).

of the common law,³¹ and inhibit the discovery of truth.³²

The second principle is that such a law must be interpreted consistent with the legislation and regulations from which it emanated.³³ While the legislative intent of Ohio Rev. Code § 5153.17 is unclear, it appears to have been passed in response to the Social Security Act Amendments of 1939.³⁴ The original legislation creating this section's predecessor, Ohio General Code § 3070-18,³⁵ was drafted, in part, to administer "all amounts received by the state from the federal government under the provisions of the social security act, or any act of the Congress of the United States amendatory thereof or in substitution therefor, for aid to dependent children."³⁶

The federal law requires that, as a condition of receiving federal aid to needy families with children, each state must develop a plan that

provide[s] safeguards which restrict the use of³⁷ disclosure of information concerning applicants or recipients to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part B, C, or D of this subchapter or under subchapter I, X, XIV, XVI, XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, [or] (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program.³⁸

There can be no doubt that a hearing held pursuant to Ohio Rev. Code §§

³¹*Belichick v. Belichick*, 37 Ohio App. 2d 95, 97, 307 N.E.2d 270, 271 (1973); *Arnovitz v. Wozar*, 9 Ohio App. 2d 16, 22, 222 N.E.2d 660, 665 (1964); *In re Roberto*, 106 Ohio App. 303, 151 N.E.2d 37, 39 (1958).

³²*See Carr*, 431 F.2d at 389.

³³*State ex rel. Dombrowski v. Moser*, 113 Wis. 2d 296, 301, 334 N.W.2d 878, 881 (1983); *see Tiptlett v. Board of Social Protection*, 19 Or. App. 408, 528 P.2d 563, 567 (1974).

³⁴Social Security Act Amendments of 1939, ch. 66, § 401(b), 53 Stat. 1379.

³⁵1946 Ohio Laws 538, 544 (H.B. 418, eff. 1/1/46).

³⁶GEN. CODE Section 1359-37; *cited in* 46 Ohio Att'y Gen. 114, 116.

³⁷"So in original. Probably should read 'or.'" 42 U.S.C. § 602, n. 1 (1983).

³⁸42 U.S.C. § 602(a)(9) (1983). *See also*, 42 U.S.C. § 620 (1983) (child welfare services); 45 C.F.R. § 205.50(a)(1)(i)(B) (1985); *Indiana ex rel. Indiana State Bd. of Public Welfare v. Ewing*, 99 F. Supp. 734, 735 (D.D.C. 1951), *appeal dismissed* 195 F.2d 556 (D.C. Cir. 1952) (old age assistance); Krause, *Reflections on Child Support*, 1983 U. ILL. L. REV. 99, 105 n. 25 (1983).

2151.03³⁹, 2151.031⁴⁰, 2151.04⁴¹, or 2151.05⁴² is a "criminal or civil proceeding conducted in connection with the administration of"⁴³ the Ohio plans for providing child welfare services.⁴⁴

IMPACT OF FEDERAL LAW

The service programs of all Ohio Children Services Boards are funded in whole or in part by federal funds under Title IV-B of the Social Security Act.⁴⁵

³⁹ As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "neglected child" includes any child:

- (A) Who is abandoned by his parents, guardian, or custodian;
- (B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;
- (C) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being;
- (D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition;
- (E) Whose parents, legal guardian, or custodian have placed or attempted to place such child in violation of sections 5103.16 and 5103.17 of the Revised Code.

A child who, in lieu of medical or surgical care or treatment for a wound, injury, disability, or physical or mental condition, is under spiritual treatment through prayer in accordance with the tenets and practices of a well-recognized religion, is not a neglected child for this reason alone.

OHIO REV. CODE § 2151.03 (Page 1979).

⁴⁰ As used in sections 2151.01 to 2151.54 of the Revised Code, an "abused child" includes any child who:

- (A) Is the victim of "sexual activity" as defined under Chapter 2907. of the Revised Code, where such activity would constitute an offense under that chapter, except that the court need not find that any person has been convicted of the offense in order to find that the child is an abused child;
- (B) Is endangered as defined in section 2919.22 of the Revised Code, except that the court need not find that any person has been convicted under that section in order to find that the child is an abused child;
- (C) Exhibits evidence of any injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it, except that a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under section 2919.22 of the Revised Code.

OHIO REV. CODE § 2151.031 (Page 1979).

⁴¹ As used in sections 2151.01 to 2151.54, inclusive of the Revised Code, "dependent child" includes any child:

- (A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian, or custodian;
- (B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;
- (C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship.

OHIO REV. CODE § 2151.04 (Page 1979).

⁴² Under sections 2151.01 to 2151.54 of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, abused, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship.

OHIO REV. CODE § 2151.05 (Page 1979).

⁴³ 42 U.S.C. § 602(a)(9) (1983); 45 C.F.R. § 205.50(a)(1)(i)(B) (1985).

⁴⁴ 42 U.S.C. § 625(a)(1); see generally, 42 U.S.C. § 620-27, also known as part B of subchapter IV ("this subchapter" as referred to above).

⁴⁵ See OHIO ADMIN. CODE §§ 5101:2-33-04(D), 5101:2-43-01 (1985).

Consequently, regardless of the history of Ohio Rev. Code § 5153.17, such agencies must follow the dictates of 42 U.S.C. § 602(a)(9)⁴⁶ and 45 C.F.R. § 205.50(a)(1)(i).⁴⁷ These provisions establish federal safeguards, which have been variously described as “the protection of applicants and recipients from exploitation and embarrassment,”⁴⁸ “to save recipients from any embarrassment,”⁴⁹ and to prohibit “any use of such records ‘for commercial or political purposes’.”⁵⁰ Moreover, one court has noted that “the intent of the Federal Social Security Act relating to the disclosure of information concerning a recipient of public assistance was to restrict the use or disclosure of such information to purposes directly connected with the administration of the aid.”⁵¹

The release of Children Services Board files at discovery and trial falls within at least two of the federal exceptions to confidentiality. It has been held that the disclosure of information for use in [court] proceedings falls directly

⁴⁶ (a) Contents. A State plan for aid and services to needy families with children must — (9) provide safeguards which restrict the use or disclosure of information concerning applicants or recipients to purposes directly connected with (A) the administration of the plan of the State approved under this part [42 USCS §§ 601 et seq.], the plan or program of the State under part B, C, or D of this title [42 USCS §§ 620 et seq., 630 et seq., 651 et seq.] or under title I, X, XIV, XVI, XIX, or XX [42 USCS §§ 301 et seq., 1201 et seq., 1351 et seq., 1381 et seq., 1396 et seq., 1397 et seq.], or the supplemental security income program established by title XVI [42 USCS §§ 1381 et seq.], (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, and (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental entity which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an entity referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; but such safeguards shall not prevent the State agency or the local agency responsible for the administration of the State plan in the locality (whether or not the State has enacted legislation allowing public access to Federal welfare records) from furnishing a State or local law enforcement officer, upon his request, with the current address of any recipient if the officer furnishes the agency with such recipient's name and social security account number and satisfactorily demonstrates that such recipient is a fugitive felon, that the location or apprehension of such felon is within the officer's official duties, and that the request is made in the proper exercise of those duties.

42 U.S.C. § 602(a)(9) (1983).

⁴⁷ The disclosure of information concerning applicants and recipients will be limited to purposes directly connected with:

(A) the administration of the plan the State approved under . . . title IV-B . . .

(B) Any investigation, prosecution, or civil or criminal proceedings conducted in connection with the administration of any such plans or programs,

(C) The administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly or indirectly to individuals on the basis of need.

45 C.F.R. § 205.50(a)(1)(i) (1985). See also 45 C.F.R. § 1355.21(a) (1984); 45 C.F.R. § 1355.30 (1984); 45 C.F.R. § 1356.20(a) (1984); 45 C.F.R. § 1357.15(a) (1984).

⁴⁸*In re Cager*, 251 Md. 473, 482, 248 A.2d 384, 390 (1968).

⁴⁹*In re Will of Melion*, 58 Misc. 2d 441, 443, 295 N.Y.S.2d 822, 824 (1968).

⁵⁰*Finance Co. of Falmouth v. Falmouth Bd. of Public Welfare*, 345 Mass. 579, 584, 188 N.E.2d 848, 852 (1963). See the following cases in which individuals used the federal law to protect their own privacy: *Sanders v. Wyman*, 464 F.2d 488 (2d Cir. 1972), cert. denied 409 U.S. 1128 (1973); *United States v. McDaniels*, 370 F.Supp. 293, 297-98 (E.D. La. 1973); *Indiana ex rel. Indiana State Bd. of Public Welfare*, 99 F. Supp. 734 (D.D.C. 1951).

⁵¹*State ex rel. Haugland v. Smythe*, 25 Wash. 2d 161, 167, 169 P.2d 706, 709 (1946).

within the purposes outlined in 45 C.F.R. § 205.50(a)(1)(i)(a): "Establishing eligibility' and 'providing services for recipients.'"⁵² Disclosure also falls within the federal exception which provides that such information may be released for "purposes directly connected with . . . any criminal or civil proceeding, conducted in connection with the administration of any such . . . program."⁵³

Ohio courts must follow the dictates of the federal law regarding release of Children Services Board records.⁵⁴ It is of no consequence that it is, in part, federal regulations which may be in conflict with Ohio Rev. Code § 5153.17, for such regulations prevail over state law under the supremacy clause.⁵⁵

EXCEPTIONS TO OHIO REV. CODE SECTION 5153.17

The court of appeals in *Barzak* ruled "that the legislature never intended to mandate absolute confidentiality or totally bar disclosure."⁵⁶ This finding was based on statutory language that Children Services "records . . . shall be open to inspection . . . by other persons, upon written permission of the executive secretary."⁵⁷

The words "upon the written permission of the executive secretary" give no clue to the circumstances under which the Ohio Legislature intended the executive secretary to provide inspection of board files. However, almost twenty years ago, the Cuyahoga County Common Pleas Court was shocked to find that one would even suggest that a governmental entity "could resist the production of any document in an action to which it was a party and thereby place itself outside the pale of the law."⁵⁸ The idea was dismissed without comment.⁵⁹ Thus, there exist valid reasons in favor of disclosure.

Public Policy

There are important public policy reasons for holding that Ohio Rev. Code § 5153.17 does not apply to court proceedings. As the *Barzak* court said, [M]aking even more compelling the need for judicial examination of the availability of the privilege is the fact that this is . . . [an action brought by]

⁵²Wisconsin *ex rel. Dombrowski v. Moser*, 113 Wis. 2d 296, 302-03, 334 N.W.2d 878, 881 (1983).

⁵³42 U.S.C. § 602(a)(9)(B) (1983); 45 C.F.R. § 205.50(a)(1)(i)(B) (1985); *Moser*, at 301, 334 N.W.2d at 880-81.

⁵⁴*Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406, 427, (1819); *Jones Metal Products Co. v. Walker*, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972); U.S. CONST. art. VI, cl. 2.

⁵⁵*Free v. Bland*, 369 U.S. 663 (1962); *Standard Ohio Co. of California v. Johnson*, 316 U.S. 481 (1942); 82 Ohio Att'y Gen. 243, 245 (1982).

⁵⁶*Barzak*, at 11. *Compare Carr*, 431 F.2d at 388; *Hanson v. Rowe*, 18 Ariz. App. 131, 133, 500 P.2d 916, 918 (1972).

⁵⁷OHIO REV. CODE ANN. § 5153.17; *Barzak*, at 11. *Compare Hanson*, at 133, 500 P.2d at 918.

⁵⁸*Parkhurst v. Cleveland*, 77 N.E.2d 735, 736 (Cuyahoga Co. C.P. 1947).

the very government agency asserting the privilege. In such cases, there is a special danger in the government official having the power to define the scope of his own privilege free of supervision by the courts.⁶⁰

Such confidentiality creates a potential for abusive government, conceals spitefulness and incompetence,⁶¹ and diminishes the information available to the public about government activities.⁶² On the other hand, "sunshine is the strongest antiseptic — its rays may penetrate areas previously closed."⁶³ Consequently, the *Barzak* court held that a state agency may not attempt to seize a person's child and then be the sole judge of how much evidence it will divulge regarding its own conduct.⁶⁴

Effect on a Fair Trial

In *Barzak*, the Trumbull County Children Services Board presented a witness who testified at great length about the contents of the agency files. The juvenile court refused to restrict testimony about the contents of the records. Thus, the parents' attorney, who could not see the papers, was hampered in his ability to cross examine based on those documents. The court of appeals ruled that the failure to allow board records to be produced in court affected the parents' right to a fair trial.⁶⁵

The special state interest in seeking the truth through the judicial process while insuring a fair trial may require disclosure of government communications despite the existence of a state rule holding the same communications to be privileged.⁶⁶ Courts have held that it is reversible error to use information from "confidential reports, when the reports are not available to counsel and the sources of information contained in the report were not identifiable, and the anonymous authors of such reports were not sworn or made available for cross-examination."⁶⁷

The rights of cross examination and assistance of counsel are protected by

⁶⁰*Barzak*, at 12, quoting *Carr*, 431 F.2d at 388. See *Price ex rel. Laramie Co., Dept. of Pub. Welfare v. Pearson*, 447 P.2d 501, 503 (Wyo. 1968).

⁶¹*Burt, Forcing Protection Children and their Parents: The Impact of Wyam v. James*, MICH. L. REV. 1259, 1285 (1971).

⁶²*Carr*, 431 F.2d at 388.

⁶³*State ex rel. Stephan v. Harder*, 230 Kan. 573, 581, 641 P.2d 366, 373 (1982); see also T. Jefferson, *Letter to Edward Carrington*, (Jan. 16, 1787).

⁶⁴*Barzak*, at 12 citing *In re Chandler*, 230 Or. 452, 370 P.2d 626 (1930) and *Carr*, 431 F.2d 384 (5th Cir. 1970). See *American Civil Liberties Union of Mississippi v. Finch*, 638 F.2d 1336, 1342 (5th Cir. 1981). See also *Price ex rel. Laramie Co. Dept. of Pub. Welfare v. Pearson*, 447 P.2d 501, 503 (Wyo. 1968).

⁶⁵See *Barzak*, at 11-12.

⁶⁶See *Davis v. Alaska*, 415 U.S. 308, 319 (1974); *Carr*, 431 F.2d at 389. See also *City of Dayton v. Turner*, 14 Ohio App. 3d 304, 305, 471 N.E.2d 162, 163 (1984).

⁶⁷*Williams v. Williams*, 8 Ill. App. 2d 1, 7, 130 N.E.2d 291, 294 (1955); *In re Guardianship of B.C.H.*, 108 N.J. Super. 531, 539-40, 262 A.2d 4, 8-9 (App. Div. 1970); *In re Chandler*, 230 Or. 452, 458, 370 P.2d 626, 629 (1962).

the United States⁶⁸ and Ohio⁶⁹ Constitutions. Denial of the right of effective cross examination "would be constitutional error of the first magnitude and no showing of want of prejudice would cure it."⁷⁰ To be effective, counsel must be "offered an opportunity to examine the documents from which testimony was given"⁷¹ in order to prepare an effective cross examination⁷², to select appropriate witnesses⁷³, or generally, to present a proper defense.⁷⁴ It has been held that the right to counsel is "but a hollow right, however, if the court conducting the . . . hearing may base its conclusion and order upon facts or documents which are never identified, made part of the record, or made available to counsel for inspection."⁷⁵

The *Barzak* court placed no restrictions on the releases of confidential Children Services records.⁷⁶ Courts in other states have limited the scope of such release by requiring that the information contained in the files be necessary to properly litigate a complaint as plaintiff⁷⁷ or to present a proper defense.⁷⁸

As an alternative to revealing such reports, the *Barzak* court suggested that "the court below could have sustained Appellant's objections to questions regarding the confidential matters."⁷⁹ However, this is not always an adequate remedy. There are times when access to files is needed for presentation of a claim or defense, even if no one has previously testified as to their contents.

Release by Director

The Executive Director of the Trumbull County Children Services Board personally signed both the complaint and the amended complaint which were filed against Veta Barzak's parents. He referred to his agency's records in the amended complaint,⁸⁰ swearing to the truth of the facts contained therein. The

⁶⁸U.S. CONST. amend. VI; *Davis*, 415 U.S. at 309.

⁶⁹OHIO CONST. art. I, § 10.

⁷⁰*Brookhart v. Janis*, 384 U.S. 1, 3, (1966); *quoted in Smith v. Illinois*, 390 U.S. 129, 131 (1968); and in *Davis*, 415 U.S. at 318.

⁷¹*Baldwin v. Lewis*, 300 F.Supp. 1220, 1233 (E.D. Wis. 1960), *rev'd or other grounds*, 442 F.2d 29 (1971).

⁷²*Barzak*, at 11; *Davis*, 415 U.S. at 316-18; *see Arnovitz v. Wozar*, 9 Ohio App. 2d 16, 23, 222 N.E.2d 660, 666 (1964).

⁷³*In re S.—M.—W.—*, 485 S.W.2d 158, 164 (Mo. Ct. App. 1972).

⁷⁴*Davis v. Alaska*, 415 U.S. 308, 316-18 (1974); *State ex rel. Dombrowski v. Moser*, 113 Wis. 2d 296, 304, 334 N.W.2d 878, 882 (1983); *See also Rowe*, at 134-35, 500 P.2d at 919-920.

⁷⁵*Baldwin*, 300 F. Supp. at 1232; *In re Guardianship of B.C.H.*, 108 N.J. Super. 531, 539, 262 A.2d 4, 10 (App. Div. 1970); *Williams v. Williams*, 8 Ill. App. 2d 1, 7, 130 N.E.2d 291, 294-95 (1955).

⁷⁶Compare *Barzak*, at 11-12 with *Barzak*, at 16-18 (Ford, J., concurring).

⁷⁷*Hanson*, at 134-35, 500 P.2d at 919-20.

⁷⁸*Moser*, at 304, 334 N.W.2d 882. *See Davis*, 415 U.S. at 316-18; *Turner*, at 305, 471 N.E.2d at 163.

⁷⁹*Barzak*, at 13.

⁸⁰*Id.* at 4.

board's only witness answered numerous questions during direct examination about the file's contents.⁸¹ It was the Executive Director who specifically requested such disclosure.⁸²

Even if the material was privileged in the first instance, the privilege ceased and was unnecessary after the information was voluntarily used in court.⁸³ One Ohio appellate court discussed this matter at great length when a similar tactic was used on cross examination. The court held that "after cross examination, the reason for non-disclosure of the content of a prior statement has disappeared. At that point, secrecy would be more apt to promote deception than truth."⁸⁴

STATUTES FROM OTHER STATES

Cases from other jurisdictions interpreting statutes similar to Ohio Rev. Code § 5153.17 hold that such laws pose no bar to discovery, admission, and other use of otherwise confidential information in connection with pending litigation of various types.⁸⁵ This includes child welfare files,⁸⁶ welfare records,⁸⁷ juvenile court papers,⁸⁸ executive sessions of school boards⁸⁹, autopsies,⁹⁰ state mortgage insurance files,⁹¹ unemployment compensation records,⁹² and employment records.⁹³

AN ALTERNATIVE METHOD FOR OBTAINING FILES

There are alternatives to subpoenas for a party to obtain access to

⁸¹*Id.* at 5, 11.

⁸²The Executive Director of the Trumbull County Children Services Board, a practicing attorney, acted as the Board's trial counsel.

⁸³*Thorne v. Big "D" Discount Auto Parts*, 92 F.R.D. 55, 57 (M.D. Ala. 1981); *Durkin v. Pet Milk Co.*, 14 F.R.D. 385, 388, 390 (W.D. Ark. 1953); see *Walling v. Richmond Screw Anchor Co.*, 4 F.R.D. 265, 269 (E.D. N.Y. 1943); see also *State ex rel. Plain Dealer Pub. Co. v. Lesak*, 9 Ohio St. 3d 1, 2, 457 N.E.2d 821, 822; *In re Roberto*, 106 Ohio App. 303, 309-10, 151 N.E.2d 37, 40-41 (1958).

⁸⁴*Arnovitz v. Wozar*, 9 Ohio App. 2d 16, 23, 222 N.E.2d 660, 665 (1964).

⁸⁵See generally, *Durkin*, 14 F.R.D. at 387-91; *State ex rel. Haugland v. Smythe*, 25 Wash. 2d 161, 169 P.2d 706 (1946); *State v. Mack*, 23 Wash. App. 392, 396-97, 597 P.2d 406, 407-8 (1979); *State ex rel. Juvenile Dept. of Multnomah Co. v. Lamar*, 7 Or. App. 132, 135-36, 490 P.2d 191, 193 (1971). But see *In re Cager*, 251 Md. 473, 482-83, 248 A.2d 384, 390-91 (1968); *Boudreau v. Holzer*, 109 R.I. 81, 87, 280 A.2d 88, 92 (1971); *Mebust v. Mayco Mfg. Co.*, 8 Wash. App. 359, 506 P.2d 326 (1973).

⁸⁶*In re Chandler*, 230 Or. 452, 457, 370 P.2d 626, 629 (1962).

⁸⁷*Washington ex rel. Washington v. Church*, 35 Wash. 2d 170, 172, 211 P.2d 701, 702 (1949); *Bell v. Bankers Life and Casualty Co.*, 327 Ill. App. 321, 64 N.E.2d 204, 208 (1945); *Jones v. Giannola*, 252 S.W.2d 660, 663 (Mo. Ct. App. 1952); But see *In re Cager*, 251 Md. 473, 248 A.2d 384 (1968); *Boudreau v. Holzer*, 109 R.I. 81, 280 A.2d 88 (1976).

⁸⁸*Davis v. Alaska*, 415 U.S. 308, 316 (1974).

⁸⁹*United States v. Phoenix Union High School District*, 681 F.2d 1325, 1337 (9th Cir. 1982).

⁹⁰*State v. Thompson*, 54 Wash. 2d 100, 105, 338 P.2d 319, 321-22 (1959).

⁹¹*Maine Sugar Industries, Inc. v. Maine Indus. Bldg. Auth.*, 264 A.2d 1, 5-6 (Me. 1970).

⁹²*Marceau v. Orange Realty, Inc.*, 97 N.H. 497, 498-99, 92 A.2d 656, 657 (1952); *Powers ex rel. Dept. of Employment Security v. Superior Court*, 79 R.I. 63, 82 A.2d 885 (1951).

⁹³*Marine Welding & Repair Works, Inc. v. NLRB*, 492 F.2d 526, 530 (5th Cir. 1974); *Fears v. Burris Mfg. Co.*, 436 F.2d 1357, 1361 (5th Cir. 1971).

Children Services Board files. One possibility is use of the Ohio Privacy Act.⁹⁴ Section 1347.08 of the Revised Code confers upon individuals who are the subject of state agencies a right of access to those documents.⁹⁵ They are allowed to review⁹⁶ and correct⁹⁷ their records even if no litigation is pending. It is a minor misdemeanor for an employee of the state or one of its subdivisions to refuse to comply with the law.⁹⁸

The only exceptions to such free access are an attorney's work product⁹⁹ and files kept by law enforcement agencies.¹⁰⁰ Ordinarily, neither of these exceptions will apply to Children Services Boards. However, it should be noted that any question of privacy versus access is to be resolved in favor of access.¹⁰¹

PROTECTING CONFIDENTIALITY

Children Services Boards have a recognized need to keep their papers confidential from the general public. This requirement can usually be satisfied by the dynamics of juvenile court proceedings. Juvenile hearings are held in closed court,¹⁰² and all records are placed in a closed file.¹⁰³ It is assumed that the secrecy of the records will be respected by the court and attorneys¹⁰⁴, thus ensuring the privacy of the information beyond the parties necessary for the proceedings.¹⁰⁵

There are times when it may be appropriate to keep secret a source's identity or other information,¹⁰⁶ although state regulations caution against "uncon-

⁹⁴OHIO REV. CODE ANN. §§ 1347.01-99 (Page 1979).

⁹⁵80 Ohio Att'y Gen 2-374, 2-377 (1980).

⁹⁶OHIO REV. CODE ANN. § 1347.08 (A)-(C) (Page 1979).

⁹⁷OHIO REV. CODE ANN. § 1347.09 (A), (C) (Page 1979).

⁹⁸ No public official, public employee, or other person who maintains, or is employed by a person who maintains, a personal information system for a state or local agency shall purposely refuse to comply with . . . division (A), (B), or (C) of section 1347.08, or division (A), or (C) of section 1347.09 of the Revised Code. Whoever violates this section is guilty of a minor misdemeanor.

OHIO REV. CODE ANN. § 1347.99 (Page 1979).

⁹⁹OHIO REV. CODE ANN. § 1347.08(F) (Page 1979). *State ex rel. Beacon Journal v. University of Akron*, 64 Ohio St. 2d 392, 394 n. 2, 415 N.E.2d 310, 312 n. 2 (1980). *Compare* with OHIO REV. CODE ANN. § 149.43 (A)(1), (B) (Page 1984) and OHIO R. CIV. P. 26(B)(3).

¹⁰⁰OHIO REV. CODE ANN. § 1347.08(E)(2) (Page Supp. 1984); *State ex rel. Beacon Journal v. University of Akron*, at 394 n. 4, 415 N.E.2d at 312 n. 4; *see* 80 Ohio Att'y Gen. 2-378 (1980); *compare* OHIO REV. CODE ANN. § 1347.04(a)(1) (Page 1981).

¹⁰¹80 Ohio Att'y Gen. 2-375 (1980). *See* OHIO REV. CODE ANN. § 1347.04(B) (Page Supp. 1984). The issue of how the Privacy Act relates to Children Services is currently being litigated in Trumbull County. *See In re Trumbull County Children Services Board*, No 85 CV 1311 (Trum. Co. C.P.).

¹⁰²OHIO REV. CODE ANN. § 2151.35; (Page 1979); *State ex rel. Haugland v. Smythe*, 25 Wash. 2d 161, 170, 169 P.2d 706, 711 (1946). *See State ex rel. Dombrowski v. Moser*, 113 Wis. 2d 296, 334 N.E.2d 883 (1983).

¹⁰³*Moser*, at 304, 334 N.E.2d at 882.

¹⁰⁴*Smythe*, at 169, 169 P.2d at 710-11. *See Carr v. Monroe Manufacturing Co.*, 431 F.2d 384 (5th Cir. 1970).

¹⁰⁵*Moser*, at 305, 334 N.E.2d at 882. *See also* OHIO ADMIN. CODE § 5101:2-35-32(D)(6) (1985).

¹⁰⁶*See Sims v. State Dept. of Public Welfare*, 438 F.Supp. 1179, 1191 (S.D. Tex. 1977), *rev'd or other grounds*, 442 U.S. 415 (1978).

ditionally" assuring this protection.¹⁰⁷ In those situations when confidentiality of identity is necessary, a court can establish safeguards with respect to examination of a file¹⁰⁸ or create procedures to protect the source¹⁰⁹. The Oregon Supreme Court, after discussing the concepts involved, established a simple procedure to protect confidentiality. The court held that in such cases the trial court should first examine the file and delete any irrelevant material and subsequently make any relevant material available to counsel.¹¹⁰ This procedure has been implemented in the Trumbull County Court of Common Pleas as a result of the *Barzak* decision.¹¹¹

CONCLUSION

In re Barzak was a forceful and forward-looking decision that has greatly advanced the cause of truth-seeking in cases of alleged neglect, dependency, and abuse. It has enforced federal injunction that:

[A]lthough some intrusions into a family unit are permissible when the state pursues its interest in investigating reports of abuse, there is no compelling reason to deny the family access to the fruits of that investigation or the conclusions reached. Of course, a certain confidentiality must be maintained for sources of information who request such anonymity, but the reports and records of the state compiled during the investigation should be available to the parents so that they may be fully apprised of the nature of any accusation to be made by the state. Due process requires no less. A state may deny the parents access to the records concerning their family only where the source must remain confidential or where there has been a judicial determination of confidentiality in an adversary proceeding.¹¹²

Many issues still remain to be litigated. One is the question of who is the holder of the privilege, if one still exists, regarding the use of Children Services Board files in court. At least one court has suggested the possibility that the holder might be the person who is the subject of the records.¹¹³ Thus, it appears that exciting years are ahead for juvenile court lawyers whose practices involve abuse, neglect, and dependency cases.¹¹⁴

¹⁰⁷OHIO ADMIN. CODE § 5101:2-35-07(B) (1955).

¹⁰⁸*In re Chandler*, 23 Or. 452, 458, 370 P.2d 626, 629 (1962).

¹⁰⁹Cf. *Kansas ex rel. Stephan v. Harder*, 230 Kan. 573, 581-82, 641 P.2d 366, 372-73 (1982).

¹¹⁰*Chandler*, 23 Or. 452, 458, 370 P.2d 626, 629 (1962).

¹¹¹See the pending cases *Varner v. Neuman*, No. 84 CV 1159 (Trum. Co. C.P.) orders of 3/15/85 (Vol. 660, p. 562) & 8/19/85; and *Doe v. Neuman*, No. 84 CV 309 (Trum. Co. C.P.), order of 7/25/85 (Vol. 663, p. 809).

¹¹²*Sims*, at 1191.

¹¹³*In re Sarvey*, No. 3463 (Trum. Co. Ct. App.).

¹¹⁴The author wishes to acknowledge the following excellent articles on the subject: Burt, *Forcing Protection On Children and their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259 (1971); Levine, *Access to "Confidential" Welfare Records in the Course of Child Protection Proceedings*, 14 J. FAM. L. 535 (1976).

