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Supreme Court of Kentucky

In the Kentucky Supreme Court

THE KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES COMMISSION,

Appellant / Cross Appellee,

v.

THE KENTUCKY OPEN GOVERNMENT COALITION,

Appellee / Cross Appellant.

APPEAL FROM FRANKLIN CIRCUIT COURT
CASE NO. 21-CI-00680

COURT OF APPEALS
NO. 2022-CA-0170-MR; NO. 2022-CA-0192-MR

THE KENTUCKY OPEN GOVERNMENT COALITION'S CROSS-APPELLANT REPLY BRIEF

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CERTIFICATE OF SERVICE

In accordance with RAP 30(B), on February 26, 2025, the undersigned filed this brief with the Court's electronic filing system which caused a copy to be served on all counsel of record. The undersigned also served copies of the brief via U.S. Mail on (1) Hon. Thomas Wingate, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; (2) Kate Morgan, Court of Appeals Clerk, 669 Chamberlin Avenue, Suite B, Frankfort, KY 40601; (3) Jonathan D. Goldberg, Charles H. Cassis, Jan M. West, and Anthony R. Johnson, Goldberg Simpson, LLC, Norton Commons 9301 Dayflower Street, Prospect, KY 40059. Undersigned counsel further certifies that it did not retrieve the appellate record from the Franklin Circuit Clerk.

s/ Michael P. Abate

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INTRODUCTION

The issues before this Court are not new. Since the inception of the Open Records Act (the "Act"), public agencies have attempted to avoid producing public records by storing them off public premises. Except for a few recent, aberrant Attorney General opinions that ignore the language of the statute, each attempt was rebuffed by Kentucky courts and Attorneys General applying the Open Records Act's broad definition of public records (KRS 61.870(2)) and instruction that its exemptions "shall be strictly construed." KRS 61.871.

The Fish and Wildlife Commission (the "Commission") is just the latest public agency to ask this Court for a judicially created, blanket exemption to the Open Records Act. It asks for an order declaring public records stored on public officials' personal devices and accounts are *never* subject to production under the Act because it is *always* an unreasonable burden for a public agency to ask these officials to search for and produce public records they store on their personal phones. Its position is contrary to the Act's plain text, this Court's seminal opinion applying the Act's unreasonable burden exemption (*Com. v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008)), and decades of lower court precedent (and Attorney General opinions), which refused to allow public agencies to avoid transparency obligations by moving public records off public premises.

The Court of Appeals was right to reject the Commission's attempted rewriting of the Act, but it erred by remanding this dispute back to the circuit

court to give the Commission a second opportunity to introduce evidence supporting its unreasonable burden claim. *Kentucky Open Gov't Coal., Inc. v. Kentucky Dep't of Fish & Wildlife Res. Comm'n*, No. 2022-CA-0170-MR, *2 (Ky. App. Oct. 27, 2023) ("COA Opinion"). The Commission *had* the opportunity—and the burden—to present such evidence, but declined to do so before it moved for summary judgment. It is not entitled to a "do-over" now that its primary argument has failed.

The Commission's (and amici's) litigation position is nothing more than a naked policy preference masquerading as law. These public agencies would *prefer* if public records stored on public officials' personal devices and accounts were beyond public scrutiny. But that policy change must come from the legislature. The Commission cannot win through litigation what the General Assembly twice declined to give through legislation. *See* KOCG Appellee/Cross-Appellant Brief, § 1(B).

The Court of Appeals also erred in concluding that the Commission did not "willfully" violate the Act. The Commission has willfully delayed production of the requested public records more than three years by refusing to even search for public records on the only devices and accounts its Commissioners used to conduct Commission business. And it made this argument even though Commissioners were (correctly) trained by state lawyers that Commission records are public records, regardless of where they are stored. That willful violation of the Act and binding judicial precedent

warrants serious sanction from this Court, and should not be waived off as a mere misunderstanding about supposedly unsettled law.

KOCG asks the Court to order the Commission to produce the requested records immediately and remand this matter to the circuit court solely to determine the appropriate award of fees and statutory penalties KOCG is entitled.

ARGUMENT

I. The Commission should not be given a second chance to introduce evidence of a purported burden to the Franklin Circuit Court.

This Court should not remand this case back to the circuit court to give the Commission a second chance to prove it would have been unduly burdened by responding to KOCG's open records request. The information contained in the withheld public records grows more stale, and less useful, by the day. *Cf. Courier-Journal & Louisville Times Co. v. Peers*, 747 S.W.2d 125, 129 (Ky. 1988) ("News is news when it happens and the [public] needs access while it is still news and not history."). That is why the Open Records Act directs courts to resolve open records disputes quickly and give them "precedence on the docket over all other causes." KRS 61.882(4). Speedy court decisions and timely disclosure of public information are critical to advancing the Act's "basic policy" that "free and open examination of public records is in the public interest." KRS 61.871.

Having failed to introduce any evidence to the circuit court when it had the chance, the Commission was in no position to request a remand. *See*

Henninger v. Brewster, 357 S.W.3d 920, 928 (Ky. App. 2012) (party's request for remand to conduct "additional discovery" was "untenable" where it "has had an opportunity to do so" already (citation omitted)). The Commission was required by the Act to prove "clear and convincing evidence" that responding to KOCG's request would have been an unreasonable burden. KRS 61.872(6). It chose not to introduce any evidence to support that claim before it moved for summary judgment. The Commission was given "the opportunity" to complete discovery. *Henninger,* 357 S.W. 2d at 928. It is not entitled to anything more. *Id*.

Remand is particularly inappropriate here because the Commission will never be able prove that it was burdened by KOCG's request. The Commission is not really arguing that *KOCG's request* was unreasonable. Instead, the Commission and amici are advancing policy arguments for why public records stored on personal devices and accounts should be off limits from the public in all instances, regardless of their content or role in agency decision-making. But that policy change cannot come from this Court. It "must come from the General Assembly in the form of restricting access to public records." *Chestnut*, 250 S.W.3d at 664.[1]

[1] As explained in KOCG's Appellee/Cross-Appellant Brief, the General Assembly recently considered two bills that would have adopted the Commission's preferred policy restricting public access to public records stored on personal devices. Neither bill passed.

The Commission has never attempted to explain how it was burdened by KOCG's request. It did not claim responding to the request would be unreasonable when it was received. The Commission produced some responsive emails that had state-employee email addresses copied on the message and asked for more time to gather and produce the remaining responsive records. R. 35; KOCG Appellee/Cross-Appellant Brief, Tab 4. There is no reason it could not, at that time, simply have asked the Commissioners to forward along any emails or text messages related to public business so they, too, could be reviewed for possible release.

After missing its self-imposed production deadline, the Commission refused to produce additional responsive records—but not because retrieving the records was particularly burdensome. Instead, it claimed Commission records stored on Commissioner's personal devices are not public records at all. R. 41-43; KOCG Appellee/Cross-Appellant Brief, Tab 6.

Even after KOCG sued, the Commission asserted 16 affirmative defenses in its Answer without mentioning KRS 61.878(6). R. 48-58. The Commission first referenced the Act's unreasonable burden exemption in the closing argument of its motion for summary judgment. R. 74-76. Without any evidence in the record, the Commission proclaimed on behalf of "nearly four hundred (400) boards and commissions throughout the Commonwealth of Kentucky" that it would be "manifestly unjust" to ask public officials to search their personal accounts and devices for public records related to their

work. R. 75. The circuit court erred when it accepted the Commission's policy argument for public official's cell phones based on concerns about the "volume of records" that may be requested from *other* "state employees, officials, volunteers, etc." who could receive similar records requests in the future. R. 326-27; KOCG Appellee/Cross-Appellant Brief, Tab 2.

On appeal, the Commission again refused the opportunity to explain the burden caused by KOCG's request. It relied on sweeping policy arguments (unsupported by any evidence) about hypothetical "fishing expeditions" into the Commonwealth's "four hundred boards and commissions." Commission COA Appellee/Cross-Appellant Brief, p. 19. The Court of Appeals was right to reverse the circuit court's error because the "relevant inquiry" is whether KOCG's "particular open records request" imposes "an unreasonable burden upon the Commission and its members considering the particular facts of this case." *Id.* at 23-24. That should have ended the matter, and the Court should have ordered the Commission to produce responsive public records; the Commission's policy concerns are irrelevant to the "fact specific" and "case-by-case" analysis required by the Act. *Id.*

In this court of last resort, the Commission yet again failed to explain the burden created by KOCG's request. It doubled down on the general privacy interests of the "state employees, officials, volunteers, etc. whose privately owned devices would be subject to open records requests." Appellant

Brief, p. 14. Indeed, the Commission argues it does not need to support its unreasonable burden claim with *any* evidence and the Court of Appeals was wrong to "impose[] such a requirement." *Id*. But that requirement was not imposed by the Court of Appeals. It was the General Assembly, which mandated public agencies prove an unreasonable burden by "clear and convincing evidence" to withhold public records. KRS 61.872(6). And this Court has strictly enforced that requirement. *See Chestnut*, 250 S.W.3d at 665.

After more than three years of litigation, the Commission should not be allowed to further delay the production of public records by remanding this case for additional discovery. There is no evidence the Commission can produce that will transform its broad policy arguments about all Kentucky public agencies into the "highly fact-specific…case-by-case" analysis required by KRS 61.878(1)(6). COA Opinion, p. 22. The Commission chose to conduct its public work on the Commissioner's personal devices and accounts. It has successfully used that "inefficiency in its own internal records keeping system to thwart an otherwise proper open records request." *Chestnut*, 250 S.W.3d at 665. This Court should not reward that effort by affirming remand and unnecessarily delaying the production of the public's records even longer.

II. The Commission willfully violated the Open Records Act by ignoring controlling precedent and refusing to provide public records it admits are stored on Commissioner's personal devices and accounts.

The Open Records Act allows "any person who prevails against any agency…upon a finding the records were willfully withheld…[to] be awarded costs, including reasonable attorney's fees." KRS 61.882(5). The term "willful" in this context means the agency withheld records "without plausible justification and with conscious disregard of the requester's rights." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). The Commission's conduct easily meets this standard.

The Commission's willfulness began the moment it received KOCG's request. In 2018, the Commission's attorneys instructed Commissioners that their communications about Commission business stored on their personal devices and accounts are subject to production under the Act. In fact, Commissioners asked counsel to answer the question that is currently before this Court: are records on "personal cell phone, personal email" public records? Counsel informed them correctly, yes: "if it doesn't meet an [ORA] exemption there has been a ruling that official business is subject to open records." Video at 48:45.

Despite this training, when KOGC requested routine public records stored on the Commissioner's personal devices and accounts, the Commission refused to acknowledge its legal obligation to search for the records, and instead claimed they were not public records. Its decision was against the

text of the Act, which defines public record broadly without regard to the record's location or "physical form and or characteristics." KRS 61.870(2). And it was against decades of this Court's precedent declaring the Open Records Act does not permit blanket exemptions, but instead requires agencies to identify specific exemptions and apply them to the particular facts of a case.[2]

The Commission took its legally indefensible position knowing the Commissioners conducted all Commission business on personal accounts and devices and it advertised that fact to the public through the Commission website.

These undisputed facts show that, from the moment it received the open records request, the Commission consciously disregarded KOCG's rights to examine the requested public records. Instead of searching the devices on which all Commission business was conducted, and then attempt to meet its statutory burden to prove one of the Act's exemptions allowed the

[2] *Shively Police Dep't v. Courier Journal, Inc.*, 701 S.W.3d 430, n.5 (Ky. 2024) (holding agency's open records denial was "deficient" because "[r]ather than individually or categorically assess each of the records requested…SPD issued a blanket rationale for withholding the requested records."); *Univ. of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43 (Ky. 2021) ("The University's initial, single-paragraph assertion of a blanket exemption to disclosure of [the requested records] was wholly insufficient."); *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013) (rejecting blanket denial of police investigatory file); *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013) ("the Act forbids blanket denials of ORA requests); *Com., Cabinet for Health & Fam. Servs. v. Lexington H-L Servs., Inc.*, 382 S.W.3d 875 (Ky. App. 2012) (rejecting blanket denial of child abuse records).

Commission to withhold the records, it simply declared the Commissioners' communications amongst themselves about public business are not public records at all.

The Commission's only defense—that it relied on recent Attorney General opinions to withhold the records—collapses under scrutiny. The opinions cited by the Commission sharply diverged from the text of the Act, decades of case law, and administrative opinions from successive Attorneys General. In similar circumstances, Kentucky Courts have not hesitated to find an agency's denial "willful," notwithstanding its reliance on Attorney General decisions. *See e.g., Dep't of Kentucky State Police v. Teague*, No. 2018-CA-000186- MR, 2019 WL 856756 (Ky. App. Feb. 22, 2019) (Awarding attorney's fees and penalties after Attorney General sided with KSP: "KSP's contention that the opinion of the Kentucky Attorney General demonstrates its good faith is in denying [the] request is belied by the long and tortious route was forced to pursue in order to obtain relief."); *Cabinet for Health & Fam. Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375 (Ky. App. 2016) (affirming largest-ever ORA fee and penalty award even though the AG had held the withholding was permissible).

The Commission's AG-reliance argument here is especially weak because the Attorney General itself has been inconsistent on this issue. For decades, the OAG recognized public records are categorized by their content and use, not where they are stored. *See* KOCG Appellee/Cross-Appellant

Brief, pp. 22-23. But AG Conway abandoned that reasoning, without explanation, on his final day in office. AG Beshear overruled that abrupt departure from decades of precedent. But AG Cameron resurrected it, citing to the Conway opinion as if it were controlling case law, without acknowledging the contrary AG opinions that came before *and* after it. In these circumstances, the AG's view should be given "considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987).

Moreover, the Commission has not consistently followed the AG's guidance, even on these issues. The Commission implemented a records management system that relied on the Commissioner's personal devices and accounts despite successive Attorney General's admonishing state employees for using non-governmental devices to conduct public business. 21-ORD-146 ("public agencies and their employees are still admonished to refrain from suing personal devices to conduct governmental work."); 15-ORD-225 ("this office admonishes public employees against using private cell phones to carry out public work."). The Commission cannot use Attorney General opinions to withhold public records because they are stored on Commissioner's devices and accounts, while ignoring directives in the same opinions to use publicly funded accounts and devices to conduct public business.

The Commission's conduct exemplifies the gamesmanship the General Assembly tried to prevent when it included the fee-shifting provision in the

Act. The Act's policy that "free and open examination of public records is in the public interest" is served "not only by the limited reading of exceptions to such a rule…but also by liberal reading of those provisions aimed at the meaningful punishment of those who willfully obfuscate the public's ability to examine non-exempt records." *Cabinet for Health & Fam. Servs. v. Courier-Journal., Inc.*, 493 S.W.3d 375 (Ky. App. 2016). Having trained its Commissioners that their communications about agency business were subject to disclosure, the Commission cannot credibly claim it believed otherwise when KOGC requested those very records.

The Commission's gamesmanship carries profound policy consequences. The public records it admits exist on its Commissioner's devices and accounts remain secret more than three years after KOCG submitted its records request. The Commission has successfully concealed these public records by advancing the remarkable proposition that by choosing not to provide Commissioners with state-funded devices or accounts, it can shield the Commissioner's public work from public scrutiny indefinitely. The Court of Appeals' was right to reject the Commission's bad faith withholding strategy. This Court should end the Commission's willful defiance of the Act now and order it to produce the requested public records immediately. All that is left for the circuit court to decide is the appropriate fees and statutory penalties under KRS 61.882(5).

CONCLUSION

The Commission's deliberate strategy to conduct public business on personal devices, followed by its refusal to search those devices for responsive records, subverts the basic policy of the Open Records Act. This Court should not reward the Commission's bad faith by allowing further delay through additional discovery on remand. Instead, it should order immediate production of all responsive records and direct the Franklin Circuit Court to determine appropriate fees and statutory penalties for the Commission's willful violations of the Act. Only then will the Commission—and other public agencies watching this case—understand that they cannot evade public scrutiny by simply moving public business to private devices.

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Respectfully Submitted,

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/s/ Michael P. Abate