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**In the Kentucky Supreme Court**

The Shively Police Department,

*Defendant-Appellant,*

v.

The Courier Journal, Inc.,

*Plaintiff-Appellee*

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APPEAL FROM JEFFERSON CIRCUIT COURT  
CASE NO. 20-CI-005707

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**BRIEF OF APPELLEE THE COURIER JOURNAL, INC.**

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**CERTIFICATE OF SERVICE**

In accordance with RAP 30(B), on December 15, 2023 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 Finn Cato, Cato & Cato Attorneys at Law, 2950 Breckenridge Lane, Suite No. 3, Louisville, KY 40220. Undersigned counsel further certifies that it did not retrieve the appellate record from the Franklin Circuit Clerk.

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## COUNTERSTATEMENT OF THE CASE

A decade ago, this Court held that “A Police Department’s Investigatory File is Not Categorically Exempt From Disclosure Under the Open Records Act Merely Because it Pertains To a Prospective Enforcement Action.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 849 (Ky. 2013). Instead, a law enforcement agency seeking to withhold records relating to a pending investigation or prosecution must show, among other things, “that premature release of the records would harm the agency in some articulable way.” *Id.* at 850. And just two years ago, this Court once again rejected “the proposition that a public agency could invoke a statutory exemption to clothe an entire investigative file with protection from disclosure, thereby avoiding a document-by-document review and detailed response to the ORA requester.” *University of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 53 (Ky. 2021).

Like many law enforcement agencies across the state, the Shively Police Department decided that *City of Fort Thomas* requires too much effort. So, it attempted a work-around. According to SPD, police agencies seeking to withhold records because of a prospective law enforcement action do not have to satisfy the Open Records Act exemption designed for that purpose, KRS 61.878(1)(h). Instead, SPD believes that a law enforcement may simply agency recite the magic phrase “KRS 17.150(2).” If it does that, SPD contends it may withhold any record related to a pending prosecution without bothering to explain how, “because of the record’s content, its release poses a concrete risk

of harm to the agency in prospective action.” *City of Fort Thomas*, 406 S.W.3d at 851.

That is not the law. With minor exceptions not relevant here, KRS 17.150(2) is a mandatory disclosure statute, not a withholding statute. Moreover, by its plain terms, KRS 17.150(2) does not even apply until a prosecution is complete or has been declined; until that time, KRS 61.878(1)(h) is the relevant provision. SPD’s attempts to invoke that latter exemption fail, too; its initial denial did not even attempt to articulate harms from disclosure of the requested records, and the showing it made in the trial court offered only the kind of “hypothetical or speculative concern[s]” that *City of Fort Thomas* rejected. 406 S.W.3d at 851. Similarly, SPD has not even attempted to undertake the case-by-case balancing that this Court requires to withhold records under the “clearly unwarranted invasion of personal privacy” exemption, KRS 61.878(1)(a).

This case would be a relatively straightforward tale of an agency trying to misuse the Open Records Act’s exemptions if it were not for the elephant in the room: the Attorney General. True, the Office of the Attorney General has issued a series of opinions that allow—if not encourage—police departments to use KRS 17.150(2) in the manner that SPD has done here. Like the Court of Appeals, however, this Court should give no weight to those non-binding decisions.

As explained in greater detail below, the Attorney General’s interpretation is at odds with the plain text of KRS 17.150(2) and ignores numerous principles of statutory construction, including the rule that this Court must read that statute as a whole, together with KRS 61.878(1)(h). It also would render this Court’s ruling in *City of Fort Thomas* a dead letter—something the Attorney General was quick to point out to police departments immediately after this Court issued that decision a decade ago. And the OAG has consistently refused to reconsider its position even after several courts—including the Court of Appeals, now in two separate opinions—have rejected it as inconsistent with the statute’s text and *City of Fort Thomas*. Indeed, the OAG’s latest word on the issue made clear that it will not back down from its oft-rejected interpretation of KRS 17.150(2) unless this Court makes it do so. *See, e.g.*, 23-ORD-228 n.3.<sup>1</sup>

The time has come for this Court to put an end to the widespread misuse of KRS 17.150(2). It should reaffirm—again—that any agency wishing to withhold records because of a prospective investigation or prosecution must follow the procedures outlined in *City of Fort Thomas* (and reiterated in *Kernel Press*). Any other result would reward these agencies’ brazen defiance of the statute and this Court’s binding precedent.

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<sup>1</sup> This Court may locate that decision at 2023 WL 5762171 or on the Attorney General’s website at <https://www.ag.ky.gov/Resources/orom/2023-OROM/2023/23-ORD-228.pdf>. However, the opinion itself appears to contain a typo; it is styled as “22-ORD-228”, even though it was issued in August 2023.



at the scene, a 17-year-old male. The driver, Guy Brison, initially evaded capture.

The next day, SPD issued a press release stating that the officers pursued the truck because they believed the female victim of the reported domestic violence may have been in the truck and in need of assistance. Yet, more than three years since its investigation began, SPD still has not identified any woman in the parking lot before the chase supposedly justifying the dangerous pursuit.

On July 29—just two days after the fatal crash—an SPD spokesperson stated publicly that there was no active internal investigation into the incident and that Officers Nelson and Breitmeyer had followed SPD policy by chasing the truck. That prompted the Courier Journal to submit an open records request to SPD seeking its vehicle pursuit policies. SPD responded by making its policies publicly available online.<sup>2</sup>

Those policies immediately called SPD’s public vindication of its own officers into question. SPD permits officers to pursue a fleeing vehicle *only* when there is a life-threatening emergency or if there is probable cause to believe the fleeing suspect has committed a serious violent felony. The policies enumerate a list of seven factors officers should consider when initiating or continuing a pursuit and instruct that “the decision to abandon

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<sup>2</sup> <http://police.shivelyky.gov/wp-content/uploads/2020/08/SOP1200.20-Vehicle-Pursuit-2011.pdf> (last visited Dec. 15, 2023).

pursuit may be the most intelligent course of action.” (SPD policies, p. 5).

Pursuits for traffic violations and non-violent felonies is never permitted and is not an “acceptable practice.” *Id.* at 1.

**B. The Courier Journal’s Open Records Request and SPD’s Response.**

Because it appeared that the SPD officers violated their own policies by conducting a high-speed chase on a densely populated stretch of Dixie Highway without proper justification, leading to the deaths of multiple individuals, Courier Journal reporter Kala Kachmar sought more information. On August 10, 2020, Ms. Kachmar submitted five Open Records requests seeking certain public records related to the initial report of domestic violence in the abandoned parking lot, the high-speed pursuit of the truck, and the collisions at the intersection of Dixie Highway and Crum’s Lane. Ms. Kachmar specifically requested (1) Computer Aided Dispatch (“CAD”) reports for the service calls, (2) 911 calls, (3) Audio communications between dispatch, the responding officers, and any other officers or supervisory personnel, (4) dashcam and bodycam footage, and (5) incident or accident reports. ORR Requests, R. 10-14.

Just thirty-six minutes later, SPD denied all five of Ms. Kachmar’s requests in a one-sentence response. The agency gave only a single, cursory reason for its denial: “As there is an active criminal case regarding this incident, all of the above request [sic] are denied under [KRS 61.878(1)(h)]. See SPD Response, R. 16. SPD did not even attempt to explain how the



Remarkably—given this Court’s demand that an agency show that, “because of the record’s content, its release poses a concrete risk of harm to the agency in the prospective action,” *City of Fort Thomas*, 406 S.W.3d at 851—Col. Higdon’s affidavit included no facts about *these* records or *this* investigation. It merely speculated that this kind of record, if turned over in any pending investigation, could cause harm.

It is not hard to see why Col. Higdon omitted the relevant facts from his Affidavit: they would not justify the blanket non-disclosure of all records related to the investigation. By the time he argued to the Court on October 30, 2020, that release of the records “will ultimately taint the grand jury pool if an indictment is sought by the Commonwealth’s Attorney” (Affidavit ¶ 6, R. 28), Guy Brison, already had been indicted on 18 felony counts, including multiple charges for murder, wanton endangerment, and fleeing the scene. *See* Indictment, *Commonwealth v. Brison*, No. 20-CR-1392 (Jeff. Cir. Ct. Aug. 24, 2020). Likewise, by the time Col. Higdon expressed a fear that “early release” of other records would harm the investigation (Affidavit ¶ 7), the Commonwealth’s Attorney had turned over everything in its possession to Brison and his attorneys. *See, e.g.*, Oct. 12, 2020 Response to Court’s Order of Discovery, *Commonwealth v. Brison*, No. 20-CR-1392 (Jeff. Cir. Ct.).<sup>3</sup>

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<sup>3</sup> The Commonwealth provided additional discovery on Nov. 4, 2020, Dec. 28, 2020, Jan. 21, 2021, Mar. 4, 2021, Apr. 23, 2021, June 24, 2021, June 25, 2021, Feb. 28, 2022, Mar. 10, 2022, Mar. 16, 2022, and Mar. 30, 2022. *See* Docket, *Commonwealth v. Brison*, No. 20-CR-1392 (Jeff. Cir. Ct.).



The parties filed competing motions for summary judgment. Citing Col. Higdon’s affidavit, the Jefferson Circuit Court held that SPD had properly invoked the Act’s law enforcement exemption. The Court conceded that Col. Higdon’s affidavit was “not vivid in detail,” but deemed SPD’s minimal showing sufficient to satisfy the *City of Fort Thomas* standard. Circuit Court Order, pp. 7-8, R. 142-143. Thus, the Court held that it need not consider SPD’s invocation of the “clearly unwarranted invasion of personal privacy” exemption or KRS 17.150(2). *Id.* at 8 n.2, R. 143.<sup>4</sup>

### **B. The Court of Appeals’ Opinion**

The Courier Journal appealed. In a unanimous opinion authored by now-Justice Thompson, the Court of Appeals vacated and remanded the decision to the circuit court. *See Courier-Journal, Inc. v. Shively Police Dept.*, No. 2021-CA-1120-MR, 2022 WL 16842295 (“COA Op.”).<sup>5</sup>

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<sup>4</sup> The MSJ ruling also addressed a second Open Records request that is no longer in dispute in this case—but takes up much real estate in SPD’s Brief. Around the same time as Ms. Kachmar’s request, SPD also denied another Courier Journal reporter’s request for copies of any commendations, complaints, or sanctions concerning the officers involved in the chase. That separate request came up at oral argument in the trial court (as part of the Courier Journal’s contention that SPD had a pattern of willfully violating the Act to shield its officers from scrutiny), and the Courier Journal filed a copy of the relevant request and response in the record after the hearing. *See* Notice of Supplemental Authority, R. 104-110. In its summary judgment order, the court found that those records are not exempt from disclosure under the Open Records Act. SPD subsequently produced those records, thereby mooting any continued dispute over their release. *See Cabinet for Health & Fam. Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 383 (Ky. App. 2016). It is unclear why SPD continues to focus on this aspect of the circuit court decision, which it elected not to appeal.

<sup>5</sup> Page citations refer to the pages of the Slip Opinion issued by the Court of Appeals, and not to the Westlaw version.

### 1. Prospective Law Enforcement Action

The Court of Appeals began by observing that “the original denial of the records by the SPD was a blanket denial that categorically declared these records off limits due to the pending criminal investigation.” COA Op., p. 14. The Court had “no difficulty in declaring that this original denial was improper.” *Id.* “As was the case in *Edmondson [v. Alig]*, 926 S.W.2d [856,] 858 [(Ky. App. 1996)], the ‘limited and perfunctory response’ by the record custodian through a one-line rejection of an open records request with a reference to a statutory exemption did not ‘even remotely compl[y] with the requirements of the Act.’” *Id.*

Turning to Col. Higdon’s affidavit, the Court noted that it was “troubled by the SPD making such general allegations of potential harm which would seem to apply in any criminal investigation in which witnesses are involved.” *Id.* at 15. Moreover, the Court noted, “there may be ways to limit rather than wholly exclude the release of the records sought so as to address any reasonable concerns.” *Id.* “For example, to address a fear that witnesses could be compromised, measures may be taken to protect their anonymity, such as eliminating personal identifiers, blurring portions of video that show their faces, and possibly altering their voices.” *Id.* The Court made clear that “[t]he onus in avoiding the feared harm should not prevent the release of records when the SPD itself can eliminate much of that harm through its own proactive actions and by judicious release of as much of the requested records as possible.” *Id.* at 16. “The SPD should be acting in







SPD's alternative argument: that KRS 17.150(2) allows it to withhold all records related to the investigation until prosecution is complete, without a showing of harm. "As it mentioned in its answer and argument below, as well as during oral argument, the SPD would *rather* rely on KRS 17.150(2) than KRS 61.878(1)(h) because KRS 17.150(2) does not require any showing of concrete harm to prohibit disclosure." COA Op., p. 31 (emphasis added). The Court recognized, however, that allowing KRS 17.150(2) to be used in this way would result in "the former essentially swallowing up the limitations contained in the KRS 61.878(1)(h) exemption." *Id.* at 31-32.

The Court of Appeals noted that "[a]lthough the Office of the Attorney General has applied KRS 17.150(2) broadly to restrict all access to information which law enforcement has which may pertain to a prospective law enforcement action, such opinions are not controlling, and *we disagree with such an interpretation based on the statutory language.*" *Id.* at 33 (emphasis added). As the court explained: "by its terms, KRS 17.150(2) provides for the complete disclosure of intelligence and investigative reports maintained by criminal justice agencies *after* a prosecution is complete, subject to four specific exemptions." *Id.* (emphasis in original). "Therefore, KRS 17.150(2) should only apply if the conditions set out in its prefatory language are met." *Id.* "There is no reaching the exceptions where a determination to prosecute has been made and the prosecution is not yet completed." *Id.* "Accordingly," the Court of Appeals did "not believe that KRS



considered “willful” in light of the prior OAG opinions interpreting KRS 17.150(2). COA Op., p. 36.

For one thing, the court emphasized that “the original denial of the records by the SPD with just a citation to KRS 61.878(1)(h) was an improper blanket denial” that could, by itself, justify some amount of fees and penalties. So, too, could a determination by the trial court that Col. Higdon’s explanations were insufficient. Likewise, the court declared that “SPD’s argument that its denial cannot be willful because it relied upon Attorney General interpretations applying KRS 17.150(2) to justify the denial of records when a prosecution is not complete is overly simplistic and assumes too much.” *Id.* at 37.

### **C. SPD’s Attempts to Undo the Panel’s Ruling**

SPD was not content to shore up the deficiencies in its evidentiary showing on remand. Instead, it sought rehearing of the panel decision, arguing that the Court of Appeals misinterpreted KRS 17.150(2) in a manner that will prevent police departments from using that statute to withhold an entire investigative file without making a showing of harm. *See* Petition for Rehearing, 11/30/2022. The Court of Appeals denied that petition. Order, 12/20/2022.

SPD then sought review in this Court, arguing (incorrectly) that the Court of Appeals simply adopted the Courier Journal’s interpretation of the relevant statutes at issue. In support of that effort, the Attorney General took the unprecedented step of filing an *amicus* brief defending its atextual

interpretation of KRS 17.150(2). To undersigned counsel's knowledge, this is the first time that the Attorney General has participated as *amicus* in an Open Records Act case to defend its interpretation in this Court, demonstrating that the Office has crossed the line from a neutral arbiter whose opinions speak for themselves to an advocate taking sides in a dispute.

This Court granted review.

### STANDARD OF REVIEW

The trial court granted SPD summary judgment. This Court reviews such rulings *de novo* because whether summary judgment is appropriate is a legal question involving no factual findings. *Lawson v. Off. of Atty. Gen.*, 415 S.W.3d 59, 65 n.5 (Ky. 2013) (“Because in this case the trial court entered summary judgment on what were essentially agreed facts, our review, as was the Court of Appeals’, is *de novo*.”); *Eplion v. Burchett*, 354 S.W.3d 598, 601 (Ky. App. 2011) (“Whether an agency has complied with the disclosure requirements of the Open Records Act is a question of law subject to *de novo* review.”).

Plainly, the construction of the Open Records Act and its interplay with other statutes (such as KRS 17.150) presents questions of law, reviewed *de novo*. *Hardin County Schools v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001).

At times, however, SPD appears to suggest that the trial court's assessment of whether Col. Higdon's affidavit satisfies the standard set forth in *City of Fort Thomas* is a factual finding that should be reviewed only for

clear error. That is not correct. Because this case was decided at summary judgment, there could be no disputed material facts for the trial court to resolve. *See Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370–71 (Ky. 2010). Moreover, the question of whether Col. Higdon’s affidavit was sufficient under KRS 61.878(1)(h) is a question that was hotly disputed between the parties (*see* R. 40-46), and therefore could not have been summarily disposed of if it were a dispute of fact.

In any event, this Court has made clear that the application of an ORA exemption to a given set of facts is a question of law, not a question of fact. *See, e.g., Cape Publications, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 821 (Ky. 2008) (application of “clearly unwarranted invasion of personal privacy” exception a question of law); *Palmer v. Driggers*, 60 S.W.3d 591, 600 (Ky. App. 2001) (same). That ruling makes perfect sense, because any “application of the...facts to the legal standard” is a legal question to be reviewed *de novo*. *Bd. of Educ. of Fayette Cnty. v. Hurley-Richards*, 396 S.W.3d 879, 885 (Ky. 2013). Indeed, even if it were deemed a mixed question of law and fact, *de novo* review would still be required. *Commonwealth v. Crowe*, 610 S.W.3d 218, 225 (Ky. 2020).<sup>6</sup>

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<sup>6</sup> Notably, federal courts interpreting the Freedom of Information Act exemption on which Kentucky’s law enforcement exception was modeled (Exemption 7(A)) have applied *de novo* review to district courts’ application of that exemption. *See, e.g., Ctr. for Nat. Sec. Stud. v. U.S. Dep’t of Just.*, 331 F.3d 918, 926 (D.C. Cir. 2003) (“It is well-established that a court may rely on government affidavits to support the withholding of documents under FOIA exemptions....and that we review the government’s justifications therein *de*





because it pertains to a prospective law enforcement action.” *City of Fort Thomas*, 406 S.W.3d at 849 (emphasis added and capitalization removed). It likewise ignores this Court’s repeated admonitions that “the Act forbids blanket denials of ORA requests.” *Kentucky New Era*, 415 S.W.3d at 88; *see also, Kernel Press*, 620 S.W.3d at 53 (rejecting “the proposition that a public agency could invoke a statutory exemption to clothe an entire investigative file with protection from disclosure, thereby avoiding a document-by-document review and detailed response to the ORA requester.”). Perhaps most importantly, SPD’s argument ignores numerous rules of statutory construction.

1. This Court interprets statutes “according to the plain meaning of the act and in accordance with the legislative intent.” *Travelers Indem. Co. v. Armstrong*, 565 S.W.3d 550, 559 (Ky. 2018). Indeed, “[t]he fundamental rule in statutory interpretation is to give effect to the legislative intent.” *Id.* That task often requires “resort to an arsenal of interpretive tools, referred to variously as canons of construction or rules of interpretation, in an effort to arrive at a fair reading of the controlling statutory language.” *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 370 (Ky. 2016) (hereinafter “*Beshear*”).

In performing this interpretive task, “a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy.” *Travelers Indem. Co.*, 565 S.W.3d at 560.







of the General Assembly....” KRS 61.878(1)(l) (emphasis added). Nothing in the language of KRS 17.150(2) *prohibits* or limits the release of any information prior to the time a prosecution is completed.

Any doubt about whether KRS 17.150 was meant to complement, and not conflict with, KRS 61.878(1)(h) is answered by the statute itself. KRS 17.150(5) states that “[t]he provisions of KRS Chapter 61 dealing with administrative and judicial remedies for inspection of public records and penalties for violations thereof shall be applicable to this section.” Plainly, that demonstrates that the General Assembly meant for the provisions of KRS Chapter 61—including KRS 61.878(1)(h)—to apply fully to requests for records covered under that statute.

2. SPD’s contrary argument rests on an unstated assumption: that because the statute compels release of records after a prosecution is complete, or a decision not to prosecute has been made, it must implicitly allow for the withholding of such records before that stage is reached. But that interpretive leap violates another basic rule of statutory interpretation: “statutes are not to be extended by implication beyond the clear import of the language used.” *Crooks v. Harrelson*, 282 U.S. 55, 61 (1930) (citation omitted); *see also BM Company v. United States*, 452 F.2d 986, 990 (5th Cir. 1972) (“Such an interpretation of the statute unreasonably extends its provisions by implication”).

That canon has particular force where, as here, the negative implications of one statute would conflict with the express terms of another statute. It is a venerable rule of statutory construction that “[w]hen statutes are plain, they are not lightly to be set at naught by negative inferences drawn from other sections.” *Golden Cycle Corp. v. Commissioner*, 51 F.2d 927, 932 (10th Cir. 1931); *see also In re Milwaukee Engraving Co., Inc.*, 219 F.3d 635, 636 (7th Cir. 2000) (“Statutes directly addressing a subject prevail over silences and implications of other provisions.”). Here, KRS 61.878(1)(h) directly addresses prospective criminal proceedings; KRS 17.150(2), by contrast, only addresses *completed* investigations and prosecutions. This Court should not go out of its way to interpret that clear command to include words the General Assembly did not use, thereby creating a perceived conflict with KRS 61.878(1)(h). *See In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 919 F.3d 121, 132 n.12 (1st Cir. 2019) (“[W]hen the plain language of a section is clear, we will not assign it an alternate interpretation that clashes with other clearly written sections.”).

3. SPD’s reading violates other canons, too. SPD also ignores the maxim that “[n]o part [of a statute] should construed as ‘meaningless or ineffectual.’” *Lexington–Fayette Urban County Gov’t v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009) (citation omitted)). But SPD’s reading does just that: it reads out of the Act the mandate that an agency show “harm” if it wants to withhold records related to an ongoing prosecution. *See* KRS 61.878(1)(h).



limitation where it has not. *See, e.g., Commonwealth v. C.J.*, 156 S.W.3d 296, 298 (Ky. 2005) (“Had the legislature intended to include such language, it certainly could have done so.”); *Cabinet for Fams. & Child. v. Cummings*, 163 S.W.3d 425, 433 (Ky. 2005) (same).

In addition, SPD’s argument ignores this Court’s presumption that a legislature “does not alter fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 791 (Ky. 2019) (internal citation omitted). That presumption is particularly appropriate where, as noted above, the legislature expressly preserved all the rights and remedies contained in the Open Records Act when enacting KRS 17.150. *See* KRS 17.150(5). Yet SPD persists in arguing that statute silently overruled the Open Records law.<sup>7</sup>

Moreover, SPD’s preferred interpretation violates the canon that courts “are to avoid absurd results in construing statutes.” *Winebrenner v. Dorten*, 825 S.W.2d 836, 837 (Ky. 1991). This case presents a perfect example of why. SPD is continuing to withhold records from the public even though Brison was indicted three years ago, the Commonwealth has made extensive

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<sup>7</sup> The Kentucky Open Government Coalition’s *amicus* brief exhaustively traces the history of KRS 17.150 and the amendments that gave rise to the language in KRS 17.150(2) that SPD cites. As that brief demonstrates, those amendments were intended solely to make clear that certain records in the federal government’s criminal records system maintained confidential even after a prosecution is complete. None of the records the Courier Journal seeks here fall within those categories.











*Courier Journal v. Kentucky State Police*, No. 21-CI-266 (Franklin Cir. Ct. Div. I Aug. 31, 2021) (“[T]he statutes operate at different points in time”); Order, *Gruner v. Kentucky State Police*, No. 22-CI-0039 (Franklin Cir. Ct. Div. II Feb. 22, 2023) (“[T]his Court declines to use KRS 17.150(2) to limit the public’s right to inspect their government’s records.”).<sup>8</sup>

Nevertheless, the Attorney General has doggedly adhered to its oft-rejected interpretation of KRS 17.150(2)—including after the Court of Appeals’ rebuke in this case. *See, e.g.*, 23-ORD-228 (acknowledging Court of Appeals’ decision in this case but uncritically adhering to prior view). Indeed, it appears that the Attorney General will not change its tune unless and until this Court makes it. *See id.* n. 3 (“[T]he Office’s interpretation of KRS 17.150(2) remains unchanged, unless and until overruled by the Supreme Court.”). It even refused to reconsider its interpretation of KRS 17.150 in light of this Court’s emphatic ruling in *City of Fort Thomas*; the Office of the Attorney General immediately wrote that opinion off as irrelevant, *see* 14-ORD-154, and continues to tell police departments they are free to evade it simply by pointing to KRS 17.150, *see* 20-ORD-104, pp. 2-3 (“[T]he holding in

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<sup>8</sup> SPD suggests this Court should not consider these decisions because the trial court rendered its summary judgment ruling before resolving the then-pending motion to submit supplemental authority attaching the *Courier Journal* decision. That is wrong; as a matter of law, a court can take notice of any judicial decision regardless of whether it “appears” in the record. *See, e.g., Berríos-Romero v. Estado Libre Asociado De Puerto Rico*, 641 F.3d 24, 27 (1st Cir. 2011) (“Thus, even when a copy of a judicial decision is placed in the record, it is not ‘evidence’ nor is it fact. We may take judicial notice of law at any time.”).

*Ft. Thomas* is inapplicable to KRS 17.150. This Office has recognized that a public agency is not required to articulate a specific and concrete harm to a potential prosecution to invoke KRS 17.150 successfully.”).

The fact that the Attorney General took the unprecedented<sup>9</sup> step of filing an *amicus* brief in this Court to defend its interpretation of the Act is a tell. The Attorney General is not acting as a neutral arbiter of the law. Rather, it sought to participate in this case as the “chief law officer” of the Commonwealth (Motion for Leave to file Amicus Brief, ¶ 1)—an institution with a viewpoint favoring the secrecy of investigative records. The Attorney General has consistently favored secrecy for the police departments and other law enforcement agencies he works with in that role and has repeatedly doubled down on his atextual interpretation of KRS 17.150 even as courts have rejected it over and again.

Finally, the Attorney General’s arguments regarding KRS 17.150(2)(d) lack merit. That statute contains one of the exemptions to KRS 17.150(2)’s

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<sup>9</sup> The Attorney General cites two other cases where it was purportedly an *amicus* in Open Records litigation, but neither is comparable. In *Zillow, Inc. v. Miller*, Nos. 23-5300, 23-5301 (6th Cir.), the Attorney General offered a constitutional defense of the Open Records Act against various First Amendment challenges; it did not appear to defend prior opinions issued by that Office. And in *Cincinnati Enquirer v. Dixon*, 638 S.W.3d 379 (Ky. 2022), the Attorney General merely served as counsel for the Commonwealth, which was the real party in interest. While commendable that the Attorney General promoted transparency in those cases, that does not merit some sort of special deference in this case, where the Attorney General has continued to adhere to an expansive view of KRS 17.150 that has been rejected by the Courts and simply waives away *City of Fort Thomas*.





in a tangible way. This will not undermine investigations or prosecutions in any material way; it will simply return the state of affairs in open records practice to what the General Assembly commanded, instead of what the Attorney General and law enforcement agencies wish it had done.

**II. The Court of Appeals properly held that SPD’s showing of potential harm to the Brison prosecution did not satisfy the *City of Fort Thomas* standard.**

The Court of Appeals had “no difficulty in declaring that [SPD’s] original denial was improper.” COA Op., p. 14. That is because SPD’s one-sentence assertion that an active criminal investigation justifies withholding all of the requested public records “was a blanket denial” that is prohibited by KRS 61.878(1)(h).

The Court also properly held that Col. Higdon’s vague, boilerplate affidavit was not sufficient to satisfy the standard set forth in *City of Fort Thomas*. That affidavit is completely devoid of any *facts* about the case or the state of the investigation. It consists of nothing more than rote recitals of statutory language and vague assertions of potential harm that *could* be caused by release of the requested public records. For example, it claims that releasing the records “*may* hinder the agency’s investigation” and “early release of the 911 call *could* compromise” a future hypothetical witness statement or grand jury panel. Affidavit ¶¶ 5-6, R. 27-28 (emphases added). The Court of Appeals was rightly “troubled by SPD making such general allegations of potential harm which would seem to apply in any criminal investigation in which witnesses are involved.” COA Op., 15.





*Washington v. Department of Justice*, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (“reliance on Exemption 7(A) may become outdated”).

Indeed, given the paucity of information in the Higdon affidavit about the underlying investigation, it is surprising that SPD is fighting the Court of Appeals’ remand order. In many ways, the court gave SPD far more process than it deserves. It would have been well within its rights to simply declare the Affidavit invalid and order the records released. Instead, it gave SPD another bite at the apple. That the agency is choosing to fight remand is just more proof that what it really wants is the blanket exemption rejected in *City of Fort Thomas*—not the ability to make the showing this Court commanded.

**III. The Court of Appeals correctly determined that SPD failed to show that release of the records, in whole or part, would constitute a clearly unwarranted invasion of personal privacy.**

SPD first invoked the Act’s clearly unwarranted invasion of personal privacy exemption in its Answer, where it appeared as the sole basis for withholding the body camera and dash camera videos in full. As with the law enforcement exception, SPD did not even try to articulate a basis for how release of these videos, in whole or part, would constitute a clearly unwarranted invasion of privacy to anyone. *See, e.g.*, Answer, ¶ 38, R. 24.

Its brief in this Court does not provide much more clarity. SPD acknowledges the Court of Appeals’ holdings that (1) the Act requires redaction even if some parts of the videos can be withheld and that (2) the law does not recognize a privacy interest for deceased individuals. But, SPD does not try explain why those holdings were wrong (which they were not).



recordings is not personal in nature, nor has SPD claimed that they are.” COA Op., p. 26. Certainly, the dashcam and bodycam footage depicting the public, high-speed chase, and the events preceding it, do not affect any individual’s privacy interest. “The privacy exemption is not nearly so broad...as to prohibit all disclosure of the footage made of the chase and collisions.” *Id.* at 28. That is even more apparent when weighed against the public’s compelling interest in learning if SPD officers followed department policy when they chose to pursue a fleeing vehicle in a chase that ended in the deaths of three innocent Louisvillians, including a 9-month-old infant, as SPD immediately claimed.

Even more to the point, SPD continues to ignore a different statute that prevents it from withholding an entire video simply because it may briefly depict a deceased individual. While an agency may generally elect “not to disclose body-worn camera records containing video or audio footage that...(g) includes the body of a deceased individual,” KRS 61.168(4), that discretion does not exist “if the recording contains video or audio footage that...(b) depicts an incident which leads to the detention or arrest of an individual.” KRS 61.168 (5)(b). In those circumstances, “the disclosure of the records shall be governed solely by the provisions of [the Open Records Act].” KRS 61.168(5)(c). That means the video must be disclosed unless some narrow exception of the ORA permits it to be withheld in whole or part. And

that statute, in turn, requires SPD to “separate [any] excepted material and make the unexcepted material available for examination.” KRS 61.878(4).

Simply put, SPD offers no argument why it need not disclose all portions of the video except for the images of deceased individuals. Because the Courier Journal does not seek such portions—and never has (*see* R.50)—the clearly unwarranted invasion of personal privacy exemption is simply irrelevant to this case.

**IV. The Court of Appeals appropriately remanded for a new determination on whether SPD willfully violated the Act.**

Finally, SPD asks this Court to declare that the Courier Journal is not entitled to any fees, costs, or penalties under KRS 61.882(5) because any violations of the Act were not “willful.” Once again, this is a strange request because the Court of Appeals simply remanded this issue to the trial court for a renewed determination after it undertakes the additional proceedings ordered by the appellate court. It did not hold that SPD acted willfully or order it to pay any fees. *See* COA Op., pp. 35-38.

SPD is *not* entitled to the appellate absolution it seeks. On the contrary, even on this record it is clear SPD, at every turn, willfully violated the Act. In this context, that simply requires a showing “that the agency withheld requested records without plausible justification and with conscious disregard of the requester’s rights.” *City of Fort Thomas*, 406 S.W.3d at 854.

Throughout this case, SPD has demonstrated at least conscious disregard of the Courier Journal’s (and public’s) rights. Right off the bat, SPD

denied the ORA requests in about thirty minutes, asserting a categorical exemption under a statute that does not permit one. The Court of rightly deemed that an “an improper blanket denial.” COA, p. 36.

Then, after it was hauled into court to answer for that improper conduct, SPD submitted an affidavit that was so vague and speculative it came nowhere close to the standard this Court set in *City of Fort Thomas*. In that filing, Col. Higdon also made assertions that were never valid bases for withholding on this record. Moreover, that affidavit did not even attempt to undertake the comparative weighing of privacy interests required by KRS 61.878(1)(a). Nor did SPD acknowledge the plain terms of KRS 61.168(5)(c), the bodycam footage statute. On top of all that, SPD failed to even attempt to separate the excepted and make the unexcepted material available for examination. KRS 61.878(1)(4). Each of these is an independent, willful, violation of the Act.

Moreover, SPD’s reliance on prior Attorney General opinions is not the “get-out-of-jail-free” card it thinks. The largest ever fee and penalty award under the Act was imposed in a case where the Attorney General had upheld the agency’s blanket denial of the Open Records request. *See, e.g., Cabinet for Health & Fam. Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375 (Ky. App. 2016). Likewise, only a year before SPD denied the Courier Journal’s request, the Court of Appeals affirmed a fee and penalty award against KSP for using KRS 17.150(2) in precisely the same manner SPD did here, even though the

Attorney General once again affirmed that denial. *See, e.g., Teague*, 2019 WL 856756 at \*3 (awarding \$10,000 in attorney’s fees and another \$13,725 in penalties for KSP’s blanket withholding policy invoking KRS 17.150(2)).

There is more than enough evidence from which the Court of Appeals could have reversed the willfulness finding and directed an award of fees outright. Its decision to ask the trial court to try again, on remand, was not reversible error.

### CONCLUSION

For the foregoing reasons, this Court should affirm the opinion of the Court of Appeals.

Respectfully Submitted,  
/s/ Michael P. Abate

*Counsel for Courier Journal Inc*



**APPENDIX INDEX**

Exhibit	Document	Record Cite
1	Open Records Request	R. 8-12
2	SPD Denial	R. 14
3	SPD Answer and Chief Higdon Affidavit	R. 20-29