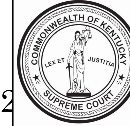
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Supreme Court of Kentucky

No. 2023-SC-0524; No. 2024-SC-02

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 COMBINED APPELLEE RESPONSE BRIEF AND CROSS-APPELLANT BRIEF

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CERTIFICATE OF SERVICE

In accordance with RAP 30(B), on December 13, 2024, 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) 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.

Michael P. Abate

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INTRODUCTION

The Kentucky Open Government Coalition ("KOCG") sought records from the Kentucky Department of Fish and Wildlife Commission ("Commission") that were prepared and used by Commissioners to conduct public business, including records that happen to be stored on individual Commissioners' personal email accounts and electronic devices. The Commission refused to produce these records.

The Franklin Circuit Court held that all records used to conduct public business are public records under the Open Records Act, regardless of where they are stored. It ordered the Commission to ask Commissioners to collect any emails sent or received on their personal accounts and submit them for review. In contrast, however, the Court held that asking Commissioners to collect and submit text messages they sent about agency business on personal cell phones was too burdensome as a matter of law, in all cases.

The Court of Appeals reversed, in part. It affirmed the holding that records used and prepared by public agencies are public records, regardless of where they are stored. But it vacated the holding that asking Commissioners to turn over text messages related to public business for agency review is always an unreasonable burden as a matter of law. It remanded the case for further proceedings.

STATEMENT CONCERNING ORAL ARGUMENT

This Court granted review with oral argument. KOCG looks forward to discussing the important issues presented by this case with the Court.

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STATEMENT OF THE CASE

This case presents an important—but straightforward—question: can a public official or employee avoid the Open Records Act simply by using a non-governmental email account, device, or app to communicate about the public's business? The Court of Appeals correctly answered that question "no." The text of the Act defines a public record by its contents, not the manner in which it was sent or the place(s) in which it is stored. *See* KRS 61.870(2). Any contrary holding would "certainly defeat the underlying purpose of the Act as public officials could easily evade disclosure of public records simply by utilizing their personal cell phones." *Kentucky Open Gov't Coal., Inc. v. Kentucky Dep't of Fish & Wildlife Res. Comm'n*, No. 2022-CA-0170-MR, 2023 WL 7095744, *17 (Ky. App. Oct. 27, 2023) ("COA Opinion") (Tab. 1).

To be sure, many people wish that the Act's definition of public record were narrower. The Commission and its *amici*, for example, argue for a property- or possession-based approach to the Open Records Act. But that is not what the law's text says. This Court is not the proper forum to seek to amend it.

Instead, revision efforts must be directed at the General Assembly, which has recently considered whether to modify the Act to adopt a version of the possession-only rule that the Commission and its *amici* champion. But those efforts have failed—repeatedly, likely because of the intense public

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outcry that opposed creating a loophole that would swallow the Act's command of transparency.

This Court should decline the Commission's invitation to gut the Open Records Act. It must, instead, affirm the Court of Appeals' application of the plain text of the statute and order that all responsive records stored on the Commissioners' personal cell phones and email accounts be produced immediately.

The Court also should vacate the portion of the Court of Appeals' opinion remanding this case to the circuit court for further evidence on the undue burden question. The Commission had a duty and opportunity to offer such evidence in the trial court, but made no attempt to do so. Finally, it should vacate the Court of Appeal's willfulness decision and remand the matter to the Franklin Circuit Court for a determination of the appropriate amount of attorney's fees and statutory penalties. *See* KRS 61.882(5).

I. The Commission

The Kentucky Department of Fish and Wildlife Resources Commission is composed of nine volunteer members appointed by the Governor from a list of names provided by sportsmen in the Commonwealth's designated fish and wildlife districts. KRS 150.022(3). When KOCG submitted its open records request over three years ago, Commissioners conducted all Commission business on their personal cell phones and email accounts. They were not provided with state-issued devices or accounts. At that time, the Commission's website listed each Commissioner's personal addresses, email

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accounts, and phone numbers as their primary contact information. During the course of this litigation, Commissioners were provided government email accounts, but continue to list their personal phone numbers on the Commission website.[1]

Before it received KOCG's open records request, the Commission understood its decision to conduct its business through individual Commissioners' personal cell phones and email accounts did not exempt it from the requirements of the Open Records Act. In 2018, Commissioners were trained by attorneys from the Commonwealth's Tourism, Arts, & Heritage Cabinet.[2] At that training session, the Commission's attorneys informed Commissioners that if they emailed amongst themselves about Commission matters, "that's business" and is subject to the provisions of the Open Meetings and Open Records Acts. Video at 48:45. Later a Commissioner asked if "everything we're doing is open records." The trainer, rightfully, answered "correct." Later, the Commissioner followed up: "personal cell phone, personal email?" *Id.* at 50:25. Again, the trainer responded with an accurate description of Kentucky open records law: "If it doesn't meet an

[1] Available at: https://fw.ky.gov/More/Pages/District-Commission-Members.aspx. "A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet." *Polley y. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004).

[2] That training session used to be publicly available on YouTube, but was removed some time during this appeal. *See*, https://www.youtube.com/watch?v=z090eElevjO

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[ORA] exemption there has been a ruling that official business is subject to open records." *Id*. at 50:33. The Commissioners have long understood that their Commission-related business, even if conducted on personal devices and accounts, is subject to disclosure under the Open Records Act.

II. KOCG's Open Records Request and the Commission's Denial

In August 2021, KOCG submitted an open records request to the Commission seeking:

> All emails and text messages that were sent from 1 June 2020 to present time, between any 2 or more of the following individuals listed: Rich Storm (former Commissioner KDFWR), Brian Clark (deputy commissioner/acting commissioner KDFWR), KDFWR Commission Chairman- Karl Clinard, Jeff Eaton (past 6th district commissioner), KDFWR Commission members, Representative C. Ed. Massey and Representative Matthew Koch.

(Tab 3, R. 32-33). The request made clear it was "not limited to communications that took place on government owned email accounts and cell phones." *Id*. KOCG specifically requested "all responsive public records which were generated on private cell phones, on private email services, or through other private communication channels." *Id*.

The Commission initially provided some responsive records and informed KOCG that other documents would be reviewed for redaction and produced by August 24, 2021. Tab 4, R. 35. On August 24, the Commission notified KOCG that it would miss its self-imposed deadline and required more time to review the responsive records. Tab 5, R. 38.

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The next day, KOCG emailed the Commission seeking confirmation that its search for responsive records included emails sent or received on Commissioners' personal email accounts and cell phones—the numbers and addresses listed on the Commission's website. Clarification was necessary because the Commission's production to that point was facially incomplete. Each record produced by the Commission contained at least one government-owned email address. The Commission responded days later with a letter from counsel, Steven Fields. Tab 6, R. 41-43. Mr. Fields produced some additional documents, but informed KOCG that the Commission would not produce responsive emails and text messages stored on the Commissioners' personal devices and accounts. He did not explain why the Commission departed from its own policy to produce public records stored on Commissioners' personal accounts and devices articulated in the August 2018 Commissioner training.

The Commission's response was internally inconsistent and against long-standing open records precedent. The Commission asserted that the requested records (records prepared and used by the Commission) were not public records at all because they are in "the possession of individuals on their personal devices not owned by the Commonwealth." Tab 6, R. 43. Yet, despite its apparent belief that these records are not subject to the Act, the Commission claimed it asked the Commissioners to "produce any responsive documents which may be contained in the personal email." *Id*. Finally, the

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response pivoted again to a distinct, non-sensical justification for the denial: citing an inapposite provision of the Open *Meetings* Act, the Commission claimed that public records are only those documents created during a public meeting with a quorum of Commissioners present. *Id*.

III. Franklin Circuit Court Order

KOCG appealed the Commission's denial to the Franklin Circuit Court, which granted in part and denied in part both parties' summary judgment motions. First, the Franklin Circuit Court agreed with KOGC that "the [Open Records Act] does not take a possession only approach" to public records. Rather, all records "used or prepared by an agency fall within the scope of the Open Records Act ***regardless of where the record is stored***." Opinion & Order, *Kentucky Open Government Coalition v. Kentucky Department of Fish and Wildlife Resources Commission*, No. 21-CI-00680 at R. 326-27 ("MSJ Order") (Tab 2) (emphasis added).

As a result of this holding, the circuit court ordered the Commission to produce emails responsive to KOCG's open records request. R. 336. However, the court reached a different conclusion regarding "text messages and other forms of communication contained on privately-owned devices." R. 336. Although it acknowledged text messages relating to Commission business are public records under the Act, the court determined retrieving such messages, as a matter of law, places an "unreasonable burden" on a responding agency. *Id*. at 14-15. And, even though the Act's unreasonable-burden provision (KRS 61.872(6)) requires a "highly fact-specific determination" and a showing of

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"clear and convincing evidence," *Dept of Kentucky State Police v. Courier Journal*, 601 S.W.3d 501, 50'6 (Ky. App. 2020), the court reached this conclusion in spite of the Commission's failure to offer *any evidence at all* about the supposed burden involved in asking Commissioners to search for, and hand over, text messages.

IV. The Court of Appeals' Opinion

The Court of Appeals affirmed the circuit court's holding that all records created and used by public agencies are public records subject to production under the Act—including emails and text messages. COA Opinion, p. 20. Its holding is grounded in the "unambiguous definition" of public record, which includes all "documentation regardless of physical form or characteristics that are prepared, used, in the possession of, or retained by a public agency." *Id.*

The Court of Appeals stressed that its holding was consistent with the policy "boldly declared" by the General Assembly: "that free and open examination of public records is in the public interest." *Id.* at 17 (quoting KRS 61.871). Kentucky law therefore requires that "all public records shall be open for inspection" and the Open Records Act "generally favors disclosure." *Id.* (citations removed). The Court of Appeals declined to adopt the Commission's (and its *amici*'s) possession-only approach to public records because it "would certainly defeat the underlying purpose of the Open Records Act as public officials could easily evade disclosure of public records simply by utilizing their personal cell phones." *Id.*

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Although the Court of Appeals agreed with the Franklin Circuit Court that the Act's broad definition of public records encompassed all records pertaining to public business, it reversed the trial court's decision to effectively create a new, categorical exemption from production for any text messages sent or received by public officials on their non-government devices. *Id*. at 22-23. The Court of Appeals faulted the circuit court for relying on generalized concerns about future open records requests, instead of the conducting the fact-specific, case-by-case analysis the Act demands. *Id*. It then remanded the case back to the circuit court to give the Commission a second chance to meet its obligation to sustain its objection by "clear and convincing evidence," KRS 61.872(6), even though the agency did not even *try* to make such a showing in support of its argument at the appropriate time.

The Court of Appeals also rejected the Commission's attempt to invoke the Act's "clearly unwarranted invasion of personal privacy" exemption, KRS 61.878(1)(a). The court reiterated that exemption, like the undue burden exemption, must be applied on a case-by-case basis and the "interest in personal privacy" balanced with "the public interest in disclosure" of the requested information. *Id*. at 24 (collecting cases). It admonished the circuit court for focusing its decision on general privacy interests and concerns about hypothetical "government overreach" unmoored from the facts of this case. *Id*. While Kentucky public employees, like all citizens, "possess a privacy interest in their personal cell phones…privacy interest in text messages that relate to

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official government business are a different matter." *Id*. The Act is concerned only with "personal information contained in public records." *Id*. (citing KRS 61.878(1)(a)). "To categorically exclude all text messages on personal cell phones from the scope of the Open Records Act would surely operate to encourage use of personal electronic devices and place vital public records beyond the reach of citizens." *Id*. at 25-26.

Finally, the Court of Appeals affirmed the trial court's conclusion that the Commission did not willfully violate the Act in refusing to search for, or produce, emails and text messages not stored on government accounts or devices.

The Commission sought discretionary review from this Court. After this Court granted review, KOGC cross-petitioned for review, asking this Court to decide whether (1) the Court of Appeals erred in remanding this matter to the Franklin Circuit Court to give the Commission a second chance to demonstrate undue burden even though it never attempted to make that showing in the first instance and (2) the Commission willfully violated the Open Records Act. This Court granted that cross-motion.

STANDARD OF REVIEW

This Court reviews the legal questions presented by this Open Records Act appeal *de novo*. *Commonwealth v. Chestnut*, 250 S.W.3d 655, 659 (Ky. 2008). All "issues concerning the construction of the [Open Records Act] [are] review[ed] de novo." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 (Ky. 2013). There are no factual issues in dispute.

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ARGUMENT

I. Records sent or received by the Commissioners regarding their role as Commissioners are public records, regardless of where they are stored.

A. The plain text of the Act makes clear that any record prepared or used by a public agency is a public record.

The Open Records Act broadly defines "public record" to mean:

> All books, papers, maps, photographs, cards, tapes, disc, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared owned, used, in the possession of or retained by a public agency.

KRS 61.870(2). Every Kentucky Court to interpret that definition—including the circuit court and Court of Appeals below—has held a record's public status is determined by its content and use, not its physical location. The Act's "unambiguous definition" means what it says: "a public record may be prepared by **or** used by a public agency but not necessarily in the possession of a public agency." COA Opinion, p. 20 (emphasis original). Any record "used or prepared by an agency fall[s] within the scope of the Open Records Act regardless of where the record is stored. A possession-only approach does not comport with the plain language of KRS 61.870(2)." MSJ Order, Tab 2, R. 327.

This is not an "issue of first impression" as the Commission claims. Appellant Brief, pp. 3-4. Since the inception of the Act, Courts have understood that an agency need not physically possess a document for it be considered a public record. Indeed, a quarter century ago the Court of Appeals reaffirmed that it is "the nature and purpose of the document that

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counts." *City of Louisville v. Cullinan*, No. 1998-CA001237-MR, 1998-CA001305-MR (Ky. App. 1999) (Tab 7). In *Cullinan*, the Court of Appeals considered the same "possession-only" approach to public records that has been rejected here by the lower courts. It dismissed the City of Louisville's argument that records were not public simply because they were stored in a private attorney's office. Like here, "there is no doubt that the records were prepared, owned, and used at the instance of the [agency]…they are essentially the agency's documents." *Id.*

The same statutory text that compels a public agency to produce public records stored in its private attorney's office compels the production of public records stored on the Commissioner's personal devices and email accounts. KOCG requested emails and text messages sent between any two or more Commissioners regarding the Commission's work. Tab 3, R. 31-33. It specifically disclaimed any right to "communications of a purely personal nature unrelated to any government function" that are also stored on those phones and accounts. *Id.* (quoting KRS 61.878(1)(s)).

Requesting these records from Commissioners' non-government accounts and devices was necessary because at the time KOCG made its request the Commissioners conducted *all Commission business* on personal devices and accounts. Plainly, those communications are public records that must be produced under the Act. *See Univ. of Louisville v. Sharp*, 416 S.W.3d 313 (Ky. App. 2013) (holding University staff emails must be disclosed unless

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subject to one of the Act's exemptions). If they were not—and this Court adopted the Commission's preferred possession-only approach to public records—none of the Commission's records would be public unless a Commissioner happened to include a state employee with a government funded phone or email address on his communications. The Act's broad definition of public record prohibits that absurd result.

Remarkably, the Commission does not even wrestle with the language of KRS 61.870(2). Instead of addressing the statute's text, it relies on a series of Opinions from the Office of Attorney General ("OAG") that—as explained below—similarly ignore the statute's language, as well as the OAG's own longstanding interpretation of it. That omission should be seen for what it is: an implicit concession that the Commission has no answer to the plain text of the Act and Kentucky courts' longstanding application of that text, reaffirmed by both courts below.[3]

With only a few recent erroneous OAG opinion to support its position, the Commission resorts to misrepresenting KOCG's request. The request is not "insurmountable" or "expansive." Appellant Brief, p. 14. If it were, presumably the Commission could have introduced evidence in the trial court

[3] The Commission incorrectly asserts that the "Franklin Circuit Court disagreed with the KOGC's expansive interpretation of the Act." Appellant Br., p. 4. In fact, that court agreed with KOGC that text messages concerning public business are public records; it simply crafted a blanket—and inappropriate—exemption excusing agencies from producing those records in all cases.

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to prove it. It didn't because KOCG's request is routine. It asks for communications between specifically named public officials during a specified timeframe. Similar requests are filed and fulfilled across the Commonwealth every day.

B. Recent, failed attempts at legislative revision only underscore what the ORA has always meant

Perhaps the best evidence that the Open Records Act's plain text encompasses all records concerning public business, regardless of where they are stored, are the repeated—but unsuccessful—attempts to change the law to say the opposite.

In the 2018 Legislative Session the General Assembly considered, and rejected, a property-based definition of public records. The Senate State & Local Government Committee advanced a bill (with committee substitute) that would have amended the definition of public record to do precisely what the Commission and its *amici* seek here: it would have exempted "any electronic communications… sent or received using a private cell phone…or received using a nongovernment electronic mail account." Tab 8, R. 79-80, HB 302. Of course, that proposal ultimately failed and the committee substitute was replaced on the Senate floor with the exemption for "communications of a purely personal nature unrelated to any government function." KRS 61.878(1)(s).

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Even more recently, during the 2024 Regular Session, the General Assembly considered—but failed to pass—HB 509.[4] That bill would have accomplished part of what the Commission and its *amici* ask for: making records sent or received on personal email accounts or devices exempt from the Open Records Act. Advocates of the bill suggested that was the necessary and intended aim of HB 509 in direct response to the Court of Appeals' decision in this case.[5] Yet, due in large part to outcry from public transparency advocates from across the political spectrum, that bill failed.[6] This Court should not read into the Open Records Act words the General Assembly repeatedly declined to place there. *See Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 651 (Ky. 2017) ("There is a strong implication that the legislature agrees with a prior court interpretation when it does not amend the statute interpreted.") (citation omitted).

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[4] Available at: https://apps.legislature.ky.gov/record/24rs/hb509.html

[5] McKenna Horsley, *Kentucky Supreme Court to hear open records case against Fish and Wildlife Commission*, THE KENTUCKY LANTERN, June 7, 2024, https://kentuckylantern.com/2024/06/07/kentucky-supreme-court-to-hear-open-records-case-against-fish-and-wildlife-commission/ ("The primary sponsor, Rep. John Hodgson, R-Fisherville, said the Court of Appeals decision prompted his bill…").

[6] Jaime Lucke, Privacy worries a smokescreen for hiding the public's business, The Kentucky Lantern, April 12, 2024, https://kentuckylantern.com/2024/04/12/privacy-concerns-a-smokescreen-for-hiding-the-publics-business/ ("As Republican Gex Williams said, even if privacy concerns are real, HB 509 fails to accommodate 'the necessity for open records—government records—to be available to citizens.'").

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C. Other federal and state jurisdictions similarly grant the public access to records stored on personal devices and accounts under similar open records laws.

Kentucky's courts are not alone in rejecting the kind of possession-only approach the Commission and its *amici* advocate here. Numerous federal and state courts have held that the public may access records stored on public employees' personal devices and accounts if they pertain to public business. These decisions have appropriately considered the text of their jurisdiction's open records laws, balanced the public's right to know what its government is doing with public employees' personal privacy interests, and have not devolved into the dystopian police state imagined by the Commission and its *amici*.[7]

[7] *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016); *Hunton & Williams, LLP v. EPA*, 248 F.Supp.3d 220, 237–38 (D.D.C. 2017); *Wright v. Admin. for Children & Families*, No. 15-218, 2016 WL 5922293, at *8 (D.D.C. Oct. 11, 2016); *Competitive Enter. Inst. v. U.S. EPA*, 12 F. Supp. 3d 100 (D.D.C. 2014); *Comstock Residents Ass'n v. Lyon County Bd. of Comm'rs*, 414 P.3d 318 (Nev. 2018); *City of San Jose v. Superior Court of Santa Clara Cnty.*, 2 Cal.5th 608 (Cal. 2017); *Toensing v. Attorney Gen. of Vt.*, 2017 Vt. 99 (Vt. 2017); *Smith v. Northside Hosp., Inc.*, 302 Ga. 517, 807 S.E.2d 909 (Ga. 2017); *Nissen v. Pierce County, 183 Wash.* 2d 863, 357 P.3d 45 (Wash. 2015); *McLeod v. Parnell*, 286 P.3d 509 (Alaska 2012); *Schill v. Wisconsin Rapids Sch. Dist*, 327 Wis. 2d 572, 2010 WI 86, 786 N.W.2d 177 (Wis. 2010); *People for the Ethical Treatment of Animals v. Bd. of Supervisors of La. State Univ.*, 376 So. 3d 178 (La. App. 2023); *Lipsky v. The N.J. Ass'n of Health Plans, Inc.*, 474 N.J. Super. 447 (App. Div. 2023); *Brumfield v. The Vill. of Tangipahoa*, 340 So. 3d 221 (La. App. 2021); *Better Gov't Ass'n v. City of Chi. Office of Mayor*, 2020 Ill. App. 190038 (Ill. App. 2020); *Better Gov't Ass'n v. City of Chi. Office of Mayor*, 2020 Ill. App. 190038, 446 Ill. Dec. 209, 169 N.E.3d 1066 (Ill. App. 2020); *Sinclair Media III, Inc. v. City of Cincinnati*, 2019 Ohio 2624 (Ohio Ct. Cl. 2019); *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036 (Fla. Dist. Ct. App. 2018); *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Cmmw. Ct. 2012); *Bradford v. Director, Employment Security Dep't*, 83 Ark. App. 332, 128 S.W.3d 20 (2003).

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To take a few examples, in *McLeod v. Parnell*, 286 P.3d 509, 510 (Alaska 2012), the Alaska Supreme Court was asked to consider if a state employee's use of a "private email account to send and receive email regarding state business" renders those emails "public records" under Alaska's Public Records Act. It concluded it does: "private emails regarding state business are no different from any other records—those records preserved or appropriate for preservation under the Records Management Act are 'public records.'" *Id*. Like Kentucky, Alaska's public records statutes do not specifically reference text messages and emails on public employees' personal accounts. The court, however, applied general statutory provisions to conclude "records that should be preserved are also public records, notwithstanding the fact that they may be difficult or impossible to access." *Id*. at 515.

In *Toensing v. Attorney General*, 206 Vt. 1, 4 (2017), the Vermont Supreme Court determined its state's public records statute reached public records stored "in digital form" in a public employee's "personal account when a requester specifically requests communications between specified state employees and third parties, including records that can be found only in the individual state employee's personal account." Vermont's statute, like Kentucky's, "does not exclude otherwise qualifying records on the basis that

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they are located in private accounts." *Id*. at 8. Rather, it defines public record broadly as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." *Id*. The "determinative factor" that decides if a record is public is "whether the document at issue is produced or acquired in the course of agency business." *Id*. (citing 1 V.S.A. § 317(b)). Vermont's statute is similar to Kentucky's because it "does not define public record in reference to the location or custodian of the document, but rather to its content and the manner in which it was created." *Id*. Construing this unambiguous statutory language broadly is the only way to carry out Vermont's legislature's intent for its open records statute to be interpreted "liberally in favor of disclosure" *Id*. (citing 1 V.S.A. § 315(a); *compare* KRS 61.871 ("the basic policy of [the Act] is that free and open examination of public records is in the public interest and [its exceptions] shall be strictly construed.").

California's public records statute is nearly identical to Kentucky's; it defines public record to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by a state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 7920.530. The California Supreme Court applied this language to reject exactly the same possession-only approach to public records advanced by the Commission. *City of San Jose v. Superior Ct.*, 2 Cal. 5th 608, 623 (2017) ("[T]he City argues public records include only materials in the

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agency's possession or directly accessible to the agency…The argument fails."). The "more fundamental question" is whether a document "located outside an agency's walls, or servers, is sufficiently 'owned, used, or retained' by the agency so as to constitute a public record." *Id.* (citing previous code number for § 7920.530). Under California's (and Kentucky's) open records statute "an agency's public records 'do not lose their agency character just because the official who possesses them takes them out the door.'" *Id.* (citing *Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y,* 827 F.3d 145, 149 (D.C. Cir. 2016)). That straightforward reasoning is not changed by the "physical form" of the public record at issue—paper records removed from an agency office building are no different than electronic messages created and stored on a personal account. *Id.* That holding is the only way to give effect to the California legislature's broad definition of public records designed to ensure the public's access to its records. "If communications sent through personal accounts were categorically excluded from [disclosure], government officials could hide their most sensitive, and potentially damning, discussions in such accounts." *Id.* The possession-only approach advanced by the Commission and rejected in California, "would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private." *Id.* at 858 (citing *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* (2014) 19 Comm. L. & Pol'y 293, 322.

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Hunton & Williams LLP v. EPA, 248 F. Supp. 3d 220 (D.D.C. 2017), which the Commission cites to support its argument, actually cuts against its position. That case *did* involve a search of the employees' personal email accounts: "the Corps initially searched the personal email account of one particular employee because that employee 'appeared to have conducted ... business using a personal email account'" and "[t]he Army…did perform a supplemental search after Hunton identified emails in the Army's releases that had been sent from a personal email account." *Id.* at 237. To be sure, the court did not order a search for text messages, but that's only because the requester "does not point to any evidence indicating that text messages were used for agency business or otherwise show that searching text messages would be likely to lead to responsive documents." *Id.* at 238. Here, by contrast, we know the Commissioners used their phones (published on the agency's website) for Commission business.[8]

D. The Attorney General Opinions cited by the Commission are non-binding and depart from long-standing policy from that office.

With the statutory text, legislative history, judicial precedent, and public policy all squarely against them, the Commission relies on a single

[8] The unpublished decision in *Stevens v. Broad. Bd. of Governors*, No. 18-CV-5391, 2021 WL 1192672 (N.D. Ill. Mar. 30, 2021), is nowhere near sufficient to overcome the weight of contrary authority. In that case, which concerned dozens of sprawling FOIA requests filed with eleven different federal agencies, the government filed affidavits explaining why the specific search requested was impossible. *Id.* at *2. Here, by contrast, no such showing was even attempted—even though the law places that burden squarely on the Commission, *see* KRS 61.872(6).

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source of authority to support its position: a few recent opinions from the Office of the Attorney General ("OAG") that approved its preferred, possession-only approach. Appellant Brief, pp. 7-12. Those opinions are non-binding, however, and in the context of this case are entitled to no deference whatsoever.

This Court "reviews questions of law and statutory interpretation de novo and without deference to the conclusions reached by the Attorney General." *Louisville/Jefferson County Metro Gov't v. Courier-Journal, Inc.*, 605 S.W.3d 72, 78 (Ky. App. 2019), *review denied* (Aug. 13, 2020). That rule embodies "the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2247 (2024).

Indeed, Kentucky courts have not hesitated to disregard even long-held views of the Attorney General where, as here, those views are at odds with the text of the ORA. Recently, this Court declined to follow a longstanding line of OAG opinions that allowed law enforcement agencies to withhold all records related to pending investigations under KRS 17.150(2). *See Shively Police Department v. Courier Journal, Inc.*, ___ S.W.3d ___, No. 2023-SC-0033-DG, 2024 WL 4310555 (Ky. Sept. 26, 2024); *see also Department of Kentucky State Police v. Teague*, No. 2018-CA-000186-MR, 2019 WL 856756 (Ky. App. Feb. 22, 2019) (rejecting KSP's reliance on KRS 17.150(2) even

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though Attorney General upheld KSPs records denial). Similarly, in *Louisville/Jefferson Cnty. Metro Government v. Courier-Journal, Inc.*, 605 S.W.3d 72, 78 (Ky. App. 2019), the Court of Appeals rejected "the interpretations by various Attorneys General" regarding the scope of the "preliminary" documents exemption as applied to economic development proposals. And in *Cabinet for Health & Fam. Servs. v. Lexington H-L Services*, 382 S.W.3d 875, 877 (Ky. App. 2012), the Court of Appeals affirmed the largest ever fee and penalty award against an agency for willfully violating the act even after the Attorney General agreed with the agency's interpretation of the relevant withholding statute.

That same result is appropriate here. The OAG opinions on which the Commission relies do not seriously grapple with the text of the ORA. They simply conclude that because an agency does not own the account or device on which certain records are stored, they are not public records. That ignores all of the other ways in which something can become a public record under the act: if it is "**prepared**, owned, **used**, in the possession of **or retained by** a public agency." KRS 61.870(2) (emphasis added).

Moreover, the inconsistent—if not disingenuous—way the OAG has interpreted the definition of "public record" over time strongly undermines any argument that this Court should defer to its purported expertise. Courts consistently decline to defer to agencies when their explanations have changed in unacknowledged and unexplained ways, as the OAG's has in this

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case. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books….And of course the agency must show that there are good reasons for the new policy."); *INS v. Cardoza–Fonseca,* 480 U.S. 421, 447 n.30 (1987) (an agency interpretation that "conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view").

That is precisely what happened here. For most of its history, the OAG applied the plain text of the Act and ordered agencies to produce public records that it prepared and used, but did not possess. *See, e.g.*, 18-ORD-032; 17-ORD-050; 16-ORD-017; 15-ORD-001; 14-ORD-120; 08-ORD-156; 08-ORD-046; 07-ORD-236; 07-ORD-002; 06-ORD-223; 06-ORD-032; 05-ORD-099; 05-ORD-007; 04-ORD-123; 00-ORD-207. For example, in 95-ORD-144, 99-ORD-194, and 00-ORD-93, the OAG determined records stored in public agencies' private attorney's offices were public records because they were used by the public agencies. Likewise in 00-ORD-207, the OAG rejected a city's attempt to withhold an insurance settlement agreement because the records were in the possession of the insurance carrier. In 04-ORD-123, the OAG cited *Cullinan* and rejected out of hand a city's attempt to withhold "drainage records" because they were in the possession of the city's private attorney. It reached the same conclusion in 06-ORD-147 and ordered a regional airport

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board to produce public records in the possession of a private engineering firm.

The OAG's reasoning did not change when public records shifted from analog to digital. In 09-ORD-020, the OAG admonished a city's use of private email servers to store public records to which it no longer had access. The practice "raise[d] serious mismanagement issues" because a "public agency cannot, by means of a contract with a private company, deprive records of their public character." *Id*. at 3; *see also* 11-ORD-025. 10-ORD-037 reaffirmed that reasoning and held that prison inmate's emails stored on private servers are public records. In 14-ORD-148, the OAG directed a county government to produce emails on public employee's personal email accounts. A year later, the OAG determined an agency "systematically failed in its duty to properly maintain its public records by allowing an investigator to use a private email account that deleted emails containing public business." 15-ORD-011.

On his last day in office, in the very last opinion he issued, then-Attorney General Jack Conway abruptly changed course and opined that an agency did not have to turn over records on a cell phone because "calls and text messages, on the private cell phones of its employees are not within the possession of" an agency. 15-ORD-226, p. 5. That opinion made no reference to prior OAG opinions, noted above, holding that the use or creation of a record by an agency makes it a public record, regardless of where it is stored. Nor did it even try to grapple with the text of the ORA.

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Not surprisingly, 15-ORD-226 was short-lived. It was narrowed (17-ORD-223 n.8; 19-ORD-011), and then abandoned (19-ORD-206 n.5), by Attorney General Andy Beshear in reasoned opinions explaining how it was inconsistent with the statutory text and a long line of OAG opinions that preceded it. These opinions reiterated that "a record that is 'used' *by* a public agency is a public record *of* that agency under the definition of the term" (quoting 12-ORD-178) and that "a public agency cannot escape accountability for public records by forwarding them to a non-public location, and that includes a private email account used by an employee to conduct public business." 19-ORD-011, p.4.

However, 15-ORD-226 sprung back to life, zombie-like, under the administration of Attorney General Daniel Cameron, which cited it as if it remained a controlling decision that had not been abrogated by his predecessor as inconsistent with the statute and a long line of OAG opinions. *See, e.g.*, 23-ORD-057; 22-ORD-030; 21-ORD-151; 21-ORD-146; 21-ORD-127. These decisions focused only on whether an agency "owned" a particular device, while at the same time lamenting—meekly—that "all the Attorney General can do is admonish public agencies to conduct government business on government owned email accounts." 22-ORD-030.

As this case illustrates, those repeated, empty "admonishments" have only emboldened public officials and agencies to use text messages and other non-governmental channels to avoid public disclosure of their records. The

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OAG's unexplained departure from decades of its own policy—and the plain text of the Act—is entitled to no deference from this Court.

II. The Commission and its *amici*'s other arguments for withholding fail.

A. The "clearly unwarranted invasion of personal privacy" exemption does not justify blanket non-disclosure of text messages related to public business.

The Commission and its *amici* also invoke abstract—indeed, soaring—privacy concerns. However, those arguments are nowhere near sufficient to justify the denial of KOCG's request.

The Act's personal privacy exemption protects information contained in public records if disclosure "would constitute a clearly unwarranted invasion of personal privacy." KRS 61.878(1)(a). Invoking that exemption requires a public agency to strike the appropriate balance between the public's interest in understanding its government's actions and an individual's right to privacy. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). Finding that balance requires a "comparative weighing" of interests on a "case-specific" basis. *Id.* "The question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational and can only be determined within a specific context." *Id.* When weighing the public interest, the "primary concern is the nature of the information which is the subject of the requested disclosure" and whether the public has legitimate interest in the disclosure." *Lexington-*

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Fayette Urban Cty. Gov't v. Lexington Herald-Leader Co., 941 S.W.2d 469, 472 (Ky. 1997). The public record's location is irrelevant.

This process makes perfect sense, and it is necessary to fulfill the General Assembly's stated policy "that free and open examination of public records is in the public interest." KRS 61.871. If it were otherwise, public servants and policy makers would need only move their discussions to group chats on their personal cell phones to avoid public oversight. School Boards, City Councils, and public commissions like Fish & Wildlife could do the same to avoid meeting in public to be scrutinized by their constituents.

Moreover, even if the personal privacy exemption applied here, the Commission (and its *amici*) are not the proper parties to raise abstract privacy concerns on behalf of current and future public employees and officials. Open records law affords a process to individuals whose personal privacy interest is actually affected by public records to come forward, assert the interest, and explain why it is implicated in a case-specific context. *See Lawson v. Off. of Atty. Gen.*, 415 S.W.3d 59, 62 (Ky. 2013); *Beckham v. Board of Education of Jefferson Co.*, 873 S.W.2d 575 (Ky.1994). No commissioner has done so here, and it is far too late to make the attempt. Even if it weren't, KOCG was careful to exclude "purely personal records" records from its request, rendering it unlikely KRS 61.878(1)(a) could have ever been successfully invoked even if the Commission bothered to attempt the required showings.

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Nor will affirming the Court of Appeals' ruling lead to "the government searching and disclosing the contents of public servants' private cell phones." Constitutional Officers ("CO") Amicus, p. 1. That alarmist framing ignores the relief that KOGC actually sought: for the agency to ask the Commissioners whether they have responsive text messages and, if so, to turn them over. That's the precise remedy the trial court ordered with respect to the Commissioners' emails, and should be applied to text messages as well.

That does not require great technological skill. A government officer or employee can easily take a screen shot of their text messages. Alternatively, strings of text messages can be copied on a phone's text messaging program. Messages can be exported to email or a cloud storage device and produced. Or, software can be used to extract them. The point is that there are myriad ways to comply with the commands of the Act that do not require a forensic examination of someone's phone. Had the Commission actually made a burden argument, these methods of compliance could have been demonstrated in the trial court, disproving the Commissions' falling-sky predictions.

B. The Commission's and *amici*'s possession-based definition of public records is atextual.

The Commission's possession-only definition of public records is supported by most of the Commonwealth's Constitutional Officers, who share the Commission's interest in limiting their legal obligations under the Act. *See* CO Amicus Brief. The Constitutional Officers accuse the Court of Appeals

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of accepting a "non-statutory" definition of public records when it held public records remain public, regardless of their location. But that is false, as just explained; the statute defines public records to include any record "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2) (emphasis added). Rather, it is the Constitutional Officers' proposed "property-based expectancy" definition of public records that "add[s] unenacted language to the Open Records Act." CO Amicus Brief, p. 4.

The Constitutional Officers' argument is—curiously—grounded in legislative intent. According to them, the General Assembly has not spoken on public records stored on personal cell phones, therefore these records should be off limits. That gets matters precisely backwards. The General Assembly presciently defined "public record" to include all manner of things prepared, owned, used, possessed, or retained by a public agency "*regardless of physical form or characteristics*." KRS 61.870(2) (emphasis added). Of course, that broad definition includes emails and text messages, even if those technologies did not exist at the time the Act was passed. And because the text is clear, resort to legislative intent is not appropriate. *See Normandy Farm, LLC v. Kenneth McPeek Racing Stable, Inc.*, ___ S.W.3d ___, No. 2022-SC-0552-DG, 2024 WL 3929543 at *4 (Ky. Aug. 22, 2024) (Where "the words used in a statute are clear and unambiguous and express legislative intent…the statute must be accepted as written" (quoting *Griffin v. City of Bowling Green*, 458 S.W.2d 456, 457 (Ky. 1970)).

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Equally irrelevant is the Constitutional Officers' argument (CO Amicus, p. 8) that the 1976 General Assembly could not imagine the ubiquity of the modern cell phone—just as they did not foresee email addresses, body worn cameras for police officers, or website metadata. The General Assembly's inability to predict the future does not nullify its generally applicable laws. As the U.S. Supreme Court has explained, the "limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 653 (2020).

But even if legislative intent were relevant, it would cut against the Constitutional Officers' argument. As noted above, recent legislative efforts to exclude emails and text messages on personal devices and accounts from the Act have repeatedly failed.

In reality, the Commission's and its *amici*'s argument boils down to a policy preference, buttressed by an imagined parade of horribles. They would prefer to replace the Act's use-based approach with a property-based one. But that is not for them—or this Court—to decide. *See Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021) ("[T]he General Assembly is the policy-making body for the Commonwealth, not the Governor or the courts.").

The Constitutional Officers also worry that the Court of Appeals' ruling will create line-drawing problems about what qualifies as a public

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record. *See* CO Amicus, pp. 4-5. But these hypothetical concerns are no different than any other request, where agencies already review potentially responsive records to determine whether they are responsive and, if so, whether some exemption applies. Messages about employees' children or complaints to their spouses are not "prepared" or "used" by a public agency and thus are not public records. But even if they were, they likely are exempted from disclosure by other provisions of the Act. *See, e.g.*, KRS 61.878(1)(a), (s). Moreover, because public records should not be stored on personal devices, most requests for these records will be quickly denied after the agency conducts a reasonable search (in conjunction with its employees) and determines no such record exists. The agency need only affirmatively state that there are no responsive records. *See Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). The burden then shifts to the requester to make a prima facie case that the records exist. Only then is a public agency required to explain the adequacy of its search or explain to the requester why the record no longer exists. *Id.*; *see also Eplion v. Burchett*, 354 S.W.3d 598 (Ky. App. 2011). And this Court has already rejected potential inadvertent disclosure of exempt records as a reason to "thwart the openness the General Assembly sought to achieve when it enacted the Open Records Act. *Chestnut*, 250 S.W.3d 655 at 666. Nothing like that occurred here. In fact, the Commission freely admits that it did not even ask the Commissioners to search for public records on their private devices—the only

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place they conducted public business—when it received KOCG's request. Tab 6, R. 41-43.

Even more bizarre is the Constitutional Officers' concern that a court might then be involved in overseeing whether an agency conducted a sufficient search for records, or perhaps even view certain responsive records *in camera* under the powers granted by KRS 61.882(3). *See* CO Amicus, p. 13. Those are important safeguards that should give this Court, and the public, confidence that any privacy concerns are appropriately respected. The Officers' out-of-hand rejection of these guardrail shows that what they really want is their own, unreviewable discretion to decide when to subject their communications to public scrutiny, and when not to.

Equally far-fetched are the arguments raised by the University of Kentucky. No one is being asked to "surrender their personal device," let alone their "constitutional rights." UK Amicus Br., p. 8. It does not raise "grave and doubtful constitutional questions" (*id.* at 7) to suggest that a person who accepts an appointment to the University's Board of Trustees should understand that if they choose to communicate about that position on their personal device, for their own convenience, they might have to search for and produce those records.[9]

[9] The University also errs in its shockingly broad claim that all text messages are inherently "preliminary" under the Act. *See* UK Amicus, p. 11. As an initial matter, this Court should not pass on this question, which was never raised by the parties in the case. *See, e.g.*, *Kim v. Hanlon*, 99 F.4th 140, 153 (3d Cir. 2024) (issues "only raised by amici…are normally not considered on

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Even if these kinds of policy concerns were appropriately considered, they point heavily in favor of affirming the Court of Appeals' ruling. Preemptively declaring certain channels of communication off-limits to the public will only embolden public employees and officials to hide their communications from the public. This is not a hypothetical concern. It was recently reported, for example, that the Louisville Police Department's leadership used an encrypted chat application that was set to automatically delete their messages within a short period of time, contrary to the preservation requirements of state law. *See* J. Wood, *Top LMPD officers used app to automatically delete their texts, a potential crime*, Courier Journal (Oct. 10, 2024).[10] Such tactics would become commonplace if only official government memoranda and emails were subject to the Act.

Simply put, if a public official chooses, for their convenience, to text or use other apps to communicate about the people's business, searching for and

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appeal"). In any event, such a claim cannot possibly be substantiated without knowing the content and context of a particular message. Moreover, this Court has held—rejecting an argument made by UK about that exemption—that "materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). And, again rejecting UK's position on the scope of the preliminary records exemption, the Court of Appeals recently held that "[t]he Act does not require that an agency reference or incorporate specific documents in order for those records to be adopted into the final agency action." *University of Kentucky v. Lexington H-L Servs., Inc.*, 579 S.W.3d 858, 863 (Ky. App. 2018).

[10] https://www.courier-journal.com/story/news/investigations/2024/10/10/louisville-police-potential-open-records-violation-with-signal-app/75554683007/ (last visited Dec. 10, 2024).

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producing those records is nothing more than the cost of doing business. The Court of Appeals' ruling should be affirmed.

III. The Commission should not get another bite at the apple where it offered no evidence at all concerning the purported burden of compliance with KOGC's request.

The Commission argued—and the Franklin Circuit Court agreed—that it would be an "unreasonable burden" within the meaning of KRS 61.872(6) for agencies to ask officials or employees to turn over copies of any text messages they sent related to public business. To invoke that statute, however, an agency must show that complying with the request "places an unreasonable burden" on the agency, and must do so "by clear and convincing evidence." KRS 61.872(6). The agency "faces a high proof threshold." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008).

The Court of Appeals correctly rejected the trial court's new blanket exemption for text messages as inconsistent with the Act. It found that "the relevant question is whether this particular open records request by [KOCG] constitutes an unreasonable burden upon the Commission and its members considering the particular facts of this case." COA Opinion, p. 23-24. Thus, it vacated the circuit court's unreasonable-burden order.

However, the court erred when it remanded the case back to the circuit court for additional factual findings. The Act is clear: agencies invoking KRS 61.872(6) have the burden to produce clear and convincing evidence. Yet the Commission offered none in the trial court, even when moving for summary judgment. Indeed, even on appeal its "undue burden" argument is not even

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related to KOCG's request. The Commission instead invoked KRS 61.872(6) on behalf of the "nearly four hundred boards and commissions throughout the Commonwealth," breathlessly speculating that requests like KOCG's "would quickly bring state agency operations to halt and result and result in potentially millions of tax payer dollars." Commission Brief, p. 13-14. These sweeping policy statements are asserted without any factual basis or supporting evidence.

The Commission has no right to a do-over. *See, e.g.*, *Henninger v. Brewster*, 357 S.W.3d 920, 928 (Ky. App. 2012) (assertion "that additional discovery may produce evidence" after adverse summary judgment ruling "is untenable"). It could have built a factual record to sustain its burden, but it chose not to. It should not now be given a chance to build the record it could have the first time around. *Id*. ("[I]t is not necessary to show that the respondent actually completed discovery, but only that the respondent has had an opportunity to do so.").

Nor could the Commission meet such a burden. The Commission never denied the requested public records exist on Commissioners' personal cell phones—in large part because it did not issue them any state-funded communication account or device. It cannot be inherently burdensome to ask the Commissioners to retrieve responsive public records from Commissioners phones if all Commission business is conducted through those phones. "In other words, the [Commission] should not be able to rely on any inefficiency

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in its own internal record keeping system to thwart an otherwise proper open records request." *See Chestnut*, 250 S.W.3d 655 at 666.

IV. 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.

Under the Open Records Act, "any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action." KRS 61.882(5). An agency acts willfully under the statute by withholding records "without plausible justification and with conscious disregard of the requester's rights." *City of Fort Thomas,* 406 S.W.3d at 854.

The Franklin Circuit Court and Court of Appeals each determined that the Commission did not willfully violate the Act. Both courts based their holding on the purportedly "unsettled" state of the law created by the isolated Attorney General opinions the Commission purports to rely on. COA Opinion, p. 27. But this Court need not defer to the lower court's legal conclusions—particularly the trial court's, which misapplied the "unreasonable burden" standard in a blanket manner. This Court is free to decide that the Commission's conduct was willful as a matter of law and remand the case for a determination of the appropriate amount of statutory fees and penalties. KRS 61.882(5) ("Any person who prevails against any agency in any action in

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the courts regarding a violation of [the Act] may, upon a finding the records were willfully withheld…be awarded costs, including reasonable attorney's fees.").

Indeed, appellate courts have not hesitated to impose statutory fees and penalties on agencies that invoke clearly erroneous OAG opinions to prevent the public from accessing its records. *See e.g., Dep't of Kentucky State Police v. Teague*, No. 2018-CA-000186- MR, 2019 WL 856756 (Ky. Ct. App. Feb. 22, 2019); *Cabinet for Health & Fam. Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375 (Ky. App. 2016). On cross-appeal, KOCG asks this Court to vacate the lower court's willfulness decision and remand the matter to the trial court to determine the appropriate fee and penalty award.

From the moment it received KOCG's request the Commission deliberately ignored KOCG's right to access Commission records. The Commission refused to acknowledge its obligations to search for public records on the Commissioner's private devices and accounts despite the plain text of the Open Records Act and caselaw establishing that all records used to conduct agency business are public records, regardless of where they are stored. Instead of searching the devices on which all Commission business is conducted, and then attempt to meet its statutory burden to prove one of the Act's exemptions allowed the Commission to withhold the records, it simply declared the Commissioners' communications amongst themselves about public business are not public records at all. Such blatant refusal to engage

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with the Act's transparency obligations should not be countenanced by this Court.

The Commission's conduct is especially willful because it *knew* the requested records were subject to the Act long before it received KOCG's request. The Commission's own attorneys advised Commissioners that the Act obligates them to produce public records on "personal cell phones [and] personal email" under the Act. Commission Training Video, 50:25-50:45. The video of the Commissioner's training was publicly available during the pendency of this appeal. It has since been removed from YouTube, further demonstrating the Commission's willingness to deprive the public of its right to know what the Commission is doing in its name.

The negative policy implications of the Commission's refusal to produce public records stored on personal accounts and devices are severe. Because the Commissioners were not provided with any government funded form of communication, all records created by the Commission that did not include a non-Commission state employee existed only on the Commissioner's personal devices and account. Despite the public advice from its own attorneys, the Commission took the position that it could evade the Act entirely simply by failing to give Commissioners access to public resources. That scheme was not devised in good faith. It was a deliberate attempt to disregard KOCG's (and the public's) right to access the Commission's records.

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The Commission then compounded this willful violation of the Act by trying to use the Open Meetings Act as a shield against disclosure under the Open Records Act. Similarly, it tried to recast any attempt by the public to learn about the agency's actions as an "unfettered fishing expedition." (Commission's Motion for Summary Judgment, p. 15). These arguments did not meet KOCG's request in good faith. The Commission abandoned them on appeal, but they have served their intended purpose: to delay, and in the process, frustrate the public's right to learn what the Commission "is up to" and if it is "indeed serving the public." *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d at 85-86.

The Commission's "legal strategy designated to delay, obstruct, and circumvent" its obligations under the Open Records Act should not be rewarded. *Courier-Journal*, 493 S.W.3d at 386. This Court should order the Commission to produce all public records responsive to KOCG's open records stored on Commissioner's personal email account and cell phones immediately and remand this matter to the circuit court solely to determine the appropriate fee and penalty award for the Commission's willful violation of the Act.

CONCLUSION

KOCG should already possess the public records it requested more than three years ago. It does not because the Commission failed to maintain an appropriate record keeping system, ensuring that Commissioners do not conduct business on government-owned communications platforms. It then

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refused to ask its Commissioners to search for and produce routine public records responsive to KOCG's request. The Commission's conscious disregard of its legal obligations and the public's rights to access its records must end. This Court should vacate the portion of the Court of Appeals opinion remanding this case to the circuit court for further evidence on the undue burden question and order that all responsive records be produced immediately. It should also vacate the Court of Appeals' willfulness decision and remand the matter to the Franklin Circuit Court for a determination of the appropriate amount of fees and statutory penalties.

Dated: December 13, 2024 Respectfully Submitted,

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/s/ Michael P. Abate

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