COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
SUPREME COURT CASE NO. 2011-SC-725

CITY OF FORT THOMAS — APPELLANT

KENTUCKY COURT OF APPEALS
CASE NO. 2010-CA-1072

v.

APPEAL FROM THE CAMPBELL CIRCUIT COURT
CASE NO. 09-CI-1145

CINCINNATI ENQUIRER d/b/a KENTUCKY ENQUIRER — APPELLEE

BRIEF OF THE ASSOCIATED PRESS AND KENTUCKY PRESS ASSOCIATION, INC. AS AMICI CURIAE IN SUPPORT OF APPELLEE

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of this brief were served via First Class U.S. Mail, postage prepaid, this 28th day of August, 2012, to: Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Fred A. Stine, Campbell Circuit Court, 330 York Street, Second Floor, Division 2, Newport, KY 41017; Jeffrey C. Mando, Jennifer H. Langen, Adams Stepner, Woltermann & Dusing, PLLC, 40 West Pike Street, Covington, KY 41012-0861; Paul Alley, John Greiner, Graydon Head & Ritchey LLP, 2400 Chamber Center Drive, Suite 300, Fort Mitchell, KY 41017.

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INTRODUCTION

Pursuant to CR 76.12(4)(e), amici curiae The Associated Press and Kentucky Press Association, Inc. state that the purpose of this Amicus Brief is to aid the Court in its review of the opinion of the Court of Appeals. The particular issue addressed in this Amicus Brief is the appropriate interpretation and application of the Open Records Act's exception for certain law enforcement records, KRS 61.878(1)(h).

The Associated Press and Kentucky Press Association, Inc. urge this Court to affirm the holding of the Court of Appeals. Applying the plain language of the exception at KRS 61.878(1)(h), the Court of Appeals held that a law enforcement agency may withhold records under the exception only where it can demonstrate *both* (1) that "enforcement action" is not yet "completed," *and* (2) that disclosure of the records would harm the agency, either by revealing the identity of unknown informants or by premature release of information to be used in a prospective law enforcement action. Id. The Court of Appeals' holding follows the language of the exception and abides by the statutory rule that Open Records Act exceptions must be "strictly construed." KRS 61.871.

Moreover, the Court of Appeals' decision correctly applied this Court's holding in Skaggs v. Redford, 844 S.W.2d 389 (Ky. 1992). Skaggs dealt only with the question of when a law enforcement action is "completed" under KRS 61.878(1)(h). However, that question is irrelevant to this case because, regardless of whether the law enforcement action is "completed," there has been no affirmative showing of any harm to the Appellant City of Fort Thomas as required by KRS 61.878(1)(h).

As such, this Court should affirm the Court of Appeals' decision.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

The Court should affirm the decision of the Court of Appeals concerning the correct interpretation and application of the Open Record Act's exception for certain records of law enforcement agencies, KRS 61.878(1)(h). The exception applies to,

> Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884.

KRS 61.878(1)(h) (emphasis added).

In this case, the Court of Appeals dealt with a situation in which the Appellant City of Fort Thomas (the "City") invoked the exception as the basis of its refusal to disclose police department records of an investigation of the death of Robert McCafferty. The target of the investigation, Cheryl McCafferty, had been convicted by a jury of killing her husband and had entered into an agreement to be sentenced to 18 years' imprisonment. Many of the records at issue had been provided to Ms. McCafferty in criminal discovery or entered as evidence at trial.

On appeal, the Court of Appeals correctly applied the Open Records Act exception under its clear and unambiguous language. The Court of Appeals held that, in

order to shield records from disclosure, the City was required to show both (1) that enforcement action against Ms. McCafferty is not completed, and (2) that release of the requested investigation records would harm the City.

On appeal to this Court, the City argues that it should only be required to show that enforcement action is not yet completed by claiming that Ms. McCafferty's sentence has not been fully carried out. According to the City, so long as there is a possibility of any judicial proceeding to collaterally attack Ms. McCafferty's conviction or sentence, it must be conclusively presumed that the release of any records would harm the City by premature release of information to be used in a prospective law enforcement action.

The City's interpretation of the law enforcement exception effectively closes all law enforcement records, where a conviction has occurred but the sentence has not been fully completed. Under the City's argument, law enforcement records in cases that result in life sentences or other substantial imprisonment would remain secret for decades. This is true even where there has been a guilty plea or in cases where there has been a trial and the records have been made available to the defendant and even put in evidence. That is not at all the intent of the law enforcement exception or of the Open Records Act. As this Court held in Courier-Journal & Louisville Times Co. v. Peers, 747 S.W.2d 125 (Ky. 1988),

> We recognize that the government belongs to the people, that its activities are subject to public scrutiny, and that the news media is a primary source for protecting the right of public access. ...
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> ***
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> News is news when it happens and the news media needs access while it is still news and not history. The value of investigative reporting as a tool to discovery of matters of public importance is directly proportional to the speed of access.

Id. at 128-129. The City's formulation of the law enforcement exception, automatically closing all records until after criminal sentences are fully served, would contradict this Court's holding in Peers and would leave the public without any means of learning about law enforcement actions until years later, after the matter has become history.

The Court of Appeals correctly rejected the City's argument, and this Court should affirm that decision.

I. THE OPEN RECORDS ACT STRONGLY FAVORS DISCLOSURE AND REQUIRES EXCEPTIONS TO BE STRICTLY CONSTRUED.

Like all other exceptions to disclosure under the Open Records Act, the proper interpretation and application of KRS 61.878(1)(h) is guided by the basic policy of the Act:

> ... that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

KRS 61.871. The Open Records Act's presumption of openness is grounded in the notion that inspection of records reveals whether public agencies are serving the public, and also provides impetus for agencies steadfastly to pursue the public good. Kentucky Bd. Of Examiners of Psychologists v. Courier-Journal and Louisville Times Co., 826 S.W.2d 324, 328 (Ky. 1992).

Relying on identical public policies underlying the Open Meetings Act, the Court recently rendered a unanimous decision reaffirming Kentucky's strong commitment to transparency and to the narrow application of exceptions to openness. In Carter v. Smith, the Court held,

> By excluding the public from the discussion of Carter's consulting contract, the Board expanded the intended scope of the personnel exception and improperly concealed matters otherwise appropriate for public view. "The people, in delegating authority, do not give their public servants the right to decide what is good for the public to know and what is not good for them to know . . . ."
>
> ***
>
> "[T]he formation of public policy is public business and may not be conducted in secret . . . [T]he people of this Commonwealth do not yield their sovereignty to the agencies which serve them . . . [but] insist on remaining informed so they may retain control over the instruments they have created."

Carter v. Smith, 366 S.W.3d 414, 422-423 (Ky. 2012) (*quoting* 1974 Ky. Acts Ch. 377, HB 100) (Supreme Court's internal punctuation and quotations).

These principles of transparency apply with great force in this case. There is no question that the public has a strong interest in monitoring the activities of its law enforcement agencies, particularly with respect to their investigation and prosecution of serious criminal offenses. The public's interest in monitoring the criminal justice system cannot be overstated. The U.S. Supreme Court has recognized a constitutional dimension to the public's interest, holding that there is a First Amendment right for the public to attend and observe criminal trials. In first articulating the constitutional right, the U.S. Supreme Court held,

> The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner. It is not enough to say that results alone will satiate the natural community desire for satisfaction. A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.

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> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.

Richmond Newspapers v. Va., 448 U.S. 555, 571-572 (1980) (internal punctuation and citations omitted). There is no doubt that the public has an intense interest in monitoring the operations of the criminal justice system, which includes both criminal trials and the work of law enforcement agencies that forms the basis of criminal prosecution.

In accord with the strong public interest in openness, Kentucky's General Assembly has made clear that exceptions to disclosure under the Open Records Act must be "strictly construed." KRS 61.871. Moreover, a public agency resisting disclosure must carry the burden of proving that any claimed exception to disclosure applies to the particular records. That burden must be carried by the public agency at each stage of the process. A public agency's denial of a request for inspection must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). If the denial is appealed to the Attorney General or to a circuit court, the public agency must carry the burden of proof. See KRS 61.880(2)(c); KRS 61.882(3).

The presumption of openness and the importance of holding a public agency to its burden of proof are further heightened specifically under the law enforcement exception. The exception provides that "[t]he exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884." KRS 61.878(1)(h). Among all 14 of the exceptions to the Open

Records Act, that provision is unique to the law enforcement exception. See KRS 61.878(1)(a) through (n). Out of all of the exceptions, the General Assembly focused on the law enforcement exception to emphasize that public agencies must not use the exception as a means of delaying or impeding public access under the Open Records Act. If any effect is to be given to that distinctive provision, then courts must hold law enforcement agencies to a strict construction and to a rigorous standard when applying the law enforcement exception.

II. THE EXCEPTION AT KRS 61.878(1)(h) REQUIRES PROOF THAT RELEASE OF RECORDS WOULD HARM THE PUBLIC AGENCY.

The law enforcement exception is explicit, and there is nothing extraordinary about the Court of Appeals' application of the exception in this case. The Court of Appeals simply followed the express language of the statute and "strictly construed" the exception as mandated by KRS 61.871. The Court of Appeals held the City to its burden of proof as mandated by KRS 61.882(3) and held that the City failed to meet its burden of proving that it would be harmed by the release of the records. That decision should be affirmed.

By its plain language, the exception requires several elements in order to exempt a public record from disclosure. First, the exception only applies to records "compiled in the process of detecting and investigating statutory or regulatory violations." KRS 61.878(1)(h). Second, the exception applies only "if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication." KRS 61.878(1)(h). Third, the exception only applies before

"enforcement action is completed or a decision is made to take no action." KRS 61.878(1)(h).

Those three requirements of the law enforcement exception are unambiguously set forth in the text of KRS 61.878(1)(h). The exception is clear that a public agency must meet all three requirements in order to withhold a public record. The Court of Appeals' decision confirms those three requirements. Yet, the City suggests that this Court should judicially nullify one of the three requirements -- harm to the public agency. Instead of following the law as written and withholding records only upon a particularized showing that release would harm the law enforcement agency, the City seeks to have the exception swallow the rule. The City wants the harm requirement to be irrebutably assumed to exist in all cases. That is neither the intent nor the language of the law enforcement exception, and this Court should reject the City's argument.

The City contends that the release of any law enforcement investigative record at any time prior to a convicted criminal defendant completing his or her sentence should automatically and irrebutably be presumed to "harm the agency ... by premature release of information to be used in a prospective law enforcement action." (See City's Brf., pp. 9, *et seq.*) Yet, the City does not articulate what harm would actually occur or how any harm might occur. In reality, the City argues for an application of the exception that would "delay or impede the exercise of rights granted by" the Open Records Act in precisely the manner prohibited by KRS 61.878(1)(h).

The City asks this Court to judicially amend KRS 61.878(1)(h) to remove altogether the requirement that release of a law enforcement record harm the agency. In its place, the City requests a new rule that would allow law enforcement agencies to

withhold all records until a convicted criminal defendant completes his or her sentence, regardless of whether the release of records would harm the agency and regardless of whether further judicial proceedings remains a "significant prospect." Skaggs v. Redford, 844 S.W.2d 389, 391 (Ky. 1992).

In suggesting that harm should be automatically presumed, the City urges an interpretation of the exception that completely ignores the use of the word "if." KRS 61.878(1)(h). The word "if" is conditional, and its use in the statute definitively signifies a legislative conclusion that release of law enforcement records prior to the completion of law enforcement action does not *always* harm the agency by premature release of information to be used in a prospective law enforcement action. Similarly, it cannot be seriously contended that release of records prior to the completion of law enforcement action always reveals the identities of unknown informants. To hold otherwise would be illogical, contrary to the language of the statute, and would render the entire first provision of KRS 61.878(1)(h) completely meaningless. Under the City's interpretation, no law enforcement agency would ever have to allege or show harm; law enforcement agencies would have carte blanche to withhold all records in cases where convicted defendants continue to serve their sentences, regardless of any other circumstances. That interpretation should be rejected as contrary to the language of the statute and contrary to the purpose of the Open Records Act.

The general rule of statutory construction is that, when interpreting a statute, a court is to assume "that the legislature intended for it to mean exactly what it says." Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009) (*citing* Revenue Cabinet v. O'Daniel, 153 S.W.3d 815, 819 (Ky. 2005)). Courts "are not at liberty to add

or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." Commonwealth v. Harrelson, 14 S.W.3d 541, 546 (Ky. 2000). Here, the unambiguous language of KRS 61.878(1)(h) requires both that enforcement action is not yet completed *and* that release of records would harm the agency either by revealing unkown informants or by premature release of information to be used in a prospective law enforcement action. The Court should not construe the statute to eliminate the requirement that release of the records would harm the public agency. Not only would such an interpretation violate the ordinary rules of statutory construction, but it would be exactly the opposite of the strict construction of exceptions mandated by KRS 61.871.

Any automatic presumption that the City will be harmed by release of law enforcement records prior to Ms. McCafferty serving her 18-year prison sentence is both unsupported by the language of the law enforcement exception and makes no practical sense. There is no suggestion that public disclosure of the records would somehow place the City or the Commonwealth at an unfair disadvantage in responding to a collateral attack under RCr 11.42 or a habeas corpus petition. The reality is that most of the investigative records were provided to Ms. McCafferty's attorneys in criminal discovery. Similarly, many of the records were placed in evidence in the public criminal trial. It is difficult to understand what harm could occur from the release of records that have already been released. The City has failed to specify any such harm and has failed to carry its burden of proof under KRS 61.882(3). The City is simply wrong to suggest that harm should be automatically presumed where a convicted defendant has not completed his or her sentence.

Under the City's interpretation of the law enforcement exception, the public's ability to learn about and to monitor the actions of state and local law enforcement activities throughout Kentucky would be severly curtailed. Police agencies throughout the state would be given the ability to deny virtually any request for records, and records relating to the investigation of the most heinous crimes would remain secret for decades upon decades until life sentences or death sentences are completed. As the Court of Appeals observed, that would make the law enforcement exception to Kentucky's Open Records Act the most restrictive of all of the States' open records laws. (See Ct. of App. Opinion, pp. 10-11.) It would, in fact, make all such records state secrets. This Court should not permit such a result, which would be anathema to the text and the fundamental policies of the Open Records Act. The Court of Appeals' decision should be affirmed.

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S HOLDING IN SKAGGS V. REDFORD.

The City incorrectly suggests that the Court of Appeals' decision somehow contravenes this Court's holding in Skaggs v. Redford, 844 S.W.2d 389 (Ky. 1992). In fact, Skaggs is nothing like this case. The question before the Court in Skaggs was whether the Commonwealth's defense of an imminent habeas corpus case by a death row inmate meant that "enforcement action" was not yet completed. Id. at 390. In Skaggs, the convicted inmate made an open records request for the Commonwealth attorney's prosecutorial file. See id. The inmate in Skaggs had exhausted his appeals, was preparing to file a petition for habeas corpus in federal court, and requested the prosecutor's file for the specific purpose of supporting his habeas corpus petition. Id. at 389.

The decision in Skaggs focused on the issue of when law enforcement action is "completed" under the statute; it did not eliminate the requirement of showing "harm"

under the law enforcement exception. The Commonwealth conceded in Skaggs that the records were only exempt "if the information would harm the agency 'prospective law enforcement action.'" 844 S.W.2d at 390 (emphasis added). The only question before the Court in Skaggs was whether "the prospect of a federal habeas corpus action, which is now admittedly under active consideration by the appellant's post-conviction counsel, qualifies as 'prospective law enforcement action.'" Id. at 390.

Further, Skaggs involved an open records request to a Commonwealth's attorney – not a police department. In 1992, during the pendency of the Skaggs case, the General Assembly revised the law enforcement exception to add the following language:

> ... however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action.

1992 Ky. Acts 163, § 5; see Skaggs, 844 S.W.2d at 390. Thus, under the 1992 amendment, the Commonwealth attorney's file was clearly exempt from disclosure regardless of whether the "enforcement action" was completed and without the need for a showing of harm. Yet, the Skaggs Court declined to decide whether the 1992 amendment applied retroactively to the inmate's records request. Id. at 390. Instead, the Court interpreted the pre-1992 version of the exception as "postponing availability of the Commonwealth Attorney's file in his case so long as the possibility of further judicial proceedings in his case remains a significant prospect." Id. at 391 (emphasis added).

Unlike Skaggs, this case deals with the records of a police department and not a Commonwealth attorney or county attorney. Under the current version of KRS

61.878(1)(h),[1] Commonwealth attorneys and county attorneys may withhold their criminal investigation and litigation records without a showing of any harm and even after enforcement action is completed. Police agencies, by contrast, must show both that releasing records would cause harm and that enforcement action is not completed.

Further, unlike Skaggs, this case deals with an open records request by a news media organization and not by the convicted defendant who is the subject of the investigation records. That is a critically important distinction in light of the Skaggs Court's treatment of the exception's "harm" component. In Skaggs, the criminal defendant had already been provided voluminous records from the Commonwealth's attorney as part of the required discovery process in the criminal case. He requested to examine the prosecutor's file to determine whether the prosecutor "did not inadvertently or deliberately fail to disclose exculpatory material which would render his sentence invalid" under Brady v. Maryland, 373 U.S. 83 (1963). Skaggs, 844 S.W.2d at 389. Thus, the open records request in Skaggs dealt solely with information that had not previously been provided in discovery or trial and that was requested for the precise purpose of harming the public agency by collaterally attacking the conviction and sentence. Id. That is a very different situation from this case, where a newspaper requested records of the City's police department after the criminal defendant had been provided the records in discovery, had been convicted in a public trial, had been sentenced, and had waived the right to a direct appeal.

As the Court of Appeals held in this case, Skaggs does not eliminate the requirement that a law enforcement agency show "harm" under KRS 61.878(1)(h). That

[1] Not considered by this Court in Skaggs.

requirement has always been a part of the law enforcement exception, and it is separate and apart from the requirement of showing that enforcement action is not yet completed. Here, the Court of Appeals correctly construed and applied the law enforcement exception, and this Court should affirm its decision.

CONCLUSION

For all the reasons stated herein, the amici curiae respectfully request the Court to affirm the decision of the Court of Appeals.

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