COMMONWEALTH OF KENTUCKY
KENTUCY SUPREME COURT
SUPREME COURT NO. 2011-SC-000725

CITY OF FORT THOMAS **APPELLANT**

KENTUCKY COURT OF APPEALS CASE NO. 2011-CA-001072
v. APPEAL FROM CAMPBELL CIRCUIT COURT
CASE NO. 09-CI-1145

CINCINNATI ENQUIRER, A DIVISION OF GANNET SATELLITE INFORMATION NETWORK, INC., d/b/a KENTUCKY ENQUIRER **APPELLEE**

BREIF FOR APPELLEE, THE CINCINNATI ENQUIRER dba THE KENTUCKY ENQUIRER

Submitted by:

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CERTIFICATE REQUIRE BY CR 76.12(6)

The undersigned does hereby certify that copies of this brief were serve upon the Clerk of the Kentucky Supreme Court, New Capitol Building, Room 235, 700 Capital Avenue, Frankfort, Kentucky 40601 by Hand-Delivery and upon the Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601; Hon. Fred A. Stine, Campbell Circuit Court, 330 York Street, Div. II, Newport, Kentucky 41017; and Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, PLLC, 40 West Pike Street, Covington, Kentucky 41012 by First Class Mail on October 19, 2012. The undersigned does also certify that the record on appeal was not removed from the Campbell Circuit Court.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee, the Cincinnati Enquirer, requests oral argument because the issues presented in this appeal are issues of first impression and no prior authority exists to elucidate the proper interpretation and application of KRS 61.878(1)(h) to a municipal law enforcement investigative file.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTER STATEMENT OF THE CASE

This appeal began as an Open Records Act[1] ("Act") appeal in which the Cincinnati Enquirer dba The Kentucky Enquirer ("Enquirer" or "Appellee") sought relief in the Campbell Circuit Court pursuant to KRS 61.882 to gain access to the City of Fort Thomas' ("City" or "Appellant") police file on the homicide of Robert McCafferty. (Record p. 2, Admitted Complaint ¶ 1). At all relevant times to the appeal, the City was in possession of the investigative file and records at issue. (Record p. 4, Complaint ¶ 14). The evidence below consists only of the admitted portions of the Enquirer's original Complaint and its exhibits since no affidavits or testimony were placed in the record.

On June 25, 2007, Cheryl McCafferty, the criminal defendant, killed her husband, Robert, inside their residence. (Record pp. 7-8, Complaint ¶¶ 48). The City's police department investigated the murder and maintained a file. *Id.* It is admitted that items gathered in the police investigation were entered into evidence at the public criminal trial. (Record p. 5, Complaint ¶28 and Answer ¶28). On March 16, 2009, the court entered an Amended Judgment and Sentence for First Degree Manslaughter. (Record p. 3, Complaint ¶8). Ms. McCafferty returned on March 19, 2009 and, as part of a sentencing agreement, waived all her appellate rights, waived the sentencing phase of the trial, and waived the right to present any mitigating evidence. (Record pp. 3-4, 11, Complaint ¶ 8 and ¶ 9 and its Exhibit A).

On March 16, 2009, the same day as the conviction, but before the sentencing, a TV station made an open records request for video tapes from the police investigative file. (Record pp. 4, 14 and 16, Complaint ¶¶ 16 and 17 and Exhibits B and C). The next day, the City gave the TV station the requested tapes. (Record pp. 4 and 16, Complaint ¶

[1] See K.R.S. 61.870-K.R.S. 61.884.

17 and Exhibit C). The City never asserted any Open Records exemption under KRS 67.878(1)(h), the investigative records exemption, nor did it make any claim that "harm" would result from giving the videos to the TV station. *Id.* On March 19, 2009, Ms. McCafferty returned to Court for sentencing. (Record pp. 13-14, 11; Complaint ¶ 8 and ¶ 9 and its Exhibit A).

On April 08, 2009 the Enquirer submitted an open records request to the City stating:

> Pursuant to the state open records law, Ky. Rev. Stat. Ann. Secs. 61.870 to 61.884, I write to request access to, and copies of, the investigation into Robert McCafferty's death. (Record pp. 5 and 18, Complaint ¶ 20 and its Exhibit D).

This Request encompassed not only the videos given to the TV station, but also the many additional documents and items in the City's file which logically divide into four general categories:

1. Documents and items disclosed as public trial evidence;
2. Documents and items previously released to the public (e.g. the videos, incident reports, etc.);
3. Documents and items given to the accused in discovery; and
4. Any remaining items.

The City responded five days later with a blanket denial "due to the right of the Defendant to file a motion under Rule of Criminal Procedure 11.42." (Record p. 5 and 22, Complaint ¶ 22 and 26 and its Exhibit E). In responding to the Enquirer's request, the City wholly denied the Enquirer's access request. *Id.* There is no evidence that the City conducted any pre-denial review of the records in its file to determine their substance. Neither is there any evidence of any effort to sort the documents based on their substance or prior disclosure status. The City instead simply withheld every document, including, but not limited to, the videos previously given to the TV station, the

evidence or copies used in the public trial, and the discovery provided to the defendant. *Id.* The only premise for the denial was that the enforcement action remained incomplete. *Id.*

The City cited KRS 61.878(1)(h) and no other exemption under the Act. (Record pp. 5, 22; Complaint ¶23 and Denial Letter). KRS 61.878(1)(h) states in its entirety,

> 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 or information to be used in a prospective law enforcement action or administration 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 litigation shall be exempt 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 61878(1)(h).

The City did not allege that any actual harm might result from permitting inspection nor did it direct the Enquirer to seek the documents from any other public agency. (Record p. 5 and 22, Complaint ¶ 22 and 26 and Exhibit E)

The Enquirer appealed the denial to the Attorney General. (Record p.7, Complaint ¶41 and OAG-09-ORD-104). In June, 2009, months after the Enquirer's original request, and while the Attorney General appeal was still pending, the City held a "public viewing" of the evidence. (Record p. 7, Complaint ¶40 and 41). Despite the City's "public viewing" event, the City never amended its position in front of the Attorney General or its original response to the Enquirer, but instead continued to oppose the Enquirer's request in its entirety. *See generally* OAG 09-ORD-104. Despite the disparate treatment

of the Enquirer and the TV Station on the videos being raised in the Attorney General appeal, the City continued to withhold the videos until after the final Attorney General decision in July, 2009. (Record p. 7, Complaint ¶¶ 40 and 42). The Attorney General Opinion noted that the City offered zero explanation or justification for withholding the videos from the Enquirer while giving them to the TV Station and observed that the practice of "selective disclosure" was a violation of the Act. OAG 09-ORD-104 at 6-7.

Only the videos were released after the Attorney General opinion, so the Enquirer sought *de novo* review pursuant to KRS 61.882(3) in the Campbell Circuit Court. (Record p. 2, Complaint ¶1). The City admitted certain allegations in the Complaint, but offered no evidence, no testimony, and no affidavits. No *in camera* inspections of the file occurred except for the two videos allegedly obtained directly by the trial judge from the criminal court file. (Record p. 107, May 10, 2010 Order). On May 10, 2010, the Circuit Court entered the decision giving rise to this appeal (the "Order"). (Record pp. 101-114). The Circuit Court's principal finding and rationale was that because a collateral motion could still be filed, the exemption under KRS 61.878(1)(h) therefore applied. (Record p. 111, Trial Order p. 11). The Enquirer appealed.

Before the Court of Appeals, the Enquirer argued in pertinent part;

1. That the trial court erred by upholding application of KRS 61.878(1)(h) when the record did not contain evidence supporting its application;

2. That the trial court misinterpreted KRS 61.878(1)(h);

3. That the trial court and City erred by not considering pre-existing and contemporaneous disclosures of the documents before denying access;

4. That reliance on *Skaggs v. Redford*, 844 S.W.2d 389 (Ky. 1992) was in error because the case was distinguishable on the facts and did not hold that investigatory records must *per se* be withheld until the sentence is complete;

5. That the trial court erred in finding that the Enquirer's open records request was "vague" as a matter of law;

6. That the evidence of a willful withholding was demonstrated and uncontested. (Enquirer's Court of Appeals Appellant Brief).

The Court of Appeals agreed that the investigatory exemption was incorrectly applied below. It partially reversed because the City never established that any harm would result from public inspection, but it affirmed on the separate narrow issue of the partial redaction of the two videos on privacy grounds. (Court of Appeals Decision at p. 16). Fundamentally, the Appeals Court held that the record did not contain the necessary evidence to support application of KRS 61.878(1)(h) and that the trial court erred in its interpretation of Skaggs. (Court of Appeals Decision p. 12). The court held that the investigative exemption remains available until a convict's sentence is complete, but held that in order to utilize the exemption a public agency *must* demonstrate that inspection would be premature and cause harm. *Id* at 12-13. The court also found that it was error to ignore pre-existing records disclosures before denying access because no harm could be demonstrated for items previously released. *Id.* The case was returned to the trial court to determine what records should have been disclosed. *Id.* at 16. Recognizing that the City lacked any legal or factual excuse for much of its conduct and with evidence of willfulness in the Denial, the Court of Appeals correctly reversed the trial court's denial of fees and costs. *Id.* A Motion for Discretionary Review by the City followed.

ARGUMENT

The Court should affirm the decision of the Court of Appeals which correctly interpreted both KRS 61.878(1)(h) and relevant case law. The appeals court correctly held that at any stage in an enforcement action the essential question under KRS 61.878(1)(h) is whether release of the records actually poses a risk of harm. In this case

the City, despite having the burden of proof, never inquired into the actual risk and when challenged never attempted an affirmative showing of harm sufficient to satisfy the exemption.

I. THE APPELLANT OFFERS A MISINTERPRETATION OF BOTH KRS 61.878(1)(h) AND *SKAGGS V. REDFORD* TO JUSTIFY A BLANKET DENIAL NOT ALLOWED BY THE OPEN RECORDS ACT.

Skaggs v. Redford, 844 S.W.2d 389 (Ky. 1992) was not dispositive of the issues in this appeal because the circumstances and records in dispute are not the same. The Court of Appeals correctly read Skaggs v. Redford, 844 S.W.2d 389 (Ky. 1992) as answering when a law enforcement action is complete, but as not having dispensed with the prerequisite harm test required by KRS 61.878(1)(h) for investigative records. Appellant simply reduced all exemption analysis to the single issue of whether the enforcement action was "complete." That analysis incorrectly short circuits KRS 61.878(1)(h)'s harm requirements by avoiding the duty to first determine if disclosure of all or part of an investigative file will cause harm. In place of thoughtful consideration of the individual records and their substantive content, the City clings exclusively to the proposition that no analysis is needed because an enforcement action survives. (Appellant Brief p.7). This skips over the basic and prerequisite issue of whether the exemption may be legitimately invoked in the first place, because an initial application of the exemption was not the issue in Skaggs. Skaggs, 844 S.W.2d at 390. Appellant misses this very point and that leads it to a fundamentally flawed misinterpretation of the Skaggs case.

A careful reading of Skaggs reveals the very different circumstances of that case. In Skaggs, both sides agreed that the prosecutor's file was initially exempt, but they

disagreed on whether that exemption could survive the end of the state court appeals process:

> The appellant's position is that the [prosecutor's] file may be exempt from the Open Records Act while his criminal prosecution is pending, but once it has been completed the Commonwealth Attorney's file is a public record open to inspection.... .

Skaggs, 844 S.W.2d at 390. The Commonwealth replied that the exemption could continue because an additional habeas corpus action was anticipated. *Id.* The Court framed it this way, "[t]he question is whether the prospect of a federal habeas corpus action qualifies as an additional 'prospective law enforcement action" under the exemption. *Id.* The court held that the "state's interest in prosecuting a [criminal] is not terminated until his sentence has been carried out" and that convicts should not have complete access to the prosecutorial file. *Id.* at 390, 391.

The Enquirer was not after a prosecutor's file like that in Skaggs, but records in a municipal police investigative file. The City attempts to blur this important factual distinction. Contrary to the City's arguments, Skaggs never mandated the same protection for a so-called "law enforcement agency's investigative file." (Appellant Brief p.6). The difference in the types of files is significant. KRS 61.878(1)(h) completely exempts a prosecutor's file, but allows only limited conditional protection for investigative records. Thus the General Assembly has recognized a difference in the nature of the two types of records and set out substantively different schemes for applying the exemption. *Id.*

In further contrast to Skaggs, most, if not all, of the records being sought by the Enquirer were previously disclosed to the defendant in Skaggs and presumably to Ms. McCafferty during the ordinary course of discovery and trial. *See* RCr 7.24. Thus the

essential core facts—the records and the entity holding them---are fundamentally different.

The fact that the City failed to produce even documents that are traditionally public, like the incident and arrest report, a copy of the dispatch log, mundane items or the videos it gave to the TV station sufficiently drives home how egregiously it failed to comply with the Open Records Act. *See* Cape Publications v. City of Louisville, Ky. App., 147 S.W.3d 731, 733 (Ky. App. 2003) (police incident reports allowed to be scrutinize), OAG 04-ORD-188 (police incident records are not exempt). It is simply unimaginable that everything in the City's file can logically satisfy the harm requirement of KRS 61.878(1)(h) and in this respect Skaggs' dicta is somewhat illustrative of the unreasonableness of the City's blanket denial,

> While we agree with the appellant that *if portions* of the file were otherwise discoverable, KRS 61.878(4) would make it incumbent upon the [agency] to "separate the excepted matterial available and make nonexcepted matterial available for examination... .

Skaggs, 844 S.W.2d at 391 (emphasis added). Despite the obligation of KRS 61.878(4) and the Open Records Act more generally, not a single record was turned over for inspection. The City made zero effort to segregate and produce non-exempt matterial; they never even looked.

Rather than address the records themselves, the City invokes the Skagg's holding about the life and duration of a valid exemption to obscure their lack of substantive review to determine true applicability. Again, before the City could get to the issue of how long items remain exempt, it first needed to do an analysis to establish which specific records actually satisfied the requirements of KRS 61.878(1)(h). It failed to do so. The City never offered a single affidavit that any of its staff so much as opened a file,

looked at a record, or made a trip to the courthouse before issuing the denial. Valid exemptions may very well last as long as the criminal's sentence, but the public agency must first perform the basic burden of establishing the exemption's applicability in the first instance. *See* University of Kentucky v. Courier-Journal & Louisville Times Co., 830 S.W.2d 373, 377 (Ky. 1992)(agency to prove public record exempt). The City's shortcut in this manner is a misguided and impermissible avoidance of the law.

II. BECAUSE KRS 61.878(1)(h) REQUIRES THAT HARM BE ESTABLISHED AS A PREREQUISITE TO ITS USE, THE CITY'S "*IPSO FACTO*" THEORY ADVANCES A PROPOSITION THAT DOES NOT EXIST IN LAW AND CAN ONLY BE ACHIEVED BY IGNORING THE ACTUAL STATUTORY LANGUAGE AND EXPRESS POLICY OF THE OPEN RECORDS ACT.

The Court of Appeal was correct in interpreting KRS 61.878(1)(h) to require actual harm and rejecting the City's "*ipso facto*" theory. The Court of Appeals layered no "additional" element of harm on top of KRS 61.878(1)(h), despite Appellant's contention to the contrary. Instead, the court found that the existing basic burden simply went unmet by the City. (Court of Appeals Decision p. 10). Rather than follow the actual language in KRS 61.878, the City urges adoption of an automatic denial rule for all investigative records until a law enforcement action is "complete". Yet, KRS 61.878(1)(h) by its plain language requires a different result. Its plain language requires that specific types of harm be shown. Merely establishing that the convict who is the subject of the file has not finished his or her sentence cannot in itself satisfy the burden. The Court of Appeals correctly recognized that KRS 61.878(1)(h) is not automatic because a thoughtful case by case consideration of the records' substance in context of all facts is necessary to determine if release would actually be premature. (Court of Appeals Decision p. 10).

"Ipso facto" must be rejected as a contrivance to avoid the assigned burden of proof and serve as a mere mechanism to justify hiding away records on a basis that has nothing to do with record content or actual risk of harm. The proposition conflicts with the basic public policy regarding a government of the people and the benefits of openness. Our courts have found virtue in promoting public access and openness even in criminal proceedings because it encourages public faith and trust in our system of justice. *E.g.* Lexington Herald-Leader Co., Inc. v. Meigs, 660 S.W.2d 658, 663-664 (Ky. 1983); Riley v. Gibson, 338 S.W.3d 230 (Ky. 2011); Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 752 (Ky. App. 1980). Similarly, the General Assembly has sought to promote the same goals through the Open Records Act. The Open Records Act has an express statement of policy,

> [T]hat 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.

Remaining faithful to these policies requires rejection of the artificial "*ipso facto*" theory because blindly denying access in every circumstance until expiration of a criminal sentence creates an excessively broad and unneeded level of secrecy with corresponding decreases in accountability. Investigations of serious crimes with long sentences will by necessity receive little to no scrutiny. The only factor that matters in the City's analysis is the duration of the sentence and "free and open examination of public records" is given short shrift. *Id.* The entire premise does violence to the clearly articulated intent of the Open Records Act. *See* Dept. of Rev, Fin. And Administrative Cabinet v. Wyrick, 323 S.W. 3d 710, 713 (Ky. 2010) (interpretation must give effect to intent of the General Assembly).

The City blindly treats all documents and material as secret no matter what the content. Not only can this not be reconciled with KRS 61.871's declaration of policy, but it fails to comply with the express obligations of KRS 61.878(1)(h) and KRS 61.878(4) too. The law does not permit withholding records for which there is no risk of harm simply because they are in a file with other items that might be exempt. *See* KRS 61.878(4). More particularly there can be no reasonable justification for refusing access to records openly discussed at the trial, introduced in trial, put on public display in other forums, shared with the defendant or third parties, or otherwise in circulation because none of those items could negatively impact the handling of a RCr 11 Motion. If simplicity of use were the goal, rather than fidelity to the Open Records Act's provisions, then *ipso facto* might make sense because it always results in denial. The actual policy however is openness.

A plain reading of KRS 61.878(1)(h) does not yield any "presumption" of harm. If the provision operated from a presumption of harm as claimed by Appellant, then the conditional use of "if" as a qualifier would be unnecessary. Ignoring the written words, "if the disclosure would harm the agency" contravenes the legal rule that all words in a statute be given effect not to mention subverting the overall statutory burden of proof assigned to the public agencies under KRS 61.882(2)(c) and KRS 61.882(3). *See also* Commonwealth v. Chestnut, 250 S.W.3d 655, 661 (court interprets Open Records Act as written without adding or subtracting); Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011) (all parts of statute to have meaning and be construed to harmonize) (citing Hall v Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008); Cape Publications v. City of Louisville, 191 S.W.3d 10 (Ky. App. 2006)(agency has burden of

proof under Open Records). On numerous levels, Appellant's interpretation of KRS 61.878(1)(h) contravenes the most basic rules of statutory construction because it deviates from both the intent and the actual written language. The City discards the "if" and ignores phrases in the exemption that warn against delay in release and generally rewrites the exemption through a tortured interpretation of Skaggs. *See* e.g. Commonwealth v. Harrelson, Ky., 14 S.W.3d 541, 546 (2000) (court not at liberty to add or subtract from the legislative enactment), Shawnee Telecom Resources, Inc., 354 S.W.3d at 551 (statute to be construed as a whole) and Hahn v. University of Louisville, 80 S.W.3d 771, 773 (Ky. App. 2002).

If statutory provisions differ in word usage it evidences intent of different meaning and effect. Commonwealth v. McBride, 281 S.W.3d 799, 806 (Ky. 2009)(legislature acted intentionally when different phrases used) (citing Palmer v. Commonwealth, 3 S.W.3d 763 (Ky. App. 1999). KRS 61.878(1)(h) displays an express difference in word choice when it deals with a prosecutor's file versus an investigative file. The relevant portion of KRS 61.878(1)(h) for a prosecutor's file states,

> [H]owever, records or information compiled and maintained by the county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation *shall be exempted* from the provisions of KRS 61.870 to 62.884 and *shall remain exempted* after enforcement action, including litigation, is completed or a decision is made to take no action. [emphasis added]

There is, however, no similar emphatic protection for the investigative records. For records compiled in the investigation process the "shall be exempted" language disappears and KRS 61.878(1)(h) instead permits only limited conditional protection:

> Records of law enforcement agencies or agencies involved in administrative adjudication that were complied 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. [emphasis added]

Being entirely conditional, the language requires establishment of the "harm." The different treatment of the two types of records is significant because "[w]here particular language is used in one statutory section, but omitted in another section...it is presumed that the legislature acted intentionally and purposefully in the disparate inclusion or exclusion." Commonwealth v. McBride, 281 S.W.3d 799, 806 (Ky. 2009). Faithful statutory construction requires that the difference be recognized and given effect. *Id.*

KRS 61.878(1)(h) exempts only records that would cause harm if released prematurely. The corollary is that if release would not cause harm then its release cannot be premature and there is no reason not to permit inspection. It is not a blanket exemption by any means and does not exempt every document merely because the action is continuing. Otherwise, the conditional language becomes unnecessary and surplus. Conditionality makes perfect sense, because at different stages in the investigative process some material can be expected to lose the need for secrecy, e.g. after an arrest is made, after trial or after appeal, so determining "harm" and "premature release" does require that all facts and circumstances be considered—rather than any artificial "*ipso facto*" rule that renders all matters of substance irrelevant. In the Enquirer's case a significant portion of the documents withheld by the City had already been disclosed in other contexts so this appeal presents a perfect demonstration of the arbitrary impact of adopting "*ipso facto.*"

Perhaps worst of all, Appellant's "*ipso facto*" rule invites abuse that the statute's drafters foresaw and sought to prevent. KRS 61.878(1)(h) is the only exemption in the entire Open Record's Act that carries with it a final expiration date beyond which no

document may be withheld and an explicit admonishment warning custodians against abuse by improperly delaying the release of records. The relevant portion of the exemption states,

> Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after an enforcement action 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 61.878(1)(h).

If investigative records were "automatically" exempt without regard to any test other than whether the action was complete as proffered by the City, then the above clauses would both be entirely unnecessary. Their collective implication when read in context of the whole provision and the greater Open Records Act, is that any records that do not pose an actual harm must be released at the earliest possible time, but in no case may records ever be withheld when no risk of harm remains.

Accepting the City's position means that even if the documents were displayed on billboards all around town, the analysis and need for denial would not change. The City's rule invites the withholding of documents that otherwise could not satisfy the requirements of the exemption. Unfortunately, the trial court's Order embraced this blanket denial theory and erroneously excused the City solely because of a theoretical possibility of an RCr 11.42 motion—not because any actual harm was established. The undesirable practical result is that any prior disclosure or other public availability of the records is ignored and harm assumed where it does not exist.

III. THE CITY SEEKS TO AVOID LEGAL DUTIES AND RESPONSIBILITIES THAT ARE A CORE RESPONSIBILITY AND ASSIGNED TO IT BY THE GENERAL ASSEMBLY BY ENACTMENT OF THE OPEN RECORDS ACT.

The City's third argument is nothing more than a wholesale rejection of the idea that the City must exercise good-faith in asserting an Open Records exemption. KRS 446.080 requires that the Commonwealth's statutes be liberally construed to promote the intent of the legislature. Here, the General Assembly determined that "free and open examination of public records is in the public interest[,]" even if "examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871. Additionally, KRS 61.871 states that any exceptions provided in KRS 61.878 shall be strictly construed. Because the exemption does not protect items unless the release would be harmful, the City has an unavoidable duty to ascertain a record's status, including reasonably ascertaining prior disclosure status, before it may in good faith assert an exemption under KRS 61.878(1)(h). Naturally, items disclosed to others outside law enforcement lose their secrecy, and in this case should have been produced to the Enquirer because their release at that point in time was neither premature nor potentially harmful much less both. Without a basic inquiry by the City to ascertain the status of the records at the time of the Open Records Act request, it can never invoke the exemption in good faith.

The Court of Appeals applied the existing law of the Open Records Act by requiring the City to satisfy the burden of proof to show the exemption was properly invoked. KRS 61.880(2)(c) and KRS 61.882(3) both assign the burden of proof to the public agency to support any denial of the inspection of public records. Any burden was created and assigned by the Legislature, not the Court of Appeals, as the Open Records Act makes permitting public inspection a legal duty and obligation of all of the Commonwealth's public agencies. *See generally* KRS 61.870 et seq. and OAG 10-ORD-

084 (Gen. Assembly determined cost of open records compliance justified). The City's claim of undue burden is baseless as every agency has the same legal duty to carry out its Open Records Act responsibilities. *Id.*

The City's assertion that the Court of Appeals' decision placed new burdens on law enforcement is simply wrong and exaggerated. The City always had the obligation to reasonably investigate which documents are or are not eligible under KRS 61.878(1)(h) because, again, it may only utilize the exemption when the prerequisites are actually satisfied. Dept. of Rev. Fin. And Administrative Cabinet v. Wyrick, 323 W.3d 710, 714 (Ky. 2010)(if the requested materials are not specifically excluded then the public agency must provide them). The determinations are not burdensome as a practical matter because only in a relatively few cases are Open Records Act requests made --if the lack of previous cases on this subject are any indication. In the case at bar, the City knew or could have easily determined that all or large portions of the records it held were no longer secret and posed no risk of harm because of prior release through the City or courthouse proceedings. The City was also aware of the complete procedural posture of Ms. McCafferty's case. It simply chose to ignore what knowledge it had and made no effort to gain any additional information.

The City's own officers would have participated in laying foundations for the evidence thereby imparting to them familiarity regarding which records were revealed at trial. Or in the alternative, a short trip to the courthouse or brief conversation with the clerk or prosecutor could have revealed what had been released outside. It was not onerous for the City to carry out its duty to determine what records no longer needed protection. Likewise, determining which of the records were given to the accused in

discovery was not difficult either and probably required nothing more than a simple telephone conversation. Even that effort probably was not necessary if copies of the matterial were provided directly from the City to the defense attorneys or if as is likely the inspection was hosted at the City's police station. Lastly, there is no excuse for the City to have withheld the videos it had itself so freely given to another media entity, while persistently continuing to willfully withhold the exact same videos from the Enquirer for many months.

There is no dispute that the City had the documents sitting at its offices but there is no evidence that it ever looked at them or made any inquiry before issuing the blanket denial. What the City declares "onerous" and "impractical" is actually typical, normal and inherent in the operation of the Open Records Act. KRS 61.878(4) requires agencies to segregate what is excepted from non-excepted material and the only way to do so is to review the documents and make an affirmative determination. If agencies may invoke the Open Records Act exemptions without any effort to first determine the applicability of the individual exemptions, then public access becomes a matter of arbitrary fiat exercised by the records custodians.

The trial court committed reversible erred because it released the City from duties the City had a legal obligation to perform. Reversal was appropriate because the trial court inexplicably held that the City could "assume" the Enquirer would have gotten the records elsewhere, i.e. at the courthouse, and therefore the City did not have to permit their inspection. (Appellant Brief p. 13). Even ignoring the fact that there is no evidence that the City made any such assumption, the whole proposition is without legal support and in reality is the equivalent of a "Go Fish" rule. Such assumptions open up the

possibility that if multiple agencies possess duplicate records then citizens may be put on a merry-go-round of denial. Further, the Court of Appeals itself correctly observed that in responding to the Enquirer, the City never asserted that complying with the request would have been unduly burdensome under KRS 61.872(6). (Court of Appeals Decision p. 13-14). The City's arguments about its alleged "limited" resources are more appropriately directed to the Legislature which created the obligation and assigned the burden in the first place as the Court of Appeals was merely following the law as it is written.

IV. THE CIRCUIT COURT DID ABUSE ITS DISCRETION BY MAKING NON-FACTUALLY BASED ASSUMPTIONS AND BY RELYING ON ERRONEOUS CONCLUSIONS OF LAW WHEN IT DENIED FEES, COSTS AND SANCTIONS.

Appellant's final argument is facially without any merit and serves to illustrate the abuse of discretion. The Enquirer was entitled to fees, cost and sanctions due to the City's refusal to furnish even previously released records. (Court of Appeals Decision p.13-14). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Miller v. Eldridge, 146 S.W.3d 909, 914 (Ky. 2004). Examples of abuse include resting on errors of law and clearly erroneous factual findings. *Id.* at fn 11. There was neither legal basis nor factual support for the trial Court to find "the City was reasonable in assuming that the Enquirer had access to these documents and therefore [the City] was under no duty to produce them." (Appellant's Brief p. 13). There is no evidence the City actually made that assumption, the only reason stated in their written denial was a potential future motion—not that they "assumed" the Enquirer already had everything. Read from beginning to end the Open Records Act does not contain any exemption that permits a

public agency to withhold records because it believes that the requestor might be able to access the records elsewhere. Appellant's assertion does little more than call attention to the clearly erroneous nature of the lower court decision.

Though it improperly denied relief, the trial court stated, "...having found that [the City] initially willfully withheld the requested videos..." and then excused the willfulness. (Record p. 113; Order p. 8). The evidence of a willful denial necessitating fees under KRS 61.882(5) is cumulative and unrebutted. The City never reviewed the records for harm, never inquired about their existing disclosure status even though it had or should have had direct knowledge of prior disclosures, never disclosed trial exhibits and most shocking of all, the City freely turned over to the TV Station the same videos it later fought for months to keep from the Enquirer. The evidence is devoid of ameliorating facts and exclusively supports the conclusion that the City knowingly and selectively picked which members of the public got to inspect certain records, and inexplicably offered some of the records for a "public view" at the same time it was battling to withhold the same records from the Enquirer. If the City had a plausible explanation for the disparate treatment, it stands to reason they would have put it into evidence. The City also withheld records it knew or should have known were shared with Ms. McCafferty.

There was no evidence of any kind to explain these events as anything less than willful and disparate treatment of the Enquirer. The trial court attempted to excuse it on supposition that the request was "broad" and "vague" but there was no evidence that the City failed to understand it. Moreover, this Court's decision in Commonwealth v.

Chestnut, 250 S.W.3d 655 (Ky. 2008), held that a similar request for an inmate's file was sufficient to encompass everything in the file. The Court stated,

> [A]n open records request should not require the specificity and cunning of a carefully drawn set of discovery requests, so as to outwit narrowing legalistic interpretations by the government. A citizen should be able to submit a brief and simple request for the government to make full disclosure or openly assert its reasons for non-disclosure.

Id. At 662. The Enquirer's original request was for the whole file and sufficient as a matter of law.

The trial court abused its discretion by ignoring the actual evidence and based its denial of fees and costs in part on an erroneous legal conclusion that the Enquirer's request was vague. In light of Chestnut there was no reasonable basis for the trial court to do so and thereby shift blame to the Enquirer for the City's failure to comply. *Id.* The video production is illustrative of willfulness not only because of the disparate treatment, but because the City remained recalcitrant long after being put on notice by the Enquirer's initiation of the Attorney General appeal. Not only did the City not make any effort to rectify the discrepancy, it never offered any defense for the withholding of the video tapes and continued to withhold them from the Enquirer until *after* the administrative appeal had ended months later. On this issue the Attorney General noted,

> The City's prior disclosure of two videotapes...is another matter....From *the City's failure to confirm nor deny* that it previously released videotapes pertaining to this criminal investigation ...,we conclude it did so. Since *the City articulated no basis for distinguishing* between [the TV station] and The Kentucky Enquirer, we find it may not rely on KRS 61.878(1)(h) as to those two videos tapes.

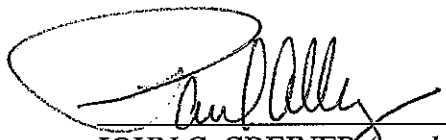
OAG 09 ORD 104 at 6. Thus the City knew the tapes had been disclosed, offered no defense, and continued to keep them from the Enquirer long after it received notice.

In summary, the City's actions were willful because no effort was made to actually review the documents to determine if any harm would result from their release. No effort was made to see what had been released in the trial process. No effort was made to determine what had been provided to the defense. The videos given to the TV station were withheld from the Enquirer. To cure these violations, the City highlights an essentially totally unrelated after-the-fact "public display" of the evidence by the court clerk some two months after the City's own denial and points to an even later production of the videos despite never offering any justification for withholding them originally. These and other facts support a conclusion that the original Denial was pretextual and done to unnecessarily delay disclosure despite an express prohibition of such action by the language of KRS 61.878(1)(h). The Court of Appeals correctly found an abuse of discretion in the denial of the original request for fees and costs under the provisions of the Open Records Act.

CONCLUSION

The Court of Appeal's Opinion that the Open Records Act contains only a conditional exemption for law enforcement investigative records should be affirmed and the policy and language of the Open Records Act upheld by a firm rejection of any "ipso facto" rule and the misinterpretation of Skaggs v. Redford, 844 S.W.2d 389 (Ky. 1992). In this case the evidence only supports a conclusion that the City willfully withheld public records from the Enquirer.

Respectfully submitted,



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