

COMMONWEALTH OF KENTUCKY
LAUREL CIRCUIT COURT
NO. 18-CI-00077

FREEDOM FROM RELIGION FOUNDATION

PLAINTIFF

v.

JAMIE MOSLEY, LAUREL COUNTY JAILER, *et al.*

DEFENDANTS

NOTICE

Plaintiff, Freedom from Religion Foundation, provides notice that it will make the following motion for judgment on the pleadings on Friday, June 8, 2018 at 9:00 a.m. or as soon thereafter as it may be heard.

MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff moves this Court to grant judgment in its favor on the pleadings and order: (1) production of the public records Plaintiff requested pursuant to the Kentucky Open Records Act; (2) payment of fine to Plaintiff; and (3) payment of Plaintiff's attorney fees and costs. Support for the motion is contained in the accompanying memorandum of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served upon all counsel of record by operation of the Court's electronic filing system and by U.S. mail, first class, postage prepaid, on May 18, 2018.

/s/ Michele Henry
Counsel for Plaintiff,
Freedom from Religion Foundation

COMMONWEALTH OF KENTUCKY
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DEFENDANTS

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

I. Issue

Freedom From Religion Foundation requested public records from Defendants Laurel County Jailer Jamie Mosley and the Laurel County Correctional Center under the Kentucky Open Records Act, KRS 61, *et seq.* Defendants did not provide some of the requested records and improperly conditioned production of other records on FFRF retrieving them in person. FFRF obtained an opinion from the Kentucky Attorney General that found Mosley and LCCC did not comply with the ORA. The AG's opinion has the force of law when it is unappealed. Neither Mosley nor LCCC appealed the decision. Should the Court enforce the decision and order Mosley and LCCC to produce the records and pay attorney fees, costs and a penalty?

II. Facts

On October 6, 2017, FFRF made six total requests for LCCC records: four related to a Night of Prayer event, one related to LCCC's substance abuse programming and one related to LCCC's religious programming.¹ On or about

¹ Complaint at ¶ 12.

October 23, 2017, Defendants produced to FFRF their Policy and Procedure Guidelines for 2015, 2016 and 2017 in response to the requests.² In addition, Defendants produced to FFRF their substance abuse programming contracts.³ Defendants stated that they were withholding responsive documents based on several ORA exceptions set forth in KRS 61.878.⁴

On November 17, 2017, FFRF asked the AG to review Defendants' denial of records under KRS 61.880(2)(a).⁵ Neither Defendants nor the Laurel County Attorney responded to the AG after receiving notice of FFRF's request for review.⁶ On December 21, 2017, the AG issued a written decision addressing Defendants' response to FFRF's record requests.⁷

The AG determined:

- (1) Defendants violated the Open Records Act by failing to provide evidence supporting its cited exemptions in its response to FFRF's requests;
- (2) Defendants subverted the intent of the Act by commingling responsive and non-responsive documents;
- (3) Defendants violated the Act by requiring FFRF to retrieve responsive documents in person as opposed to transmitting them electronically or by mail;
- (4) Defendants claimed that the records were subject to an ORA exemption while also claiming they did not have the records; and
- (5) LCCC failed to comply with KRS 61.880(1)'s requirement that the agency respond to a record request within three days.

² *Id.* at ¶ 13.

³ *Id.*

⁴ *Id.* at ¶ 14.

⁵ *Id.* at ¶ 15.

⁶ *Id.* at ¶ 16.

⁷ *Id.* at ¶ 17.

A. Defendants violated the Open Records Act by failing to provide evidence supporting its cited exemptions in its response to FFRF's requests.

Defendants relied on several ORA exemptions to justify its refusal to produce the records FFRF requested. Defendants refused to provide responsive documents to several requests because they were “unduly burdensome.”⁸ The unduly burdensome exemption requires Defendants to provide clear and convincing evidence supporting it.⁹ In this case, Defendants did not provide any evidence or argument for this assertion in response to FFRF or the AG’s request.

In response to several requests, Defendants relied on an ORA exemption that permits public agencies to withhold records “containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy....”¹⁰ As explained by the AG, the agency must provide evidence that the disclosure “would constitute a clearly unwarranted invasion of personal privacy.”¹¹ But despite bearing the burden of proof on this point, Defendants again simply refused to provide any explanation beyond the bare assertion of the exemption.

In response to FFRF’s request for “all records related to employee staffing at LCCC during the “Night of Prayer,” Defendants alleged that the requests were subject to an ORA exemption that protects from disclosure records that “would have a reasonable likelihood of threatening the public safety by exposing a vulnerability

⁸ Exhibit A to Complaint at p. 2, 6, 9-10.

⁹ *Id.* at p. 4, citing *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008).

¹⁰ KRS 61.878(1)(a); Exhibit A at p. 6.

¹¹ Exhibit A at p. 4-5.

in preventing, protecting against, mitigating, or responding to a terrorist act.”¹²

This exemption identifies eight categories of documents covered by the exemption including vulnerability lists, antiterrorism protective measures, counterterrorism plans, security and response needs assessments, and certain infrastructure records.¹³ Again, Defendants refused to provide information supporting this assertion, perhaps because it is hard to imagine how employee staffing at a county jail implicates terrorism, which is defined by the ORA to be “a criminal act intended to (a) intimidate or coerce a public agency or all or part of the civilian population; (b) disrupt a system; or (3) cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency.”¹⁴ By not providing any explanation for this exemption, Defendants failed to meet their burden of proof.¹⁵

B. Defendants subverted the intent of the Act by commingling responsive and non-responsive documents.

In response to three requests the AG found that Defendants’ production of its Policy and Procedures Guidelines was overly broad and commingled responsive and nonresponsive documents – a violation of the statute.¹⁶

¹² KRS 61.878(m).

¹³ KRS 61.878(m)(1)(a-h).

¹⁴ KRS 61.878(m)(2).

¹⁵ Exhibit A at p. 8-9.

¹⁶ Exhibit A at p. 2-10.

C. Defendants violated the Act by requiring FFRF to retrieve responsive documents in person as opposed to transmitting them electronically or by mail.

Defendants permitted the records to be inspected and copied at limited times at LCCC. The statute required Defendants mail the records to FFRF upon receipt of costs associated with copying and mailing the records.¹⁷

D. Defendants claimed that the records were subject to an ORA exemption while also claiming they did not have the records.

In response to one of FFRF's requests, Defendants alleged that they did not have custody of responsive records.¹⁸ Interestingly, they claim both that the records contain personal information that is subject to the exemption and also that they do not have responsive documents. The fundamental policy underlying the ORA is that "free and open examination of public records is in the public interest."¹⁹ Making these mutually exclusive arguments, according to the AG, "leads to the conclusion that LCCC has failed to comply with that basic policy and violated the Act."²⁰

E. LCCC failed to comply with KRS 61.880(1)'s requirement that the agency respond to a record request within three days.

The ORA requires a public agency provide a response to an ORA within three days.²¹ FFRF made its request October 6, 2017.²² Defendants responded to the request on October 23, 2017 – 17 days later and well outside the statutory period.²³

¹⁷ KRS 61.872(3).

¹⁸ Exhibit A at p. 2-3.

¹⁹ KRS 61.871.

²⁰ Exhibit A at p. 5.

²¹ KRS 61.880(1).

²² Exhibit A at p. 2.

²³ *Id.* at p. 2 and n.1.

III. Standard of Review

CR 12.03 permits the Court to grant judgment on the pleadings if the issue raised is purely a question of law and no material fact is in dispute.²⁴ Judgment should be granted when it “appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief.”²⁵

IV. Argument

A. The Court must enforce the AG opinion.

“The Open Record Act is neither an ideal nor a suggestion. It is the law.”²⁶ The AG issued his opinion on December 21, 2017. The opinion concludes with a paragraph explaining the parties’ right to appeal the decision.²⁷ Despite this instruction, Defendants did not object to the AG’s opinion within 30 days of its issuance. Absent an objection, the AG’s decision has “the force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business” or in the county where the records are maintained.²⁸ In an enforcement action such as this, “the circuit court does not reach the merits of the case under the ORA but merely enforces the attorney general’s opinion.”²⁹ The Court should order Defendants to immediately provide the records requested by FFRF over seven months ago.

²⁴ *KentuckyOne Health v. Reid*, 522 S.W.3d 193, 196 (Ky. 2017).

²⁵ *Id.* at 196-7.

²⁶ *Cabinet for Health & Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 389 (Ky. App. 2016).

²⁷ Exhibit A at p. 13.

²⁸ KRS 61.880(5)(b).

²⁹ *Cabinet for Health and Family Services v. Todd Cnty. Std.*, 488 S.W.3d 1, 7 (Ky. App. 2015).

B. FFRF is entitled to recover fees and costs associated with bringing this action.

To discourage intentional obfuscation of the ORA, the statute permits a court to award attorney fees and costs to prevailing parties in an enforcement action.³⁰ The Court must find that the records were willfully withheld to award fees and costs.³¹ Willful “connotes that the agency withheld requested records without plausible justification and with conscious disregard of the requester’s rights.”³² Advancing a plausible argument that an exemption protects disclosure that is later deemed inapplicable is not a willful violation of the Act.³³ In considering whether the refusal is willful, the Court may assess various factors:

- The extent of the agency’s wrongful withholding;
- The withholding’s egregiousness;
- Harm to the requester due to the withholding, including litigation expense; and
- Whether the request serves an important public purpose.³⁴

1. Defendants withheld most of the requested documents and provided commingled records.

The extent of the withholding weighs heavily in favor of awarding fees and costs in this case. Defendants withheld nearly every document requested. And when it produced responsive documents, it provided an entire policy manual as opposed to

³⁰ KRS 61.882(5); *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 853-4 (Ky. 2013).

³¹ KRS 61.882(5).

³² *City of Fort Thomas*, 406 S.W.3d 842, 854 (2013) (quoting *Bowling v. Lexington-Fayette Urban County Gov’t*, 172 S.W.3d 333, 344 (Ky. 2005)).

³³ *City of Fort Thomas*, 406 S.W.3d at 854.

³⁴ *Id.*

the actual policy requested, impermissibly commingling requested and non-requested documents.

2. Defendants' behavior was egregious because they entirely failed to comply with mandatory sections of the statute including providing an explanation for its cited exemptions and requiring inspection of the responsive documents at its facility.

The egregiousness of Defendants' behavior also weighs in FFRF's favor. For instance, Defendants refused to provide the documents based on the terrorism exception – despite the fact that the exemption does not have an even tangential application to the requested records. Defendants took the mutually exclusive positions of denying the existence of the requested records while also maintaining that the requested documents were exempt from disclosure because they contain private personal information without even attempting to explain the conflict. If the records Defendants argue are not in their possession exist and are in their possession, this misrepresentation alone is enough to justify a willfulness finding.³⁵

Even if Defendants had a good faith belief that an exemption protected the records from disclosure, they blatantly refused to comply with sections of the ORA that are non-negotiable. For instance, they simply refused to comply with the statute's requirement that records be mailed upon request and payment of appropriate fees and costs without even acknowledging that requirement. They refused to provide any explanation for the exemptions cited as required by the statute. They refused to identify the subpart of the terrorism exemption cited. They refused to provide any information to the Attorney General to defend their refusal

³⁵ *Cabinet for Health and Family Servs v. Todd Cnty. Std.*, 488 S.W.3d 1, 9 (Ky. App. 2015).

to comply with the statute. They declined to challenge the AG's opinion but to date have also refused to provide the requested documents, thereby requiring this litigation. This conduct is egregious and warrants a fee award.

3. Defendants' conduct harmed FFRF.

FFRF incurred harm because of Defendants' actions. Initially FFRF expended the time and expense to obtain an AG opinion. Defendants' failure to abide by the terms of the AG's opinion or challenge it forced FFRF to retain counsel and incur litigation expenses. This harm supports a fee award.

4. Requiring transparency in government serves an important public purpose as does enforcing the constitutional requirement of separation of church and state.

Finally, the public good is harmed by Defendants' actions. The ORA is the statutory embodiment of Kentucky's public policy supporting transparency in government. Defendants' flouting of the law without consequence sends a message that the ORA can be ignored until the Court orders compliance. Obtaining public records in accordance with the ORA should not require the effort and expense of obtaining an AG opinion and litigation. Defendants did not rely on the exemptions or refuse to provide records in good faith; they acted only to obstruct FFRF in its lawful right to obtain the requested documents. Defendants' behavior warrants the imposition of fees and costs.

C. FFRF is entitled to recover a statutory penalty due to Defendants' failure to comply with the ORA.

In addition to fees and costs, Defendants' egregious violations described above warrant imposing a statutory penalty payable to FFRF. KRS 61.882(5) allows the Court to award FFRF "\$25 per day for each day they were denied the right to inspect or copy said public record." FFRF has, to date, been denied these records for 207 days.³⁶

It is unclear how many records have been withheld, but the penalty should be imposed for each document that Defendants willfully refused to produce.³⁷ In *Cabinet for Health and Family Services v. Courier-Journal, Inc.*, the Court of Appeals imposed a \$10 per day fine applicable to 140 records that were withheld for 540 days. It affirmed the Circuit Court's explanation that the penalty was not for unsuccessfully asserting the exemptions, "but for the Cabinet's refusal to comply with the plain requirements of the statute to assert the privileges it claims, and to provide an explanation of why the privilege applies."³⁸ This case is substantially similar – Defendants relied on exemptions without explanation and also simply ignored the statutes requirements. A penalty is appropriate.

V. Conclusion

The Court should order production of the documents FFRF requested over seven months ago, payment of FFRF's attorney fees and costs and payment of the statutory penalty. Defendants willfully disregarded the ORA by refusing to provide

³⁶ Calculated from Defendants' October 23, 2017 response despite Defendants' failure to comply with the statute's three-day response requirement. KRS 61.880(1).

³⁷ *Cabinet for Health & Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 388 (Ky. App. 2016).

³⁸ *Id.* at 386.

requested public records when initially requested, by refusing to explain their failure to the Attorney General, by allowing the AG opinion to become final but continuing to refuse to provide the records, and by continuing to ignore this obligation even after FFRF initiated litigation. Their willful refusal to obey the law requires this Court to issue an order demanding compliance with the ORA and production of the requested documents. In addition, their willful behaviors warrant the imposition of fees, costs and a penalty.

Respectfully submitted,

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Counsel for Plaintiff,
Freedom from Religion Foundation

CERTIFICATE OF SERVICE

I certify that the foregoing was served upon all counsel of record by operation of the Court's electronic filing system and by U.S. mail, first class, postage prepaid, on May 18, 2018.

/s/ Michele Henry
Counsel for Plaintiff,
Freedom from Religion Foundation

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DEFENDANTS

ORDER

Pending before the Court is Plaintiff's motion for judgment on the pleadings. The Court, having heard the arguments of counsel and being fully informed, hereby GRANTS the motion and finds as follows:

1. Defendants failed to provide records in response to Plaintiff's requests pursuant to the Open Records Act, KRS § 61.870, *et seq.*
2. Plaintiff properly appealed that decision to the Kentucky Attorney General under KRS § 61.880.
3. The Attorney General issued an opinion regarding Defendants' refusal to provide the records on December 21, 2017.
4. Defendants' did not appeal the Attorney General's opinion; thus it has the force of law and the Court must enforce it.
5. Based on the egregiousness of Defendants' failure to comply with the Open Records Act, the importance of the Open Records Act to a functioning democracy and the harm Plaintiff sustained, the Court finds that Defendants acted willfully.

Based on these findings, the Court Orders:

1. Defendants shall provide all records responsive to Plaintiff's open records requests within 10 days of the date of this Order.
2. The records shall be provided to Plaintiff's counsel either electronically or by mail.
3. The Court finds that imposition of a fine is appropriate and imposes a fine of \$25 per day for 207 days for a total of \$5,175. This amount shall be paid to Plaintiff within 10 days of the date of this Order. Defendants are jointly and severally liable for the fine.
4. Based on the Court's finding that Defendants' actions were willful, Plaintiff is entitled to recover fees and costs incurred in this action. Plaintiff is directed to file a fee petition with the Court within 21 days of this Order.

So ordered this ____ day of _____, 2018.

 Judge Gregory A. Lay
 Laurel Circuit Court, Division 1

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