

COMMONWEALTH OF KENTUCKY  
LAUREL CIRCUIT COURT  
CASE NO.: 18-CI-00077  
*-Electronically Filed-*

FREEDOM FROM RELIGION FOUNDATION

PLAINTIFF

v.

**RESPONSE TO PLAINTIFF'S MOTION  
FOR JUDGMENT ON THE PLEADINGS**

JAMIE MOSLEY, LAUREL COUNTY JAILER  
and LAUREL COUNTY CORRECTIONAL CENTER

DEFENDANTS

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Defendants Jamie Mosley and the Laurel County Correctional Center, by counsel, file this Response in Opposition to Plaintiff's Motion for Judgment on the Pleadings.

**INTRODUCTION**

Plaintiff Freedom from Religion Foundation ("FFRF") filed this action, alleging that Defendants Jamie Mosley and the Laurel County Correctional Center ("Defendants") *willfully* violated the Kentucky Open Records Act. This action stems from FFRF's request for records in conjunction with a Night of Prayer event hosted at the Laurel County Correctional Center last year. FFRF challenged Defendants' responses to their requests for records with the Attorney General. The Attorney General found that although Defendants fell short of compliance with the Kentucky Open Records Act by failing to provide evidence supporting their cited exemptions, the facts did not conclusively establish intent on the part of Defendants to impede FFRF's inspection of the records. FFRF cannot demonstrate that Defendants willfully refused to produce records. Furthermore, FFRF's motion for judgment on the pleadings is premature and this Court should overrule their motion.

## STANDARD OF REVIEW

A motion for judgment on the pleadings may be filed once the pleadings have been closed. CR 12.03. The purpose of the motion is to expeditiously dispose of cases or issues where “only a question of law is to be decided.” *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003). For purposes of the motion only, the truth of the party opposing judgment is assumed to be true to “test the legal sufficiency of a claim.” *Id.* A motion for judgment on the pleadings should only be granted if “it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief.” *Id.* FFRF cannot meet this stringent burden and its motion for judgment on the pleadings should be denied.

## ARGUMENT

### **1. Defendants will supplement their response to FFRF’s requests for records.**

As for FFRF’s requests for records, as the Attorney General found, some records were provided. For other requests from FFRF, certain exemptions were invoked, if even imperfectly. Defendants are in the process of compiling a supplemental response to FFRF’s requests for records and will produce those records no later than Friday, June 22, 2018. Thus, FFRF’s motion is premature as the Court has had no opportunity to review what has, or has not been provided, or why.

### **2. FFRF is not entitled to recover fees and costs.**

FFRF has made a claim for fees and costs. However, fees and costs can only be awarded in limited circumstances when it is shown that a public agency has committed a *willful* violation of the Open Records Act. “A public agency's mere refusal to furnish records based on a good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Act. In other words, a technical violation of the Act is not

enough; the existence of bad faith is required.” *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 343 (Ky. 2005) (internal citations omitted). A plaintiff moving for costs under KRS 61.882(5) must demonstrate that the public agency acted with bad faith with an intent to violate the Act and without plausible explanation for the alleged errors and with conscious disregard of the requester’s rights. *See Shyamashree Sinha, M.D. v. University of Kentucky*, 284 S.W.3d 159, 162 (Ky.App. 2008); *see also City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). Although the Attorney General found that the Kentucky Open Records Act had been violated, a mere violation is insufficient for an award of costs. There must also be evidence that the public agency consciously disregarded the requester’s rights and acted in bad faith without a plausible explanation. Defendants deny that they acted with intent to disregard FFRF’s rights to review the records and merely looking at the pleadings, FFRF cannot demonstrate that Defendants’ actions rose to this level of error.

A finding of willfulness must be supported by substantial evidence. *Sinha*, 284 S.W.3d at 162. There are simply not enough facts developed on the record at this time to support a finding of willfulness. Courts have upheld a finding of willfulness where there has been a blanket refusal to produce records. *See Com., Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875 (Ky.App. 2012) (holding that a blanket policy of refusing to disclose records evidenced a willful violation of the Kentucky Open Records Act). However that is not the case here. Defendants disclosed records responsive to FFRF’s initial request. Furthermore, Defendants intend on complying with the Attorney General’s order.

In order to prevail on their request for fees and costs, FFRF must demonstrate that Defendants intended to impede its inspection of Defendants’ records. Defendants’ conduct was neither in bad faith nor willful. There are no facts on the record that would indicate such intent.

Indeed, after reviewing the materials submitted by both parties, the Attorney General held that “the facts giving rise to this appeal do not conclusively establish intent on the part of LCCC to impede Appellant’s inspection of the records identified in his request.” Ky. Op. Atty. Gen. 17-ORD-272, \*2 (Dec. 21, 2017). Viewing all facts in a light most favorable to Defendant, FFRF’s motion for judgment on the pleadings should be denied.

**CONCLUSION**

For the foregoing reasons, FFRF’s Motion should be denied.

Respectfully submitted,

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