

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

FREEDOM FROM RELIGION FOUNDATION

PLAINTIFF

v.

RESPONSE

JAMIE MOSLEY, LAUREL COUNTY JAILER  
and LAUREL COUNTY CORRECTIONAL CENTER

DEFENDANTS

\*\*\*\*\*

The parties, by counsel, jointly file this statement of the procedural history in this matter in accordance with the Agreed Order entered by the Court on December 3, 2018.

1. On October 6, 2017, Andrew Seidel, Constitutional Attorney, Director of Strategic Response at the Freedom From Religion Foundation sent an open record request to Jamie Mosley, the Laurel County Jailer at the Laurel County Correctional Center.

2. On October 23, 2017, a response was sent to Mr. Seidel. Included with that response were the Correctional Center's policy and procedure manuals for 2015, 2016 and 2017 and the substance abuse programming contracts for the same years.

3. On November 17, 2017, Mr. Seidel requested review by the Office of the Attorney General for the Commonwealth of Kentucky.

4. On November 21, 2017, the Office of the Attorney General issued notice of the receipt of the appeal and advised Mr. Mosley of the allotted time to respond.

5. On December 21, 2017, the Office of the Attorney General issued its decision - No. 17-ORD-272.

6. On January 29, 2018, Plaintiff initiated this suit.

7. On March 23, 2018, Defendants filed their Answer.

8. On May 18, 2018, Plaintiff filed a Motion for Judgment on the Pleadings.
9. On June 4, 2018, Defendants responded to the Motion for Judgment on the Pleadings.
10. On June 22, 2018, Defendants provided a supplemental production of documents.
11. The parties then engaged in limited discovery which was completed on August 19, 2018.

A courtesy written copy of these items will be provided to Court chambers.

Respectfully submitted,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

By: /s/ Bryan H. Beauman  
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COUNSEL FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

This will certify that a true and correct copy of the foregoing has been electronically filed with the KY e-Filing system on this 10<sup>th</sup> day of December, 2018, and that same has been sent by electronic mail via the Court's electronic filing system to all parties registered to receive electronic filings and also sent via U.S. Mail to:

Michele Henry  
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COUNSEL FOR PLAINTIFF

**VIA U.S. MAIL AND ELECTRONIC MAIL**

Hon. Kent Hendrickson  
Harlan Circuit Court Judge  
P.O. Box 1530  
Harlan, KY 40831  
[kenthendrickson@kycourts.net](mailto:kenthendrickson@kycourts.net)  
(Word version only via email)

By: /s/ Bryan H. Beauman  
Bryan H. Beauman



## FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

October 6, 2017

**SENT VIA U.S. MAIL AND EMAIL TO: [jailerlcdc@windstream.net](mailto:jailerlcdc@windstream.net)**

Jamie Mosley  
Laurel County Jailer  
Laurel County Correctional Center  
204 W. 4th St.  
London, KY 40741

**Re: Open Records Request**

Dear Mr. Mosley:

Pursuant to Kentucky's Open Records Act (KRS §§61.870-61.884), I request copies of the following records concerning the "Night of Prayer" held at Laurel County Correctional Center on August 29, 2017:

- 1.) All records related to the organization and/or planning of the Night of Prayer. This request includes: (a) any LCCC policies regarding jail events involving the public, and (b) any communications between LCCC employees or between LCCC employees and persons not employed by LCCC regarding the Night of Prayer including, but not limited to: memos, emails, fliers, signs, social media posts, notes, and meeting minutes.
- 2.) All records related to employee staffing at LCCC during the "Night of Prayer." This request includes: (a) any LCCC policy regarding staffing during jail events involving the public, and (b) logbooks, timecards, staff assignments, payment receipts, expense reports, invoices, and any communications related to employee staffing including, but not limited to: memos, emails, fliers, signs, social media posts, notes, and meeting minutes.
- 3.) All records related to inmate attendance at the "Night of Prayer," including, but not limited to: (a) any LCCC policies regarding releasing inmates from their cells, (b) any communications regarding inmate attendance at the "Night of Prayer," including, but not limited to: memos, emails, social media posts, notes, and meeting minutes.
- 4.) All advertisements or promotional material related to the "Night of Prayer," including drafts of the materials.





Jailer Jamie Mosley

Laurel County Corrections

October 23, 2017

**VIA U.S. MAIL AND EMAIL**

Mr. Andrew Seidel  
FREEDOM FROM RELIGION FOUNDATION  
P.O. Box 750  
Madison, WI 53701

RE: Response to Open Records Request  
Freedom from Religion Foundation

Dear Mr. Seidel:

Thank you for your interest in the Laurel County Correctional Center. This letter is in response to your Open Records Request dated October 6, 2017. Your requests were as follows:

1. All records related to organization and/or planning of the Night of Prayer. This request includes: (a) any LCCC policies regarding jail events involving the public, and (b) any communications between LCCC employees or between LCCC employees and persons not employed by LCCC regarding the Night of Prayer including, but not limited to: memos, emails, fliers, signs, social media posts, notes and meeting minutes.

**Response:** Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center.

This request is denied in part as overly burdensome and exempt pursuant to KRS 61.878(1)(a) wherein communications between LCCC employees and/or LCCC employees and private citizens are not subject to public disclosure and would constitute a clearly unwarranted invasion of personal privacy. The Laurel County Correctional Center is not in custody or control of records related to the organization and/or planning of the Night of Prayer.

2. All records related to employee staffing at LCCC during the "Night of Prayer." This request includes: (a) any LCCC policy regarding staffing during jail events involving the public, and (b) logbooks, timecards, staff assignments, payment receipts, expense reports, invoices, and

Further requests of the following records for the period of January 1, 2015 to the present:

1. (a) **any contracts or other agreements** with any persons or organizations to provide substance abuse programming at LCCC;
- (b) **any communications, including emails**, to or from LCCC employees regarding persons or organizations providing substance abuse programming at LCCC;
- (c) **any LCCC policies or procedures** for creation or dissolution of any substance abuse program.

**Response:** Enclosed are the 2015, 2016 and 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4<sup>th</sup> Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

The Laurel County Correctional Center exclusively contracts with the Kentucky Department of Corrections to provide substance abuse programming ("SAP") for inmates. Enclosed are the SAP contracts for 2015, 2016 and 2017.

2. (a) **any contracts or other agreements** with any persons or organizations to provide religious programming at LCCC;
- (b) **any communications, including emails**, to or from LCCC employees regarding persons or organizations providing religious programming at LCCC;
- (c) **any LCCC policies or procedures** for creation or dissolution of any religious program.

**Response:** No contracts or agreements exist at the Laurel County Correctional Center for religious programming.

Once again, thank you for your interest in the Laurel County Correctional Center. If you have any questions or would like to schedule a visit to our facility, please do not hesitate to call me at 606-878-9431.

Respectfully,

Enclosures: Policy and Procedures (2015-2017)  
SAP Contracts (2015-2017)







473

**FAX****Date:** 11/17/2017**Pages including cover sheet:** 5

<b>To:</b>	Andy Beshear
<b>Phone</b>	
<b>Fax Number</b>	(502) 564-2894

<b>From:</b>	Freedom From Religion
	Freedom From Religion Fou
	PO Box 750
	Madison
	WI 53701
<b>Phone</b>	16082568900
<b>Fax Number</b>	(888) 510-2208

**NOTE:**

FFRF - Open Records Request - Appeal

## FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 • MADISON, WI 53701 • (608) 256-8900 • WWW.FFRF.ORG

November 17, 2017

SENT VIA U.S. MAIL & FAX TO: (502) 564-2894

The Honorable Andy Beshear  
Kentucky Attorney General  
ATTN: Open Records / Open Meetings decisions  
700 Capitol Avenue, Suite 118  
Frankfort, KY 40601

Re: Open Records Request - Appeal

Dear Attorney General Beshear:

Pursuant to KRS §61.880, I request that your office review the denial of inspection for various records that I requested from Laurel County Jailer Jamie Mosley on October 6, 2017. In his October 23, 2017 reply, nearly two weeks after the three day, statutorily-required time period to respond, Mr. Mosley cited several inapposite and inapplicable sections of the Open Records and Open Meetings Acts to all but summarily deny inspection for any of the requested records. I ask that your office review the matter and render an official opinion as to whether Mr. Mosley has complied with the law.

Attached, please find a copy of my October 6, 2017 open records request to Mr. Mosley, as well as his October 23, 2017 reply.

Thank you very much for your time and attention to this matter.

Respectfully,



Andrew Seidel  
Constitutional Attorney, Director of Strategic Response  
Freedom From Religion Foundation

ALS:cem



**Notification to Agency of Receipt  
of Open Records Appeal**

Re: Open Records appeal filed by Andrew Seidel

An appeal has been filed with the Attorney General pursuant to KRS 61.880(2) regarding your agency's denial of an open records request. A copy of the appeal is attached. A copy of this notice is being sent to the complaining party.

Pursuant to 40 KAR 1:030 Section 2, the agency may respond to this appeal. The agency must send a copy of its response, and any accompanying materials, to the complaining party.

The Attorney General shall not agree to withhold action on the appeal beyond the time limit imposed by KRS 61.880(2). The agency response should be faxed to:

Gordon Slone  
Attorney General's Office  
700 Capitol Avenue  
Frankfort, Kentucky 40601  
Fax: (502) 564-6801

If you wish to respond, please refer to log number 201700473.

Your response must be received no later than Wednesday, November 29, 2017.

This notice was distributed on 11/21/17 to:

Andrew Seidel  
Freedom From Religion Foundation  
P.O. Box 750  
Madison, WI 53701

Jamie Mosley  
Laurel County Jailer  
Laurel County Corrections  
204 W. 4th Street  
London, KY 40741

Jodi L. Albright, Esq.  
Laurel County Attorney  
101 S. Main Street, Rm. 200  
London, KY 40741-2300





COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITOL AVENUE  
FRANKFORT, KY 40601  
(502) 696-5300  
FAX: (502) 564-2894

17-ORD-272

December 21, 2017

In re: Andrew Seidel/Laurel County Jailer

*Summary:* Laurel County Jailer violated the Open Records Act in responding to request for records regarding "Night of Prayer" at Laurel County Correctional Center. Laurel County Jailer commingled nonresponsive records with responsive records, and failed to meet its burden of proof to justify withholding records under the personal privacy and homeland security exemptions. Laurel County Jailer did not explain why producing certain records would be unreasonably burdensome, and violated the Act by requiring out-of-county requester to inspect records at Laurel County Correctional Center.

*Open Records Decision*

The issue presented in this appeal is whether the Laurel County Jailer violated the Open Records Act in the disposition of a request for records relating to a "Night of Prayer" at the jail, and various other records. For the reasons stated below, we find that the Laurel County Jailer violated the Act.

Background. The Laurel County Correctional Center (LCCC) hosted a "Night of Prayer" on Tuesday, August 29, 2017. The event was announced on LCCC's Facebook page with the stated purpose of forming "a prayer chain around each floor, and around the entire jail." The reason for the event, as reported in news articles, was to "battle the drug issues in the community" and to recognize the overcrowding problem at the jail. News articles estimated that hundreds of people attended the event in and around LCCC.

By letter dated October 6, 2017, Andrew Seidel, Freedom From Religion Foundation, requested records from LCCC relating to the "Night of Prayer;" contracts, communications, and policies relating to substance abuse programming at LCCC, and contracts, communications, and policies relating to religious programming at LCCC. LCCC responded to the request on October 23, 2017,<sup>1</sup> by providing the 2015, 2016, and 2017 "Policy and Procedure Guidelines" for LCCC, and substance abuse program contracts, but otherwise denying the requests.<sup>2</sup>

The requests and responses, and our analysis of those responses follows:

**Request No. 1 and Response.**

1. All records related to organization and/or planning of the Night of Prayer. This request includes: (a) any LCCC policies regarding jail events involving the public, and (b) any communications between LCCC employees or between LCCC employees and persons not employed by LCCC regarding the Night of Prayer including, but not limited to: memos, emails, fliers, signs, social media posts, notes and meeting minutes.

**Response:** "Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center.

This request is denied in part as overly burdensome and exempt pursuant to KRS 61.878(1)(a) wherein communications between LCCC employees and/or LCCC employees and private citizens are not subject to public disclosure and would constitute a clearly unwarranted invasion of personal privacy. The Laurel County

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<sup>1</sup> We note that LCCC failed to comply with the procedural requirement for timely responses to open records requests. KRS 61.880(1) states, in pertinent part: "Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision." There is no explanation in the record as to why LCCC did not respond in a timely manner.

<sup>2</sup> Neither the Laurel County Jailer nor the Laurel County Attorney responded to this Office after receipt of notice of the appeal. Our decision is thus based on the request and LCCC's response to Appellant.



Correctional Center is not in custody or control of records related to the organization and/or planning of the Night of Prayer."

**Analysis of Request No. 1 and Response.**

**Policies regarding jail events involving the public.** LCCC's response to the request for "policies regarding LCCC events involving the public," was to provide a copy of LCCC's 2017 Policy and Procedure Guidelines without further explanation. It is not reasonable that the entirety of the 2017 Policy and Procedure Guidelines would apply to the request for policies regarding LCCC events involving the public, and there is no explanation of which portion(s) of the 2017 Guidelines are responsive to the request. Without further explanation from LCCC, we must conclude that any responsive record(s) in the 2017 Guidelines are commingled with nonresponsive portions of the Guidelines.

In prior decisions, where this Office has found that an agency has commingled nonresponsive records with responsive records in a manner that precluded meaningful review of the responsive records, we have found that "the [agency's] efforts fell short of the statutory requirements codified at KRS 61.880(1)." 02-ORD-150, p. 7; 07-ORD-150 (other citations omitted).

As in those prior decisions, 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. However, the language of the statute governing agency action is unambiguous. It requires the agency to produce records responsive to an open records request formulated with sufficient specificity to enable the agency's custodian of records to locate and retrieve those records. In this case, Appellant's request was formulated with sufficient specificity for LCCC to identify and locate the records requested, and LCCC should have responded only with the responsive records or explained which policies and procedures in the 2017 Policy and Procedure Guidelines were responsive to this particular request. We find that LCCC subverted the intent of the Open Records Act, short of denial of inspection, by commingling nonresponsive records with responsive records so as to create an unnecessary impediment to effective inspection. 07-ORD-105.

All records related to organization and/or planning the Night of Prayer, and Communications regarding the Night of Prayer

LCCC denied the request regarding communications on three different bases: 1. The request was overly burdensome; 2. The records are exempt pursuant to KRS 61.878(1)(a) which exempts "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[;]" and 3. LCCC is not in custody or control of records related to the organization and/or planning of the Night of Prayer.

Unreasonably Burdensome. KRS 61.872(6) authorizes public agencies to deny open records requests if the requests "place[ ] an unreasonable burden in producing public records" or if the agency "has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency." Denial of the right of inspection under this provision must be supported by clear and convincing evidence, and the public agency that attempts to do so "faces a high proof threshold." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008). "[T]he obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Id.* at 665. Moreover, the fact that the responsive records "are voluminous does not mean that it would necessarily be unreasonable [for an agency] to comply with an otherwise valid open records request." *Id.* at 666. LCCC presents no evidence, clear and convincing or otherwise, that Appellant's requests are unreasonably burdensome or intended to disrupt its essential functions. "A bare allegation that a request is unreasonably burdensome or intended to disrupt essential functions does not satisfy the requirements of the statute." 10-ORD-203, p. 3 (citing 06-ORD-177). LCCC's denial, on the basis that the request is overly burdensome, fails as LCCC provided no evidence or argument that complying with the request was overly burdensome.

Personal Privacy Exemption. Regarding LCCC's claim that the records are not subject to disclosure due to personal privacy concerns, KRS 61.878(1)(a) excludes from the application of the Open Records Act "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This

language acknowledges "that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny," while the Open Records Act as a whole "exhibits a general bias favoring disclosure" and places the burden of establishing an exemption on the public agency. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). This necessitates a "comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. [T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.* at 327-28. LCCC has provided no hint as to what privacy interests would be at risk by the release of the requested records. Without some explanation of the privacy interests implicated by release of the records, the public's interest in the records must prevail in the comparative weighing of the antagonistic interests.

LCCC also argues that it is not in custody of records relating to the organization and/or planning of the night of Prayer. This claim is directly contradictory to its claim that the records are protected from release due to privacy concerns and the claim that production would be unreasonably burdensome. This self-contradiction, when taken in light of the Act's basic policy 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[,]"<sup>3</sup> leads to the conclusion that LCCC has failed to comply with that basic policy and violated the Act.

Pursuant to KRS 61.880(2)(c), the burden of proof in sustaining an agency's action (in withholding public records) lies with the agency. LCCC has made disparate claims regarding whether responsive records exist, whether they contain personal information, and that disclosure would be "overly burdensome." LCCC has provided no credible basis in fact for withholding the records, nor explained how these claims apply to the records, if they exist or not. LCCC has not sustained its burden of proof in withholding the requested records.

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<sup>3</sup> KRS 61.871 states: "The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is 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."

Request No. 2. And Response.

2. All records related to employee staffing at LCCC during the "Night of Prayer." This request includes: (a) any LCCC policy regarding staffing during jail events involving the public, and (b) logbooks, timecards, staff assignments, payment receipts, expense reports, invoices, and any communications related to employee staffing including, but not limited to: memos, emails, fliers, signs, social media posts, notes and meeting minutes.

Response: Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

The request is denied in part as overly burdensome as the request places an unreasonable burden on the agency in producing all staffing records for August 29, 2017. The request is further denied pursuant to KRS 61.878(1)(a) as records containing information of a personal nature if disclosure would constitute a clearly unwarranted invasion of personal privacy. The request for staff assignments and communications related to employee staffing is further denied pursuant to KRS 61.878(1)(m) as the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act.

No public funds were expended by the Laurel County Correctional Center for the Night of Prayer event held on August 29, 2017.

Analysis of Request No. 2 and Response.

Records related to staffing at LCCC during the "Night of Prayer."

As in response to Request No. 1, LCCC provided the 2017 Policy and Procedure Guidelines without explaining which portions of the Guidelines are responsive to the request. For the same reasons as we explained in our analysis of LCCC's response to Request No. 1, LCCC subverted the intent of the Act by failing to separate nonresponsive records from responsive records.

LCCC further responded that "non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST." However, a public agency cannot require all persons to inspect records at the physical address of the agency. Pursuant to KRS 61.872(3), there are two methods by which a requester may inspect public agency records:

(3) A person may inspect the public records:

(a) During the regular office hours of the public agency; or

(b) By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing.

Appellant and his requests meet the requirements of KRS 61.872(3)(b),<sup>4</sup> and LCCC must mail the requested records to Appellant after receipt all fees and cost of mailing.

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<sup>4</sup> Appellant's address is Madison, Wisconsin, and so he has his residence and workplace outside Laurel County, and his requests "precisely describe" the records requested. KRS 61.872(3)(b).

LCCC denied this request on the basis that it placed an unreasonable burden on the agency, but also invoked KRS 61.878(1)(a). The response again failed to provide any explanation for the exemptions claimed and we reject these denials on the same bases as we explained above regarding the request for records relating to the organization and/or planning of the Night of Prayer.

Analysis of exemption pursuant to KRS 61.878(1)(m).

LCCC also asserted that the request for "staff assignments and communications related to employee staffing is further denied pursuant to KRS 61.878(1)(m) as the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act."

In 17-ORD-179, the Lexington Police Department (LPD) denied a request for certain records pertaining to surveillance technologies owned or used by the LPD on the basis of KRS 61.878(1)(m). In deciding that LPD did not meet its burden in justifying its reliance on KRS 61.878(1)(m), we cited, in part, to LPD's failure to specify which subparagraph of KRS 61.878(1)(m), if any, was applicable to the denial. By its own terms, KRS 61.878(1)(m) is "limited to" the types of records listed in subparagraphs KRS 61.878(1)(m)1.(a) through 1.(h) of that statute.<sup>5</sup> In this appeal, LCCC also failed to cite the subparagraph on which it

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<sup>5</sup> KRS 61.878(1)(m) authorizes the withholding of:

1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terroristic act and limited to:
  - a. Criticality lists resulting from consequence assessments;
  - b. Vulnerability assessments;
  - c. Antiterrorism protective measures and plans;
  - d. Counterterrorism measures and plans;
  - e. Security and response needs assessments;
  - f. Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems;
  - g. The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility owned, occupied, leased, or maintained by a public agency; and

relied in denying the request. A reasonable explanation of the application of KRS 61.878(1)(m) would necessarily have to explain which particular subparagraph of KRS 61.878(1)(m)1 applies to the requested records. LCCC made no attempt to explain how releasing the requested records relating to "staff assignments and communications related to employee staffing" would have a "reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act[.]"

We adopt the reasoning set forth in 17-ORD-179, both as to the requirement that an agency must identify which subsection of KRS 61.878(1)(m)1.(a) through 1.(h) applies to the records withheld, and to that decision's more substantive analysis explaining that the agency must establish how disclosure would create a "reasonable likelihood of threatening the public safety by exposing a vulnerability" in the manner described. LCCC's failure to cite to the specific subsection of KRS 61.878(1)(m)1. that applies to its denial, and failure to provide an explanation of how the "homeland security" exemption applies to the requested records, are violations of the Act.

Request No. 3 and Response.

All records related to inmate attendance at the "Night of Prayer," including but not limited to: (a) any LCCC policies regarding releasing inmates from their cells, (b) any communications regarding inmate attendance at the "Night of Prayer," including, but not limited to: memos, emails, social media posts, notes, and meeting minutes.

Response: Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4<sup>th</sup> Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

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- h. Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact location of hazardous chemical, radiological, or biological materials.

The request is denied in part as overly burdensome and exempt pursuant to KRS 61.878(1)(a) wherein the public disclosure of an inmate's free and voluntary religious practice, including worship and/or prayer would constitute a clearly unwarranted invasion of personal privacy.

**Analysis of Request No. 3 and Response.** As in response to Requests No. 1, and No. 2, LCCC provided the 2017 Policy and Procedure Guidelines without explaining which portions of the Guidelines are responsive to the request. For the same reasons as we explained in our analyses of those responses, LCCC subverted the intent of the Act by failing to separate nonresponsive records from responsive records. LCCC also conflated the exemption for personal privacy (KRS 61.878(1)(a)) with KRS 61.872(6), which allows an agency to refuse unreasonably burdensome requests. LCCC's refusal did not satisfy the burden of proof for either of those sections of the Act.<sup>6</sup> LCCC's response to this request also constitutes a violation of the Act.

LCCC's response that "non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST," is also rejected by the same analysis as we set forth in response to Request No. 2. Appellant and his requests meet the requirements of KRS 61.872(3)(b), and LCCC must mail the requested records to Appellant after receipt all fees and cost of mailing.

**Request No. 4 and Response.**

4. All advertisements or promotional material related to the "Night of Prayer," including drafts of the materials.

**Response:** The Laurel County Correctional Center is not in custody or control of advertisements, promotional material and/or or drafts thereof related to the "Night of Prayer."

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<sup>6</sup> As explained in our analysis of Request No. 1, the personal privacy exemption requires the agency to explain how public disclosure of the agency's records "would constitute a clearly unwarranted invasion of personal privacy;" and that denying the request on the basis that it constitutes an "unreasonable burden" requires the agency to sustain the refusal "by clear and convincing evidence."



**Analysis of Request No. 4 and Response.**

A public agency cannot afford a requester access to a record that it does not have or that does not exist. 99-ORD-98. The agency discharges its duty under the Open Records Act by affirmatively so stating. 99-ORD-150. In the absence of legal authority requiring the creation of the records, or facts indicating the records were created, we see no need to require further explanation of the requested documents' nonexistence. See 11-ORD-091. Accordingly, we find no violation of the Open Records Act in LCCC's response to this request.

**Two Additional Requests and Responses.** Appellant made two additional records requests, each with three subparts:

**Additional Request No. 1 and Response.**

I further request copies of the following records for the period of January 1, 2015 to the present:

1. (a) any contracts or other agreements with any persons or organizations to provide substance abuse programming at LCCC;  
(b) any communications, including emails, to or from LCCC employees regarding persons or organizations providing substance abuse programming at LCCC;  
(c) any LCCC policies or procedures for creation or dissolution of any substance abuse program.

**Response:** Enclosed are the 2015, 2016 and 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4<sup>th</sup> Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

The Laurel County Correctional Center exclusively contracts with the Kentucky Department of Corrections to provide substance abuse programming ("SAP") for inmates. Enclosed are the SAP contracts for 2015, 2016 and 2017.

Analysis of Additional Request No. 1 and Response.

LCCC appears to have responded appropriately to the request for contracts by providing the requested records, but did not respond at all to the request for communications regarding persons or organizations providing substance abuse at LCCC. KRS 61.880(1), in relevant part, states:

Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision.

LCCC's failure to respond to the request for communications is a violation of the Act. The response to the request for policies regarding creation or dissolution of any substance abuse program violated the Act by again failing to except out the nonresponsive portions of the records provided, or to explain which parts of the Guidelines are responsive.

Additional Request No. 2 and Response.

The second part of the request for records for the period of January 1, 2015, to the present was:

2. (a) any contracts or other agreements with any persons or organizations to provide religious programming at LCCC;
- (b) any communications, including emails, to or from LCCC employees regarding persons or organizations providing religious programming at LCCC;
- (c) any LCCC policies or procedures for creation or dissolution of any religious program.

Response: No contracts or agreements exist at the Laurel County Correctional Center for religious programming.

Analysis of Additional Request No. 2 and Response.

We again cite to 99-ORD-98 and 99-ORD-150 for the proposition that a public agency cannot afford a requester access to a record that it does not have or that does not exist, and that the agency discharges its duty under the Open Records Act by affirmatively so stating. Accordingly, we find no violation of the Open Records Act by LCCC in responding to this request.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

Andy Beshear  
Attorney General

*Gordon Slone* by *more*  
Gordon Slone  
Assistant Attorney General

#473

Distributed to:

Andrew Seidel  
Jamie Mosley  
Jodi L. Albright, Esq.



COMMONWEALTH OF KENTUCKY  
LAUREL CIRCUIT COURT  
NO. \_\_\_\_\_

FREEDOM FROM RELIGION FOUNDATION

PLAINTIFF

v.

JAMIE MOSLEY, LAUREL COUNTY JAILER

Serve: Jamie Mosley, Laurel County Jailer  
204 West 4<sup>th</sup> Street  
London, Kentucky, 40741

and

LAUREL COUNTY CORRECTIONAL CENTER

DEFENDANTS

Serve: David Westerfield, Laurel County Judge/Executive  
101 South Main Street, Suite 320  
London, Kentucky, 40741-2301

COMPLAINT

Introduction

1. Plaintiff, Freedom from Religion Foundation, files this action to enforce a decision issued by the Kentucky Attorney General on December 21, 2017. The Attorney General held that Laurel County Jailer Jamie Mosley, as records custodian for Laurel County Correctional Center (collectively LCCC), violated the Open Records Act when he: (1) failed to timely respond to FFRF's record requests related to his operation of LCCC; and (2) failed to provide the records requested. The opinion, 17-ORD-272, is attached as Exhibit 1. LCCC declined to appeal the Attorney General's decision; therefore it has the force and effect of law and must be enforced against him.

2. FFRF also seeks attorney's fees, costs and statutory penalties, which it is entitled to as a result of LCCC's willful violations of the Open Records Act.

**Parties, Jurisdiction and Venue**

3. FFRF is a foreign 501(c)(3) non-profit corporation with its principal office in Madison, Wisconsin, which was founded in 1978.

4. FFRF serves as a national membership association, whose two purposes are to educate the public about nontheism, and to defend the constitutional principle of separation between church and state. FFRF currently has 245 Kentucky members.

5. LCCC and the Laurel County Jailer are public agencies as that term is defined by KRS 61.870(1).

6. This action is brought pursuant to KRS 61.880 and 61.882 to enforce the Attorney General's decision set forth in 17-ORD-272.

7. This Court has jurisdiction and venue is proper pursuant to KRS 61.880(5)(b) and KRS 61.882 because LCCC is located in Laurel County.

8. A courtesy copy of this Complaint will be provided to Hon. Andy Beshear, Attorney General, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky, 40601-3449.

### Facts and Procedural History

9. On August 29, 2017, Mosley organized a "Night of Prayer" at LCCC. Laurel County citizens and churches were invited to the jail to pray for inmates, their families, their victims and jail staff. LCCC erected a tent on the premises for the event.
10. Christian ministers, members of the community and jail staff attended the event and a local church choir performed.
11. Inmates were escorted to the tent to interact with the crowd. Additionally, attendees, including community members and religious leaders, were permitted in the jail to form a "prayer chain."
12. On October 6, 2017, FFRF made four specific requests for LCCC records related to the Night of Prayer event, one specific request for records related to LCCC's substance abuse programming and one specific request for records related to LCCC's religious programming.
13. On or about October 23, 2017, LCCC provided FFRF with its Policy and Procedure Guidelines for 2015, 2016 and 2017 in response to the requests. In addition, LCCC provided FFRF with its substance abuse programming contracts.
14. LCCC stated that it was withholding numerous responsive documents based on a variety of exceptions set forth in KRS 61.878.
15. On November 17, 2017, FFRF asked the Kentucky Attorney General to review LCCC's denial of records pursuant to KRS 61.880(2)(a).

16. Neither LCCC nor the Laurel County Attorney responded to the Attorney General after receiving notice of FFRF's request for review.
17. On December 21, 2017, the Attorney General issued a written decision addressing LCCC's response to FFRF's record requests.
18. The Attorney General held that:
- a. LCCC violated the Open Records Act in its response to five of FFRF's six requests related to the Night of Prayer event and one of its two requests related to substance abuse programming by failing to provide evidence supporting its cited exemptions;
  - b. LCCC subverted the intent of the Act by commingling responsive and non-responsive documents;
  - c. LCCC violated the Act by requiring FFRF to retrieve responsive documents in person as opposed to transmitting them electronically or by mail; and
  - d. LCCC failed to comply with KRS 61.880(1)'s requirement that the agency respond to a record request within three days.
19. The Attorney General's decision included information regarding LCCC's right to appeal the decision by filing an action in circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days.
20. LCCC did not appeal the decision.
21. Absent an appeal, KRS 61.880(5) provides that "the Attorney General's decision shall have 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 the Circuit Court of the county where the public record is maintained.”

22. Thus, pursuant to KRS 61.880(5), the Attorney General’s decision against LCCC has the force of law and must be enforced by this Court without reaching the merits of the case.

**CLAIM ONE  
ENFORCEMENT OF OPEN RECORDS DECISION 17-ORD-272**

23. Attorney General decision 17-ORD-272 has the force and effect of law and is enforceable by this Court.

24. LCCC possesses records responsive to FFRF’s requests, which it has not provided to FFRF.

25. Pursuant to KRS 61.882(1), this Court has jurisdiction to enforce the Open Records Act, including the Attorney General’s decision, against LCCC by injunction or other appropriate order compelling LCCC to provide the requested records.

26. Pursuant to KRS 61.882(4), this action should take precedence on the Court’s docket over all other causes and be assigned for hearing and trial at the earliest practicable date.

**CLAIM TWO  
CLAIM FOR ATTORNEY’S FEES, COSTS AND STATUTORY PENALTIES**

27. Pursuant to KRS 61.882(5), a party is entitled to recover costs and attorney’s fees and statutory penalties of up to \$25 per record, per day, when a public agency willfully withholds records in violation of the Open Records Act.

28. LCCC willfully violated the Open Records Act by failing to timely respond to FFRF's request for records.
29. LCCC willfully violated the Act by subverting the intent of the Act when it commingled responsive and non-responsive documents.
30. LCCC willfully violated the Act by requiring FFRF retrieve the requested documents in person in direct violation of KRS 61.872(3)(b).
31. LCCC willfully violated the Act by refusing to provide some of the requested documents in reliance on the personal privacy exemption to the Act while providing no explanation of any privacy interest implicated by release of the records.
32. LCCC willfully violated the Act by making contradictory claims that it was not in custody of some of the requested records while also maintaining that the records were protected from release due to privacy concerns and that production would be unreasonably burdensome.
33. LCCC willfully violated the Act by refusing to provide some of the requested records because doing so would be unduly burdensome but providing no credible basis for this determination.
34. LCCC willfully violated the Act by refusing to produce some of the requested records and providing no explanation whatsoever for its refusal.
35. LCCC willfully violated the Act by invoking KRS 61.878(1)(m) without providing a basis for invoking that very narrow exemption to the Act and without

identifying which of the eight types of records enumerated in that subsection the requested records fell under.

36. FFRF is entitled to an award of costs, including reasonable attorney's fees, incurred in connection with this action. It is also entitled to an award of statutory penalties of up to \$25 per day from the date of the request to the date of production for each document that LCCC is required to produce in this action.

Wherefore, Plaintiff, Freedom From Religion Foundation, respectfully asks this Court for relief as follows:

- a. An expedited hearing on this matter at the earliest practicable date;
- b. A declaration that LCCC willfully withheld records in violation of KRS 61.870 through KRS 61.884;
- c. An injunction ordering LCCC to disclose the records responsive to FFRF's requests;
- d. An award of costs, including reasonable attorney's fees, incurred in connection with this action;
- e. An award of \$25 per document for each day that LCCC denied FFRF's right to inspect the requested records; and
- f. All other relief to which FFRF might be entitled.

Respectfully submitted,

CRAIG HENRY PLC

/s/ Michele Henry

Michele Henry

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*Counsel for Plaintiff, Freedom From Religion  
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Presiding Judge: HON. GREGORY A. LAY (627226)

COM : 000008 of 000008

17-ORD-272

December 21, 2017

In re: Andrew Seidel/Laurel County Jailer

**Summary:** Laurel County Jailer violated the Open Records Act in responding to request for records regarding "Night of Prayer" at Laurel County Correctional Center. Laurel County Jailer commingled nonresponsive records with responsive records, and failed to meet its burden of proof to justify withholding records under the personal privacy and homeland security exemptions. Laurel County Jailer did not explain why producing certain records would be unreasonably burdensome, and violated the Act by requiring out-of-county requester to inspect records at Laurel County Correctional Center.

### *Open Records Decision*

The issue presented in this appeal is whether the Laurel County Jailer violated the Open Records Act in the disposition of a request for records relating to a "Night of Prayer" at the jail, and various other records. For the reasons stated below, we find that the Laurel County Jailer violated the Act.

**Background.** The Laurel County Correctional Center (LCCC) hosted a "Night of Prayer" on Tuesday, August 29, 2017. The event was announced on LCCC's Facebook page with the stated purpose of forming "a prayer chain around each floor, and around the entire jail." The reason for the event, as reported in news articles, was to "battle the drug issues in the community" and to recognize the overcrowding problem at the jail. News articles estimated that hundreds of people attended the event in and around LCCC.

Presiding Judge: HON. GREGORY A. LAY (627226)

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By letter dated October 6, 2017, Andrew Seidel, Freedom From Religion Foundation, requested records from LCCC relating to the "Night of Prayer;" contracts, communications, and policies relating to substance abuse programming at LCCC, and contracts, communications, and policies relating to religious programming at LCCC. LCCC responded to the request on October 23, 2017,<sup>1</sup> by providing the 2015, 2016, and 2017 "Policy and Procedure Guidelines" for LCCC, and substance abuse program contracts, but otherwise denying the requests.<sup>2</sup>

The requests and responses, and our analysis of those responses follows:

**Request No. 1 and Response.**

1. All records related to organization and/or planning of the Night of Prayer. This request includes: (a) any LCCC policies regarding jail events involving the public, and (b) any communications between LCCC employees or between LCCC employees and persons not employed by LCCC regarding the Night of Prayer including, but not limited to: memos, emails, fliers, signs, social media posts, notes and meeting minutes.

**Response:** "Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center.

This request is denied in part as overly burdensome and exempt pursuant to KRS 61.878(1)(a) wherein communications between LCCC employees and/or LCCC employees and private citizens are not subject to public disclosure and would constitute a clearly unwarranted invasion of personal privacy. The Laurel County

<sup>1</sup> We note that LCCC failed to comply with the procedural requirement for timely responses to open records requests. KRS 61.880(1) states, in pertinent part: "Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision." There is no explanation in the record as to why LCCC did not respond in a timely manner.

<sup>2</sup> Neither the Laurel County Jailer nor the Laurel County Attorney responded to this Office after receipt of notice of the appeal. Our decision is thus based on the request and LCCC's response to Appellant.

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Correctional Center is not in custody or control of records related to the organization and/or planning of the Night of Prayer."

**Analysis of Request No. 1 and Response.**

**Policies regarding jail events involving the public.** LCCC's response to the request for "policies regarding LCCC events involving the public," was to provide a copy of LCCC's 2017 Policy and Procedure Guidelines without further explanation. It is not reasonable that the entirety of the 2017 Policy and Procedure Guidelines would apply to the request for policies regarding LCCC events involving the public, and there is no explanation of which portion(s) of the 2017 Guidelines are responsive to the request. Without further explanation from LCCC, we must conclude that any responsive record(s) in the 2017 Guidelines are commingled with nonresponsive portions of the Guidelines.

In prior decisions, where this Office has found that an agency has commingled nonresponsive records with responsive records in a manner that precluded meaningful review of the responsive records, we have found that "the [agency's] efforts fell short of the statutory requirements codified at KRS 61.880(1)." 02-ORD-150, p. 7; 07-ORD-150 (other citations omitted).

As in those prior decisions, 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. However, the language of the statute governing agency action is unambiguous. It requires the agency to produce records responsive to an open records request formulated with sufficient specificity to enable the agency's custodian of records to locate and retrieve those records. In this case, Appellant's request was formulated with sufficient specificity for LCCC to identify and locate the records requested, and LCCC should have responded only with the responsive records or explained which policies and procedures in the 2017 Policy and Procedure Guidelines were responsive to this particular request. We find that LCCC subverted the intent of the Open Records Act, short of denial of inspection, by commingling nonresponsive records with responsive records so as to create an unnecessary impediment to effective inspection. 07-ORD-105.

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**All records related to organization and/or planning the Night of Prayer, and Communications regarding the Night of Prayer**

LCCC denied the request regarding communications on three different bases: 1. The request was overly burdensome; 2. The records are exempt pursuant to KRS 61.878(1)(a) which exempts "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[;]" and 3. LCCC is not in custody or control of records related to the organization and/or planning of the Night of Prayer.

**Unreasonably Burdensome.** KRS 61.872(6) authorizes public agencies to deny open records requests if the requests "place[ ] an unreasonable burden in producing public records" or if the agency "has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency." Denial of the right of inspection under this provision must be supported by clear and convincing evidence, and the public agency that attempts to do so "faces a high proof threshold." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008). "[T]he obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Id.* at 665. Moreover, the fact that the responsive records "are voluminous does not mean that it would necessarily be unreasonable [for an agency] to comply with an otherwise valid open records request." *Id.* at 666. LCCC presents no evidence, clear and convincing or otherwise, that Appellant's requests are unreasonably burdensome or intended to disrupt its essential functions. "A bare allegation that a request is unreasonably burdensome or intended to disrupt essential functions does not satisfy the requirements of the statute." 10-ORD-203, p. 3 (citing 06-ORD-177). LCCC's denial, on the basis that the request is overly burdensome, fails as LCCC provided no evidence or argument that complying with the request was overly burdensome.

**Personal Privacy Exemption.** Regarding LCCC's claim that the records are not subject to disclosure due to personal privacy concerns, KRS 61.878(1)(a) excludes from the application of the Open Records Act "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This



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language acknowledges "that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny," while the Open Records Act as a whole "exhibits a general bias favoring disclosure" and places the burden of establishing an exemption on the public agency. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). This necessitates a "comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. [T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.* at 327-28. LCCC has provided no hint as to what privacy interests would be at risk by the release of the requested records. Without some explanation of the privacy interests implicated by release of the records, the public's interest in the records must prevail in the comparative weighing of the antagonistic interests.

LCCC also argues that it is not in custody of records relating to the organization and/or planning of the night of Prayer. This claim is directly contradictory to its claim that the records are protected from release due to privacy concerns and the claim that production would be unreasonably burdensome. This self-contradiction, when taken in light of the Act's basic policy 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[.]"<sup>3</sup> leads to the conclusion that LCCC has failed to comply with that basic policy and violated the Act.

Pursuant to KRS 61.880(2)(c), the burden of proof in sustaining an agency's action (in withholding public records) lies with the agency. LCCC has made disparate claims regarding whether responsive records exist, whether they contain personal information, and that disclosure would be "overly burdensome." LCCC has provided no credible basis in fact for withholding the records, nor explained how these claims apply to the records, if they exist or not. LCCC has not sustained its burden of proof in withholding the requested records.

<sup>3</sup> KRS 61.871 states: "The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is 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."

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**Request No. 2. And Response.**

2. All records related to employee staffing at LCCC during the "Night of Prayer." This request includes: (a) any LCCC policy regarding staffing during jail events involving the public, and (b) logbooks, timecards, staff assignments, payment receipts, expense reports, invoices, and any communications related to employee staffing including, but not limited to: memos, emails, fliers, signs, social media posts, notes and meeting minutes.

**Response:** Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

The request is denied in part as overly burdensome as the request places an unreasonable burden on the agency in producing all staffing records for August 29, 2017. The request is further denied pursuant to KRS 61.878(1)(a) as records containing information of a personal nature if disclosure would constitute a clearly unwarranted invasion of personal privacy. The request for staff assignments and communications related to employee staffing is further denied pursuant to KRS 61.878(1)(m) as the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act.

No public funds were expended by the Laurel County Correctional Center for the Night of Prayer event held on August 29, 2017.

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**Analysis of Request No. 2 and Response.****Records related to staffing at LCCC during the "Night of Prayer."**

As in response to Request No. 1, LCCC provided the 2017 Policy and Procedure Guidelines without explaining which portions of the Guidelines are responsive to the request. For the same reasons as we explained in our analysis of LCCC's response to Request No. 1, LCCC subverted the intent of the Act by failing to separate nonresponsive records from responsive records.

LCCC further responded that "non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST." However, a public agency cannot require all persons to inspect records at the physical address of the agency. Pursuant to KRS 61.872(3), there are two methods by which a requester may inspect public agency records:

(3) A person may inspect the public records:

(a) During the regular office hours of the public agency; or

(b) By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing.

Appellant and his requests meet the requirements of KRS 61.872(3)(b),<sup>4</sup> and LCCC must mail the requested records to Appellant after receipt all fees and cost of mailing.

<sup>4</sup> Appellant's address is Madison, Wisconsin, and so he has his residence and workplace outside Laurel County, and his requests "precisely describe" the records requested. KRS 61.872(3)(b).

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LCCC denied this request on the basis that it placed an unreasonable burden on the agency, but also invoked KRS 61.878(1)(a). The response again failed to provide any explanation for the exemptions claimed and we reject these denials on the same bases as we explained above regarding the request for records relating to the organization and/or planning of the Night of Prayer.

**Analysis of exemption pursuant to KRS 61.878(1)(m).**

LCCC also asserted that the request for "staff assignments and communications related to employee staffing is further denied pursuant to KRS 61.878(1)(m) as the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act."

In 17-ORD-179, the Lexington Police Department (LPD) denied a request for certain records pertaining to surveillance technologies owned or used by the LPD on the basis of KRS 61.878(1)(m). In deciding that LPD did not meet its burden in justifying its reliance on KRS 61.878(1)(m), we cited, in part, to LPD's failure to specify which subparagraph of KRS 61.878(1)(m), if any, was applicable to the denial. By its own terms, KRS 61.878(1)(m) is "limited to" the types of records listed in subparagraphs KRS 61.878(1)(m)1.(a) through 1.(h) of that statute.<sup>5</sup> In this appeal, LCCC also failed to cite the subparagraph on which it

<sup>5</sup> KRS 61.878(1)(m) authorizes the withholding of:

1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act and limited to:
  - a. Criticality lists resulting from consequence assessments;
  - b. Vulnerability assessments;
  - c. Antiterrorism protective measures and plans;
  - d. Counterterrorism measures and plans;
  - e. Security and response needs assessments;
  - f. Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems;
  - g. The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility owned, occupied, leased, or maintained by a public agency; and

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relied in denying the request. A reasonable explanation of the application of KRS 61.878(1)(m) would necessarily have to explain which particular subparagraph of KRS 61.878(1)(m)1 applies to the requested records. LCCC made no attempt to explain how releasing the requested records relating to "staff assignments and communications related to employee staffing" would have a "reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act[.]"

We adopt the reasoning set forth in 17-ORD-179, both as to the requirement that an agency must identify which subsection of KRS 61.878(1)(m)1.(a) through 1.(h) applies to the records withheld, and to that decision's more substantive analysis explaining that the agency must establish how disclosure would create a "reasonable likelihood of threatening the public safety by exposing a vulnerability" in the manner described. LCCC's failure to cite to the specific subsection of KRS 61.878(1)(m)1. that applies to its denial, and failure to provide an explanation of how the "homeland security" exemption applies to the requested records, are violations of the Act.

**Request No. 3 and Response.**

All records related to inmate attendance at the "Night of Prayer," including but not limited to: (a) any LCCC policies regarding releasing inmates from their cells, (b) any communications regarding inmate attendance at the "Night of Prayer," including, but not limited to: memos, emails, social media posts, notes, and meeting minutes.

**Response:** Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4<sup>th</sup> Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

- 
- h. Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact location of hazardous chemical, radiological, or biological materials.

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The request is denied in part as overly burdensome and exempt pursuant to KRS 61.878(1)(a) wherein the public disclosure of an inmate's free and voluntary religious practice, including worship and/or prayer would constitute a clearly unwarranted invasion of personal privacy.

**Analysis of Request No. 3 and Response.** As in response to Requests No. 1, and No. 2, LCCC provided the 2017 Policy and Procedure Guidelines without explaining which portions of the Guidelines are responsive to the request. For the same reasons as we explained in our analyses of those responses, LCCC subverted the intent of the Act by failing to separate nonresponsive records from responsive records. LCCC also conflated the exemption for personal privacy (KRS 61.878(1)(a)) with KRS 61.872(6), which allows an agency to refuse unreasonably burdensome requests. LCCC's refusal did not satisfy the burden of proof for either of those sections of the Act.<sup>6</sup> LCCC's response to this request also constitutes a violation of the Act.

LCCC's response that "non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST," is also rejected by the same analysis as we set forth in response to Request No. 2. Appellant and his requests meet the requirements of KRS 61.872(3)(b), and LCCC must mail the requested records to Appellant after receipt all fees and cost of mailing.

**Request No. 4 and Response.**

4. All advertisements or promotional material related to the "Night of Prayer," including drafts of the materials.

**Response:** The Laurel County Correctional Center is not in custody or control of advertisements, promotional material and/or or drafts thereof related to the "Night of Prayer."

<sup>6</sup> As explained in our analysis of Request No. 1, the personal privacy exemption requires the agency to explain how public disclosure of the agency's records "would constitute a clearly unwarranted invasion of personal privacy;" and that denying the request on the basis that it constitutes an "unreasonable burden" requires the agency to sustain the refusal "by clear and convincing evidence."

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**Analysis of Request No. 4 and Response.**

A public agency cannot afford a requester access to a record that it does not have or that does not exist. 99-ORD-98. The agency discharges its duty under the Open Records Act by affirmatively so stating. 99-ORD-150. In the absence of legal authority requiring the creation of the records, or facts indicating the records were created, we see no need to require further explanation of the requested documents' nonexistence. See 11-ORD-091. Accordingly, we find no violation of the Open Records Act in LCCC's response to this request.

**Two Additional Requests and Responses.** Appellant made two additional records requests, each with three subparts:

**Additional Request No. 1 and Response.**

I further request copies of the following records for the period of January 1, 2015 to the present:

1. (a) any contracts or other agreements with any persons or organizations to provide substance abuse programming at LCCC;
- (b) any communications, including emails, to or from LCCC employees regarding persons or organizations providing substance abuse programming at LCCC;
- (c) any LCCC policies or procedures for creation or dissolution of any substance abuse program.

**Response:** Enclosed are the 2015, 2016 and 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4<sup>th</sup> Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

The Laurel County Correctional Center exclusively contracts with the Kentucky Department of Corrections to provide substance abuse programming ("SAP") for inmates. Enclosed are the SAP contracts for 2015, 2016 and 2017.

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**Analysis of Additional Request No. 1 and Response.**

LCCC appears to have responded appropriately to the request for contracts by providing the requested records, but did not respond at all to the request for communications regarding persons or organizations providing substance abuse at LCCC. KRS 61.880(1), in relevant part, states:

Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision.

LCCC's failure to respond to the request for communications is a violation of the Act. The response to the request for policies regarding creation or dissolution of any substance abuse program violated the Act by again failing to except out the nonresponsive portions of the records provided, or to explain which parts of the Guidelines are responsive.

**Additional Request No. 2 and Response.**

The second part of the request for records for the period of January 1, 2015, to the present was:

2. (a) any contracts or other agreements with any persons or organizations to provide religious programming at LCCC;
- (b) any communications, including emails, to or from LCCC employees regarding persons or organizations providing religious programming at LCCC;
- (c) any LCCC policies or procedures for creation or dissolution of any religious program.

**Response:** No contracts or agreements exist at the Laurel County Correctional Center for religious programming.



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Rev. 9-14

Sum Code: CI

Commonwealth of Kentucky  
Court of Justice Courts.ky.gov

CR 4.02; Cr Official Form 1



## CIVIL SUMMONS

Case #: 18-CI-00077

Court: CIRCUIT

County: LAUREL

Plaintiff, FREEDOM FROM RELIGION FOUNDATION VS. MOSLEY, JAMIE, ET AL, Defendant

TO: JAMIE MOSLEY  
LAUREL COUNTY JAILER  
204 WEST 4TH STREET  
LONDON, KY 40741

The Commonwealth of Kentucky to Defendant:

You are hereby notified that a **legal action has been filed against you** in this Court demanding relief as shown on the document delivered to you with this Summons. **Unless a written defense is made by you or by an attorney on your behalf within twenty (20) days** following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached complaint.

The name(s) and address(es) of the party or parties demanding relief against you or his/her (their) attorney(s) are shown on the document delivered to you with this Summons.

/s/ Roger Schott, Laurel Circuit Clerk  
Date: 01/29/2018

### Proof of Service

This Summons was:

☐ Served by delivering a true copy and the Complaint (or other initiating document)

To: \_\_\_\_\_

☐ Not Served because: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_\_\_

Served By \_\_\_\_\_

Title \_\_\_\_\_

Summons ID: @00000171232

CIRCUIT: 18-CI-00077 Return to Filer for Service

FREEDOM FROM RELIGION FOUNDATION VS. MOSLEY, JAMIE, ET AL





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

FREEDOM FROM RELIGION FOUNDATION

PLAINTIFF

v.

ANSWER

JAMIE MOSLEY, LAUREL COUNTY JAILER  
and LAUREL COUNTY CORRECTIONAL CENTER

DEFENDANTS

\*\*\*\*\*

Defendants, by counsel, file this Answer to the Plaintiff's Complaint and state as follows:

FIRST DEFENSE

The Complaint fails to state a claim against Defendants upon which relief can be granted and should be dismissed.

SECOND DEFENSE

1. Paragraphs 1, 2, 6 and 8 of the Complaint do not require a factual response of the Defendants.
2. Defendants are without sufficient information or knowledge to form a belief as to the allegations of paragraphs 3 and 4 of the Complaint and therefore deny the allegations of those paragraphs.
3. Defendants admit that Mr. Mosley is the duly elected Jailer of Laurel County, Kentucky. Defendant Laurel County Correctional Center is merely a building and not a corporate entity. Otherwise, Defendants deny the allegations of paragraph 5 inconsistent therewith.
4. Defendants do not contest venue in Laurel Circuit Court.
5. The allegations of paragraphs 12, 13, 14, 15, 16, 17, 18, 19, and 20 refer to record correspondence or other documentation contained with the submission of Plaintiff's requests and

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matters with the Kentucky Attorney General. The content of those documents speak for themselves. Therefore, Defendants rely upon those documents in response to the factual allegations made in these referenced paragraphs of the Complaint.

6. Defendant denies the allegations of paragraphs 9, 10, 11, 24, 28, 29, 30, 31, 32, 33, 34, 35, and 36 of the Complaint as stated.

7. Paragraphs 21, 22, 23, 25, 26, and 27 of the Complaint state conclusions of law which do not require a factual response of the Defendants, but to the extent a response is deemed necessary, Defendant denies so much of the allegations of these paragraphs of the Complaint.

8. Defendants deny the remaining allegations of the Complaint not specifically admitted herein.

### **THIRD DEFENSE**

Defendant "Laurel County Correctional Center" is not a corporate entity capable of suing or being sued. To that extent, Plaintiff's Complaint may be barred by insufficiency of process and insufficiency of service of process.

### **FOURTH DEFENSE**

The Complaint is barred by the sovereign, governmental, absolute, qualified and/or official immunity of the Defendants, which also bars any discovery against Defendants.

### **FIFTH DEFENSE**

These Defendants have acted in conformity with all applicable statutes, regulations, ordinances, common law, and in conformity with the Constitutions of the United States and the Commonwealth of Kentucky.

**SIXTH DEFENSE**

These Defendants are entitled to good faith immunity in that no action was taken against Plaintiffs with malice or in violation of state or federal law. Because Defendants acted in good faith and without any ill motive or tortious intent, and their actions were not taken in bad faith, acts as a complete bar to Plaintiffs' Complaint.

**SEVENTH DEFENSE**

Defendants at all times referenced in the Complaint relied upon the advice of counsel which constitutes a complete defense to all or part of Plaintiff's Complaint.

**EIGHTH DEFENSE**

Defendant reserves the right to raise additional affirmative defenses.

WHEREFORE, Defendants respectfully request judgment be entered in their favor, and that the Plaintiffs' Complaint be dismissed and that they take nothing thereby. Defendants further requests costs and expenses, including attorneys' fees, expended in this matter and for any and all other appropriate relief to which it may appear to be entitled.

Respectfully submitted,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

By: /s/ Bryan H. Beauman

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Todd P'Pool  
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Madisonville, KY 42431  
T: (270) 821-0087  
COUNSEL FOR DEFENDANTS

**CERTIFICATE OF SERVICE**

This will certify that a true and correct copy of the foregoing has been electronically filed with the KY e-Filing system on this 23<sup>rd</sup> day of March, 2018, and that same has been sent by electronic mail via the Court's electronic filing system to all parties registered to receive electronic filings and also sent via U.S. Mail to:

Michele Henry  
Aaron Bentley  
CRAIG HENRY PLC  
239 South Fifth Street, Suite 1400  
Louisville, Ky 40202  
[mhenry@craighenrylaw.com](mailto:mhenry@craighenrylaw.com)  
[abentley@craighenrylaw.com](mailto:abentley@craighenrylaw.com)  
COUNSEL FOR PLAINTIFF

By: /s/ Bryan H. Beauman  
Bryan H. Beauman



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,

CRAIG HENRY PLC

/s/ Michele Henry  
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Suite 1400  
Louisville, KY 40202  
(502) 614-5962  
mhenry@craighenrylaw.com  
*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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COMMONWEALTH OF KENTUCKY  
LAUREL CIRCUIT COURT  
NO. 18-CI-00077

FREEDOM FROM RELIGION FOUNDATION

PLAINTIFF

v.

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

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.<sup>1</sup> On or about

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<sup>1</sup> 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.<sup>2</sup> In addition, Defendants produced to FFRF their substance abuse programming contracts.<sup>3</sup> Defendants stated that they were withholding responsive documents based on several ORA exceptions set forth in KRS 61.878.<sup>4</sup>

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

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.

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<sup>2</sup> *Id.* at ¶ 13.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at ¶ 14.

<sup>5</sup> *Id.* at ¶ 15.

<sup>6</sup> *Id.* at ¶ 16.

<sup>7</sup> *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."<sup>8</sup> The unduly burdensome exemption requires Defendants to provide clear and convincing evidence supporting it.<sup>9</sup> 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...."<sup>10</sup> As explained by the AG, the agency must provide evidence that the disclosure "would constitute a clearly unwarranted invasion of personal privacy."<sup>11</sup> 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

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<sup>8</sup> Exhibit A to Complaint at p. 2, 6, 9-10.

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

<sup>10</sup> KRS 61.878(1)(a); Exhibit A at p. 6.

<sup>11</sup> Exhibit A at p. 4-5.

in preventing, protecting against, mitigating, or responding to a terrorist act.”<sup>12</sup> 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.<sup>13</sup> 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.”<sup>14</sup> By not providing any explanation for this exemption, Defendants failed to meet their burden of proof.<sup>15</sup>

**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.<sup>16</sup>

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<sup>12</sup> KRS 61.878(m).

<sup>13</sup> KRS 61.878(m)(1)(a-h).

<sup>14</sup> KRS 61.878(m)(2).

<sup>15</sup> Exhibit A at p. 8-9.

<sup>16</sup> 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.<sup>17</sup>

- 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.<sup>18</sup> 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."<sup>19</sup> 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."<sup>20</sup>

- 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.<sup>21</sup> FFRF made its request October 6, 2017.<sup>22</sup> Defendants responded to the request on October 23, 2017 – 17 days later and well outside the statutory period.<sup>23</sup>

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<sup>17</sup> KRS 61.872(3).

<sup>18</sup> Exhibit A at p. 2-3.

<sup>19</sup> KRS 61.871.

<sup>20</sup> Exhibit A at p. 5.

<sup>21</sup> KRS 61.880(1).

<sup>22</sup> Exhibit A at p. 2.

<sup>23</sup> *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.<sup>24</sup> 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.”<sup>25</sup>

### 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.”<sup>26</sup> The AG issued his opinion on December 21, 2017. The opinion concludes with a paragraph explaining the parties’ right to appeal the decision.<sup>27</sup> 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.<sup>28</sup> 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.”<sup>29</sup> The Court should order Defendants to immediately provide the records requested by FFRF over seven months ago.

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

<sup>25</sup> *Id.* at 196-7.

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

<sup>27</sup> Exhibit A at p. 13.

<sup>28</sup> KRS 61.880(5)(b).

<sup>29</sup> *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.<sup>30</sup> The Court must find that the records were willfully withheld to award fees and costs.<sup>31</sup> Willful “connotes that the agency withheld requested records without plausible justification and with conscious disregard of the requester’s rights.”<sup>32</sup> Advancing a plausible argument that an exemption protects disclosure that is later deemed inapplicable is not a willful violation of the Act.<sup>33</sup> 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.<sup>34</sup>

**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

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

<sup>31</sup> KRS 61.882(5).

<sup>32</sup> *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)).

<sup>33</sup> *City of Fort Thomas*, 406 S.W.3d at 854.

<sup>34</sup> *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.<sup>35</sup>

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

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<sup>35</sup> *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.

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**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.<sup>36</sup>

It is unclear how many records have been withheld, but the penalty should be imposed for each document that Defendants willfully refused to produce.<sup>37</sup> 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."<sup>38</sup> 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

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

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

<sup>38</sup> *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,

CRAIG HENRY PLC

/s/ Michele Henry  
239 South Fifth Street  
Suite 1400  
Louisville, KY 40202  
(502) 614-5962  
mhenry@craighenrylaw.com  
*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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MEM : 000011 of 000011

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

FREEDOM FROM RELIGION FOUNDATION

PLAINTIFF

v.

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

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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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

---

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,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

By: /s/ Bryan H. Beauman

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**CERTIFICATE OF SERVICE**

This will certify that a true and correct copy of the foregoing has been electronically filed with the KY e-Filing system on this 4<sup>th</sup> day of June, 2018, and that same has been sent by electronic mail via the Court's electronic filing system to all parties registered to receive electronic filings and also sent via U.S. Mail to:

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By: /s/ Bryan H. Beauman  
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June 22, 2018

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RE: *Freedom From Religion Foundation v. Jamie Mosley, Laurel County Jailer and Laurel County Correctional Center*, Laurel Circuit Court, Case No. 18-CI-00077  
STBM File No.: 65797.0001

Dear Shelley:

I am writing in follow-up to my prior conversation with you (and the Court) about supplementing the Laurel County Correctional Center's ("LCCC") responses to your client's open records request. Specifically, I am writing to address the request you have made on behalf of your client for any additional records not yet received. If I have overlooked something in the detail below that you believe I am not responding to, please let me know. In other words, if you think there are still other records that should have been produced, please let me know.

As I understand the Attorney General's ruling and your position, there are two categories of records you believe were never received. First, your client requested records relating to employee staffing at LCCC. Second, you requested records relating to inmate attendance at the "Night of Prayer."

As for the original Request No. 2 regarding staffing at LCCC during the event, enclosed you will find what is labeled as a "Detail Report," which shows every employees' hours worked on August 29, 2017. Of course, not all employees listed actually worked during the event, but you can readily ascertain who did by the time-stamped entries of clocking in and out. No other document exists that would provide a detail of only those employees who were working during the event. Further, to be clear, there are no responsive documents relating to communications with employees concerning the "Night of Prayer" event.

As for the original Request No. 3 relating to inmate attendance at the "Night of Prayer," there are no documents for communications regarding inmate attendance at the "Night of Prayer"

and no memos, emails, social media posts, notes, or meeting minutes. Nor does any roster of attendance at the event exist. At best, LCCC could only create a new and currently non-existent record of inmate attendance by viewing the complete listing of all inmates and comparing that list to a separate record which shows all cell assignment history detailing movement of inmates out of their cells or through the facility. Because the Open Records Act clearly does not require a public agency to create a new document in order to respond to a request (18-ORD-077), and since no record of inmate attendance exists, these documents were not originally identified or provided in response to the original request. However, I am providing a record to you that shows the "Alpha Head Count by Date" as of August 29, 2017 as well as the "Cell Assignment History" on August 29, 2017 from 6:00 p.m. to 10:00 p.m. Subtracting one from the other is the best we can do but still it is not in itself a record of attendance, simply a list of those inmates in entire facility.

Again, I believe the enclosed documents cover what the LCCC has responsive to your client's outstanding requests. To the extent an Open Records exemption was asserted in the LCCC's original response for which it ultimately was determined there were in fact no responsive documents, our clients maintain such exemptions were cited out of an abundance of caution and a good faith desire both to protect personal privacy rights and comply with other applicable laws such as those reflected in KRS 61.878(1)(m). However, upon further review, and without waiving the merit of prior assertions, our clients have determined the enclosed documents can be reasonably produced while still maintaining compliance with personal privacy rights and other applicable law.

I will be away from the office with family through July 5. I assume that by now you have received the notice that we drew Judge Hendrickson from Harlan for this case. I am happy to work with you to schedule a hearing with him on the renewal of your motion. I do not think it serves either of us well - or our clients - to make additional trips to Harlan for this Laurel County case. If you think we can generally make a phone call to Judge Hendrickson's chambers to schedule a special appointment/hearing on the motion, I am happy to do so.

Sincerely,

STURGILL, TURNER, BARKER & MOLONEY, PLLC



Bryan H. Beaman

BHB/jg

Enclosures (Bates No. LCCC 00001-00044)

cc: Todd P'Pool (via E-mail: [jtpool@yahoo.com](mailto:jtpool@yahoo.com))

Jamie Mosley