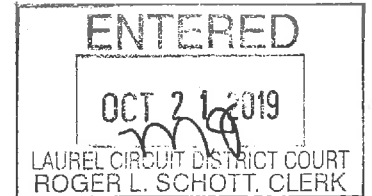


COMMONWEALTH OF KENTUCKY  
27th JUDICIAL CIRCUIT  
LAUREL CIRCUIT COURT  
DIVISION 1  
CIVIL ACTION NO. 18-CI-00077



FREEDOM FROM RELIGION  
FOUNDATION,

PLAINTIFF

v.

JAMIE MOSLEY,  
LAUREL COUNTY JAILER, and  
THE LAUREL COUNTY  
CORRECTIONAL CENTER,

DEFENDANTS

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This matter is before the Court to enforce an Open Records Act request and to award attorney fees, penalties and costs for the agencies alleged willful withholding of requested documents. The Plaintiff, the Freedom From Religion Foundation ("FFRF"), is a nonprofit organization located in Madison Wisconsin that litigates issues dealing with the separation of church and state. The Defendant, Jamie Mosley, is the Laurel County Jailer in charge of the Defendant Laurel County Correctional Center and hereinafter referred to as "LCCC" or the "jail." An evidentiary hearing was held on September 9, 2019. Present and testifying were Colin McNamara, a former member of FFRF and Defendant Mosley.

## **Factual and Procedural Background**

On August 29, 2017, LCCC hosted a "Night of Prayer" at the jail. Afterward, someone (an individual unidentified and unconnected with the event but presumably alarmed by it) notified FFRF that it had taken place. On October 6, 2017, McNamara wrote Mosley two letters, signed by FFRF attorney Andrew Seidel, one chastising him about the event and a second containing an Open Records request. Plaintiff's Exhibits 1 and 2. Four of the requests were for records dealing with the Night of Prayer event, the first of those being a request for LCCC's policies regarding jail events involving the public, "communications between LCCC employees or between LCCC employees. . . [and others] regarding the 'Night of Prayer' including but not limited to: memos, emails, flyers, signs, social media posts, notes and meeting minutes." The second request was for "all records relating to employee staffing at LCCC during the 'Night of Prayer'" including "any LCCC policy regarding staffing during jail events involving the public, and. . . logbooks, timecards, staff assignments, payment receipts, expense reports, invoices, and any communications related to employee staffing including, but not limited to: memos, emails, flyers, signs, social media posts, notes and meeting minutes." The third requested "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." The fourth request was for "all advertisements or promotional material related to the 'Night of Prayer,' including drafts of the materials." Plaintiff's Exhibit 2.

Finally, there were two additional requests, one for records related to LCCC's substance abuse programs and a request for "any contracts or other agreements. . .to provide religious programming at LCCC," records of any communications between LCCC employees and persons or organizations providing religious programming at LCCC and "policies or procedures for creation or dissolution of any religious program." Id.

On October 23, 2017, LCCC responded in writing, albeit late, and accompanied its response with a copy of its only policy and procedures manual and copies of its substance abuse program (SAP) contracts with the state for the years 2015 through 2017. On November 17, 2017, FFRF requested the Office of the Attorney General to review the adequacy of the response. Plaintiff's Exhibit 4. On or about November 27, 2017, the Attorney General's office notified LCCC of the requested review. Plaintiff's Exhibit 5. For reasons unexplained LCCC did not respond to the notice nor participate in the review. On December 21, 2017, the Office of Attorney General issued its decision (17-ORD-272) finding some of LCCC's

responses were appropriate but that others violated the Open Records Act.<sup>1</sup> Plaintiff's Exhibit 6. Thirty days elapsed with no appeal to circuit court, whereupon the Attorney General's decision became final and binding on LCCC.<sup>2</sup>

On January 29, 2018, FFRF filed this action demanding the following:

A declaration that LCCC willfully withheld records in violation of KRS 61.870 through KRS 61.884;

An injunction ordering LCCC to disclose the records responsive to FFRF's requests;

An award of costs, including reasonable attorney's fees, incurred in connection with this action;

An award of \$25 per document for each day that LCCC denied FFRF's right to inspect the requested records.

Complaint at 7. Under cover letter dated June 22, 2018, Plaintiff's Exhibit 7, counsel for LCCC supplemented the earlier response with a "Detail

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<sup>1</sup> The Attorney General found that LCCC had appropriately responded to the two additional requests for records related to LCCC's substance abuse programs and for "any contracts or other agreements. . .to provide religious programming at LCCC," records of any communications between LCCC employees and persons or organizations providing religious programming at LCCC and "policies or procedures for creation or dissolution of any religious program."

<sup>2</sup> "If an appeal is not filed within the thirty (30) day time limit, 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." KRS 61.880 (5)(b)

Report" listing the names of jail employees working on August 29, 2017, including the times they clocked in and out. In the letter, counsel states:

Of course, not all employees listed actually work 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.

Id. Also included in the supplemental response is a list of inmates on that day and their cell numbers. Otherwise, counsel states in his letter "there are no documents for communications regarding inmate attendance at the "Night of Prayer" and no memos, emails, social media post, notes, or meeting minutes. Nor does any roster of attendance at the event exist." Id.

### **Discussion and Findings of Fact**

The primary issue is whether the Defendants willfully withheld documents in violation of KRS 61.882(5), which provides as follows:

Any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorneys fees, incurred in connection with the legal action. . . In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said public record.

Whether records are withheld "willfully" is a matter of fact-finding for the court. *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). However, such a finding (along with any potential award of attorney fees, statutory fees and costs that might result) is necessarily predicated on proof that responsive records were in fact withheld. At the outset of the hearing, FFRF conceded that it had the burden of proving that LCCC had willfully withheld records responsive to its requests. Throughout his testimony, Mr. McNamara, FFRF's sole witness, never identified a single, existing, responsive record that LCCC allegedly failed to produce. The substance of his testimony was that LCCC's clumsy and at times contradictory written responses of October 23, 2017, excited him to conclude, or simply suspect, that requested and responsive records were being withheld. Otherwise he believed records were withheld because he didn't get what he wanted.

On the other hand, Mosley went through the requests and testified convincingly and credibly that the jail had no documents responsive to the various requests for memos, emails, flyers, signs, social media posts, meeting minutes, advertisements or promotional material related to the Night of Prayer event, records of inmate attendance at the event, communications between LCCC employees or between LCCC employees and others about the event. Mosley emphasized that the event was a very

informal process in which he had talked with very few people and there were no meetings about it. As for inmates "attending" the event, Mosley testified those inmates were not removed from their cells.<sup>3</sup> Nonetheless, he testified there is no log or check off list of those in attendance.

As for FFRF's request for records of staffing "logbooks, timecards, staff assignments, payment receipts, expense reports, invoices, and any communications related to employee staffing," Mosley's testimony was that the only existing staffing record for the day of the event is the supplemental "Detail Report" provided June 22, 2018, which itself is not responsive to the specific requests, but provides clock in and clock out times showing staff on duty the evening of the event. Mosley testified that this wasn't produced earlier because it really didn't respond to what was being requested. He is correct. Nonetheless, he said it was produced later only because he thought he should produce whatever he had, responsive or not.

With regard to the requests for the jail's various policies, Mosley correctly testified that multiple policies were requested, and that the jail did not have policies for some of the requests. Therefore, he sent the

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<sup>3</sup> Earlier on the day of the event, Mosley personally went from cell to cell asking each inmate whether he or she wanted to "attend" the event or opt out. If they did not want to be a part of the event, Mosley told them they would be moved to another area. He testified that two people did opt out and were moved to another area.

jail's entire 2017 Policy and Procedure Guidelines manual.<sup>4</sup> He testified that the manual is approximately 180 pages length and divided into 12 chapters. Moreover, he also provided a PDF file identifying each chapter and what it pertained to. He did so thinking FFRF could review the manual and better determine what portions were responsive to the requests, i.e., that they could do so better than he could. He said he certainly did not do that in any effort to confuse, but rather to give FFRF everything openly. That was an inappropriate response, and the Attorney General determined that production of the entire manual improperly co-mingled responsive and non-responsive material. Nonetheless, insofar as the claims in this action are concerned, Mosley's testimony establishes all of the jail's policies were produced.

In summary, Mosley's testimony established that the documents requested but not produced did not and do not exist. As he correctly observed, "In hindsight and having a better understanding at this point I think it would've been much more beneficial if we just said there are no documents." Indeed, had LCCC's October 23, 2017, response simply said as much, the Attorney General's findings would have been much different.

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<sup>4</sup> The manual is not in the record; however, there was no dispute at the hearing that it was served with LCCC's October 23, 2017 response.



## **FINDINGS OF FACT**

1. The evidence is conclusive that LCCC withheld no responsive documents, and the Court so finds; accordingly, the issue of willful withholding of responsive documents is moot.

2. Although the Attorney General found Defendants' production of its entire policy and procedures manual an improper co-mingling of responsive and non-responsive material, the question is whether documents pertaining to jail policies were withheld. The Court finds no such policy documents were withheld, willfully or otherwise.

## **CONCLUSIONS OF LAW**

Plaintiffs are not entitled to a declaration that LCCC willfully withheld records in violation of KRS 61.870 through KRS 61.884, are not entitled to an award of costs and attorney's fees incurred in connection with this action nor an award of \$25 per document for each day that LCCC allegedly withheld. In accordance with the Attorney General's decision, FFRF is entitled to a segregation of those any portions of LCCC's 2017 Policy and Procedure Guidelines responsive to FFRF's Open Records requests 1, 2 and 3. FFRF is entitled to no other relief.

## **ORDER**

**IT IS HEREBY ORDERED** that Defendants' shall do the following within thirty (30) days of entry hereof:

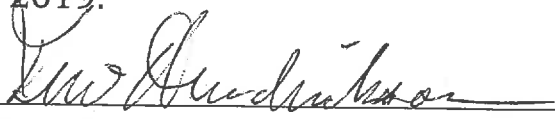
1. Copy and send to FFRF only those portions of LCCC's 2017 Policy and Procedure Guidelines responsive to FFRF's Open Records requests 1, 2 and 3 and file a copy of the response with the Court; or

2. If LCCC concludes the Policy and Procedure Guidelines are not responsive to one more of the requests, LCCC shall certify that to the Court, with service on FFRF. If FFRF objects to such certification, it shall have thirty (30) days thereafter to file a response. Absent a timely objection, judgment will enter incorporating these Findings of Fact, Conclusions of Law and Order as the final and appealable judgment in this matter.

3. In the alternative, FFRF may waive receipt of the foregoing by promptly notifying the Court and LCCC whereupon judgment will enter incorporating these Findings of Fact, Conclusions of Law and Order as the final and appealable judgment in this matter.

4. The remainder of FFRF's claims for relief is **DENIED**.

This <sup>th</sup> 17 day of October 2019.

  
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Kent Hendrickson, Special Judge  
Laurel Circuit Court

Distribution:

Hon. Michele Henry  
Craig Henry PLC  
239 South Fifth Street  
Suite 1400  
Louisville, KY 40202  
*Counsel for Plaintiff,  
Freedom from Religion Foundation*



Hon. Bryan Beauman  
Sturgill, Turner, Barker & Moloney, PLLC  
333 W. Vine Street, Suite 1500  
Lexington, KY 40507  
*Counsel for Defendants*



Hon. Todd P'Pool  
P'Pool & Roy, PLLC  
220 N. Main Street  
Madisonville, KY 42431  
*Counsel for Defendants*



mg 10-21-19  
Clerk's Initials & Date