No. 2022-CA-0170-MR; 2022-CA-0192-MR

In the Kentucky Court of Appeals

KENTUCKY OPEN GOVERNMENT
COALITION, INC. APPELLANT

v.

KENTUCKY DEPARTMENT OF
FISH AND WILDLIFE RESOURCES
COMMISSION APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
CASE NO. 21-CI-00680

BRIEF OF APPELLANT THE KENTUCKY OPEN GOVERNMENT COALITION, INC.

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CERTIFICATE OF SERVICE

In accordance with CR 76.12(5), on January 26, 2022, the undersigned sent for filing, via Federal Express, the original and four (4) true and correct copies of this brief to Kate Morgan, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned counsel further certifies that he served copies of this brief by First-Class U.S. Mail, postage prepaid, on: (1) Hon. Thomas D. Wingate, Circuit Judge, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601 and (2) Jonathan D. Goldberg, Charles H. Cassis, Jan M. West, and Anthony R. Johnson, Goldberg Simpson, LLC, Norton Commons, 9301 Dayflower Street, Prospect, KY 40059. Undersigned counsel further certifies that it did not check out the record in from Franklin Circuit Court.

s/ Michael P. Abate
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INTRODUCTION

This is an Open Records Act case in which the Kentucky Open Government Coalition ("KOCG") sought public records from the Kentucky Department of Fish and Wildlife Commission (the "Commission") relating to the Commission's official business, including any records that might have been on individual Commissioners' personal email accounts and electronic devices. After the Commission refused to produce any records from Commissioners' personal email accounts and devices, KOCG appealed to the Franklin Circuit Court. The trial court granted KOCG summary judgment in part, ordering the Commission to disclose records sent or received on Commissioners' personal email accounts, but declined to order production of text messages and other public records stored on the Commissioner's personal devices. KOCG now appeals, asking this Court to (1) rule that the Commission must release all records requested by KOCG, (2) find the Commission's denial was a willful violation of the Act, and (3) remand the case back to the circuit court to oversee compliance with this Court's opinion and to determine the appropriate amount of fees and penalties.

STATEMENT CONCERNING ORAL ARGUMENT

KOCG believes oral argument will assist the Court in resolving the important issues raised by this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This case presents a question of vital importance under the Open Records Act (the "Act"): are public records sent or received by a public official, pertaining to public business, exempt from disclosure simply because they were sent, received, or are currently stored on a non-government-funded email account or electronic device? The Commission insists that is the law, but its position directly contradicts the plain text of the Act, which requires disclosure of all records "prepared, owned, used, in the possession of or retained by a public agency" regardless of where they are housed. KRS 61.870(2). That argument also defies this Court's holding that "in the end, it is the nature and purpose of the document, *not the place where it is kept*, that determines its status as a public record." *City of Louisville v. Brian Cullinan*, No. 1998-CA-001237-MR, 1998-CA001305-MR (Ky. App. 1999) (emphasis added) (**Tab 2**).[1]

The Franklin Circuit Court rightfully rejected the Commission's "possession-only" definition of public records, concluding that *all* "records used or prepared by an agency fall within the scope of the Open Records Act regardless of where the record is stored." Opinion & Order, *Kentucky Open Government Coalition v. Kentucky Department of Fish and Wildlife Resources Commission*, No. 21-CI-00680 at 11 (**Tab 1**) ("Order"). Thus, the Court ordered

[1] Kentucky's Attorney General's routinely cite *Cullinan* to reiterate that the Act rejects the "possession-only" approach to public records advocated by the Commission. *See e.g.*, 00-ORD-207; 04-ORD-123; 07-ORD-002; 08-ORD-046; 05-ORD-007; 07-ORD-236; 08-ORD-156; 14-ORD-120; 06-ORD-223; 05-ORD-099; 15-ORD-001; 06-ORD-032; 18-ORD-032; 17-ORD-050; 16-ORD-017.

the Commission to produce all public records stored in Commissioner' personal email accounts.

The Court erred, however, by reaching a different result for records stored on public officials' personal devices (such as text messages and other communications). Although the Court recognized that these, too, are the public's records under the Act, it nevertheless created a new categorical exemption that would allow agencies to withhold them in every case. Citing KRS 61.872(6), the Court concluded that requiring officials or employees who choose to do the public's business on their personal devices to retrieve those communications would be such "an unreasonable burden" that they can simply ignore such requests. And it reached that conclusion even though the Commission did not even *try* to offer the "clear and convincing evidence" necessary to sustain that argument. KRS 61.872(6).

This result cannot be tolerated if the Act's basic purpose—to ensure "free and open examination of public records," KRS 61.871—is to survive. Courts and the Attorney General have long admonished public employees and officials not to conduct official business on non-government accounts and devices. Where these agencies and employees have ignored that instruction, their conduct cannot be rewarded by placing all such records off limits to the public. This Court must hold that *any* public record belonging to the public remains accessible to it, regardless of where it is stored.

FACTUAL BACKGROUND

I. The Kentucky Fish and Wildlife Commission

The Commission is composed of nine volunteer members appointed by the Governor from a list of names provided by sportsmen in the relevant fish and wildlife districts of the Commonwealth. *See* KRS 150.022(3). At the time KOCG filed its open records request, Commissioners were not provided with government cell phones or email addresses to conduct official Commission business. Rather, they sent and received all Commission-related communications on their personal devices and accounts. When this litigation began, the Commission's website listed each Commissioner's personal contact information, including non-governmental street and email addresses and phone numbers, as their primary contact information. It appears that Commissioners have now been provided government email accounts but continue to list their personal phone numbers on the Commission website. *See* Kentucky Department of Fish and Wildlife Resources, District Commission Members, **(Tab __)**.[2]

Any communications sent or received by the Commissioners related to Commission business are public records, regardless of the device or account from which they were sent or received. *See* KRS 61.870(2). Indeed, the Commissioners were made aware of this fact in their Commission training. On

[2] Available at: https://fw.ky.gov/More/Pages/District-Commission-Members.aspx. "A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet." *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. Ct. App. 2004).

December 8, 2018, the Department of Fish and Wildlife held a training for the Commissioners after the conclusion of one of its quarterly meetings. The training was conducted by attorneys for the Tourism, Arts, & Heritage Cabinet. A video of that training session remains available on YouTube.[3]

At that training session, the Commission's attorneys informed the Commissioners that if they emailed amongst themselves about matters before the Commission, "that's business" and is subject to the provisions of the Open Meetings and Open Records Acts. *Id*. at 48:45. Later a Commissioner asked if "everything we're doing is open records." The trainer, rightfully, answered "correct." Later, the Commissioner followed up: "personal cell phone, personal email?" *Id*. at 50:25. Again, the trainer responded with an accurate description of Kentucky open records law: "If it doesn't meet an [ORA] exemption there has been a ruling that official business is subject to open records." *Id*. at 50:33. Thus, the Commissioners have long understood that their Commission-related business, even if conducted on personal devices and accounts, is subject to disclosure under the Open Records Act.

II. The KOCG's Open Records Request and the Commission's Denial

In August 2021, the KOCG Commission submitted an open records request to the Commission seeking:

> All emails and text messages that were sent from 1 June 2020 to present time, between any 2 or more of the following individuals listed: Rich Storm (former Commissioner KDFWR), Brian Clark (deputy commissioner/acting commissioner KDFWR), KDFWR

[3] Available at: https://www.youtube.com/watch?v=zQ9QeE1evjQ

> Commission Chairman – Karl Clinard, Jeff Eaton (past 6th district commissioner), KDFWR Commission members, Representative C. Ed. Massey and Representative Matthew Koch.

(Open Records Request, **Tab 4**). The request was explicitly "**not limited** to communications that took place on government owned email accounts and cell phones." *Id.* (emphasis in original). The KOCG requested the Commission's response "include all responsive public records which were generated on private cell phones, on private email services, or through other private communication channels." *Id.*

The Commission responded by providing some responsive records and indicating that other documents would be reviewed for redaction and provided to KOCG by August 24, 2021. (Commission First Response, **Tab 5**). The response did not indicate whether the Commission planned to search records stored on personal phone or email accounts of any of the Commissioners named in the request. On August 24, the Commission reneged on its self-imposed deadline and informed the KOCG that it would be taking more time to review the responsive records. (Commission Second Response, **Tab 6**). Again, this response did not indicate whether the Commission was searching for public records stored on personal devices or in private accounts.

The next day, the KOCG emailed the Commission seeking clarification and confirmation that its "search for responsive records includes emails sent or received exclusively on private devices/addresses?" Clarification was required because all the records produced by the Commission to that point

contained at least one government-owned email address. *Id*. On August 27, the Commission sent its third and final response to the KOCG. (Third Response, **Tab 7**). The third response, drafted by Fish & Wildlife attorney Steven Fields, included a link to additional responsive documents from the Commission. However, it also made clear that the Commission was not producing any emails stored solely on Commissioners' personal devices or email accounts.

It is difficult to discern the Commission's initial reasoning for denying the KOCG's request for emails sent to or from purportedly "personal" devices or accounts. First, the response quotes a recent Attorney General decision that states, "documents in the possession of individuals on their personal devices are not owned by the Commonwealth and therefore are not 'public records' within the scope of the Open Records Act.'" *Id*. (quoting 21-ORD-127). While that suggests that the Commission believes these records were not subject to the ORA, it immediately contradicts that reasoning by noting that it asked the Commissioners to "produce any responsive documents which may be contained in their personal email" despite the Commission's apparent belief that they are not obligated to do so. *Id*.

Then, the response pivots again to a distinct—and non-sensical—justification of its denial. The Commission asserted that because "members of the Fish and Wildlife Resources Commission can only conduct business when in a public meeting with a quorum…there can be no action taken by individual members…outside of a public meeting. Therefore, the personal emails/texts of

Commission members are not considered public records." *Id*. (quoting the Open Meetings Act). This response, which conflates the Commission's duties under the Open Records Act with unrelated provisions of the Open Meetings Act, provides no basis for denying KOGC's request. (To the extent this response is relevant to this case at all, it is relevant to show the Commission's willful refusal to comply with clear requirements of the Act.)

III. Franklin Circuit Court Order

Unable to square the Commission's denial with the requirements of the Open Records Act, KOCG appealed in Franklin Circuit Court seeking an injunction ordering the Commission to produce the requested records and a finding that it acted willfully under the Act. The Franklin Circuit Court granted in part and denied in part both parties' summary judgment motions on the sole claim in the Complaint.

The Franklin Circuit Court was clear: "the [Open Records Act] does not take a possession only approach" and "records used or prepared by an agency fall within the scope of the Open Records Act ***regardless of where the record is stored***." Opinion & Order, *Kentucky Open Government Coalition v. Kentucky Department of Fish and Wildlife Resources Commission*, No. 21-CI-00680 at 10-11(emphasis added) (**Tab 1**). However, after correctly stating the law, the Court proceeded to order production and withholding of records based solely on where the record is stored. The Court ordered the Commission "to obtain any email from the Commissioners' personal email accounts that relate to the KOCG's open records request." *Id*. at 13. But just two paragraphs later, the

Court categorically exempted from disclosure all "text messages and other communications sent or received on private devices" because obtaining public records from an employee's private device would purportedly place an "unreasonable burden" on the agency. *Id*. at 14-5.

The Franklin Circuit Court acknowledged that the Act's "unreasonable-burden" exception, KRS 61.872(6), requires "a highly fact-specific determination and requires clear and convincing evidence." *Id*. at 15 (citing *Dep't of Kentucky State Police v. Courier Journal,* 601 S.W.3d 501, 505 (Ky. Ct. App. 2020); KRS 61.872(6)). But here, the Court created a categorical exemption to the Act on summary judgment *without any evidence in the record*—let alone clear and convincing evidence—to establish any burden on the Commission. In essence, it found that asking public officials or employees to produce public records contained on personal cell phones is *always* so burdensome that such records can never be obtained under the Act.

For the reasons herein, KOCG is entitled to all of the public records requested from the Commission regardless of where those records are stored. If the Franklin Circuit Court's categorical exemption is permitted to stand it will nullify the General Assembly's decision to balance protecting purely private information and allowing the public access to its records. It must be reversed.

STANDARD OF REVIEW

This Court reviews the Circuit Court's Order *de novo*. *Commonwealth v. Chestnut*, 250 S.W.3d 655, 659 (Ky. 2008). All "issues concerning the

construction of the [Open Records Act] [are] review[ed] de novo." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 (Ky. 2013).

ARGUMENT

I. Any communications sent or received by the Commissioners regarding their role as Commissioners are public records regardless of where they are stored.

A. The Act's plain text makes clear that the definition of "public record" turns on its contents, and not its location.

The Open Records Act broadly defines "public record" to mean:

> All books, papers, maps, photographs, cards, tapes, disc, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are **prepared, owned, used, in the possession of or retained by a public agency**."

KRS 61.870(2) (emphasis added). As the Circuit Court recognized, that definition is clear: "records used or prepared by an agency fall within the scope of the Open Records Act regardless of where the record is stored. A possession only approach [advanced by the Commission] does not comport with the plain language of KRS 61.870(2)." Order, p. 10-11.

Here, there is no doubt that the requested records were "prepared," "owned," and "used" by the Commission, and are therefore public records under the Act. *Id*. KOCG requested emails and text messages sent between any two or more of the Commissioners regarding their work as Commissioners. (Open Records Request, **Tab 4**). KOCG reiterated that its request includes "public records" even if "generated on private cell phones, on private email accounts, or through other private communication channels." *Id*. KOCG was clear that it seeks only public records not "communications of a purely personal nature

unrelated to any government function." *Id.* (quoting KRS 61. 878(1)(r)). Importantly, at the time the KOCG made its request all the Commissioners' communications took place on private devices and accounts because they were not provided state-funded cell phones or email accounts. KOCG's request contemplates only those communications between Commissioners related to their public business as Commissioners. Plainly, those communications are subject to the Act. *See Univ. of Louisville v. Sharp*, 416 S.W.3d 313 (Ky. Ct. App. 2013) (holding University staff emails must be disclosed unless subject to one of the Act's exemptions).

It is simply not relevant that the requested records are stored on a private device or account. This Court has long recognized that an agency need not possess a document for it to retain its public character; what matters is "nature and purpose of the document." *Cullinan*, **Tab** 2 at 4. In the analogue era, Kentucky Courts (and the OAG) had little difficulty dismissing arguments from public agencies contending that records stored off government property or in the possession of private parties lost their public status. That was the core holding in *Cullinan*, where this Court rejected the City of Louisville's argument that its legal bills were not public records because they were stored in a private attorney's office. There, like here, "there is no doubt that the records requested were prepared, owned, and used at the instance of the [agency]…they are essentially the [agency's] documents. *Id.*

For many years, the Attorney General followed this same rule. *See, e.g.*, 20-ORD-109 (emails stored on private email server are "public records only if they are 'prepared, owned, used, in the possession of, or retained by" the agency…clearly an email 'prepared' by the [agency]…would be a public record."); *see also* 09-ORD-020 10-ORD-037; 11-ORD-025; 14-ORD-148; 15-ORD-011; 19-ORD-011.

To be sure, some recent OAG opinions have endorsed the Commission's possession-only approach and found records stored on personal devices not to be "public records" at all. *See, e.g.*, 21-ORD-127 (finding that public records contained in the personal email accounts and cell phones of the same Commissioners in this case were not public records). However, those decisions erroneously trace back to a previous OAG decision (15-ORD-226) that had already been abrogated by that office before the OAG relied on it. *See* 19-ORD-206 at n. 5 (any "record that is 'used' ***by*** a public agency is a public record ***of*** that agency…[i]nsofar as 15-ORD-226 suggests otherwise that decision is hereby modified") (emphasis in original). More importantly, however, it violates both the statute's text and the holding of this Court, and therefore is not binding.[4]

[4] OAG opinions are never binding on this Court, which reviews "questions of law and statutory interpretation [] de novo and without deference to the conclusions reached by the Attorney General." *Louisville/Jefferson County Metro Gov't v. Courier-Journal, Inc.*, 605 S.W.3d 72, 78 (Ky. Ct. App. 2019), review denied (Aug. 13, 2020). And where, as here, an agency's interpretation of the Open Records Law is plainly at odds with statutory text, courts have not hesitated to reject even longstanding Attorney General

B. The Act's legislative history confirms that the General Assembly rejected the Commission's location-based approach to public records.

If there were any doubt about the meaning of the Act's definition of "public record" (which there is not), this Court could look to legislative history. *See Ky. Bd. of Med. Licensure v. Strauss*, 558 S.W.3d 443, 453 (Ky. 2018) ("While we reject the attempt to create an ambiguity in KRS 13B.110(1) that does not exist, if the statute were ambiguous on its face, resort to the statute's legislative history would be appropriate."). The legislative history of the Act's newest statutory exemption makes clear that the legislature considered, but ultimately rejected, the kind of location-based approach to public records that the Commission advocates for here. Indeed, it is rare that a bill's legislative history provides such clarity into the legislature's intent.

In 2018, the Senate State & Local Government Committee advanced a bill (with committee substitute) that would have amended the definition of public record to do precisely what the Commission advocates for here: it would have excluded from the scope of the Act "any electronic communications…sent

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opinions. *See, e.g., id*. at 78 (rejecting "the interpretations by various Attorneys General" regarding the scope of the "preliminary" documents exemption as applied to economic development proposals); *see also Dep't of Kentucky State Police v. Teague*, No. 2018-CA-000186-MR, 2019 WL 856756 (Ky. Ct. App. Feb. 22, 2019) (affirming circuit court's holding that KSP willfully violated the ORA by misusing KRS 17.150(2) even though Attorney General upheld KSP's records denial); *Cabinet for Health & Fam. Servs. v. Lexington H-L Services*, 382 S.W.3d 875, 877 (Ky. Ct. App. 2012) (noting that the Attorney General had agreed with the interpretation of KRS 620.050 that the Court rejected in an opinion the Court of Appeals affirmed).

or received using a private cell phone…or received using a nongovernment electronic mail account." (HB 302, **Tab 8**). However, that proposal ultimately failed, and the committee substitute was replaced on the Senate floor with a narrower proposal that left the Act's broad definition of public record unchanged but added a new exemption to KRS 61.878(1) for "communications of a purely personal nature unrelated to any government function." KRS 61.878(1)(r).

This history shows that the General Assembly abandoned a move toward a location-based approach and opted, instead, for a narrower exception based on the content of the requested records, regardless of where they are stored. It thus requires this Court to reject the Commission's argument; after all, courts should not give a statute an interpretation "the Legislature declined to adopt" when given the opportunity. *Ky. Exec. Branch Ethics Comm'n v. Wooten*, 465 S.W.3d 453, 456 (Ky. Ct. App. 2014). Indeed, "[f]ew principles of statutory construction are more compelling than the proposition that [the General Assembly] does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

II. The Circuit Court correctly rejected the Commission's location-based approach to public records, but fatally undermined its own ruling by exempting all records stored on personal devices from the Act.

A. The Circuit Court correctly held that all records pertaining public business are subject to the Act, regardless of where they are stored.

The Franklin Circuit Court began its analysis by holding that "[a] possession only approach [to defining public record] does not comport with the plain language of KRS 61.870(2) or the general purpose of the Open Records Act." Order at 11. The Court was emphatic: "state employees, officials, volunteers, etc. should not be allowed to circumvent the Open Records Act by using a private email account to conduct state business." *Id.* For reasons just explained, that holding was correct as a matter of text and comports with the Act's very recent legislative history.

The court had little trouble applying this broad definition of public records to emails sent and received on Commissioners' personal accounts if they concern public business. Indeed, the Court deemed it "logical that emails sent or received via the Commissioners' personal email accounts concerning state business are 'prepared' and 'used' by the Commission, therefore placing the emails at issue within the purview of the Open Records Act." *Id*. at 12.

Accordingly, the Court ordered the Commission to "to obtain any emails from the Commissioners' personal email accounts that relate to the KOGC's open records request" and "then analyze whether any records are subject to being withheld under a specific exemption and outline how the exemption applies to each withheld record," (Order at 13-14)—in other words, to satisfy its basic obligations under the Act as with any other request for public records. The Court acknowledged that this step does not require the Commissioners to

"turn over access to their personal email accounts." Order at 13 n.5. Rather, it simply requires the Commission to "ask the Commissioners to search their private email accounts and provide any responsive records to the Commission." *Id.*

In concluding this part of its analysis, the Court admonished the Commission and other state agencies about the "significant issue the Commonwealth has created in failing to provide state email accounts for the Commissioners." Order at 14. By giving "Commissioners no other option but to communicate via their personal email accounts," the agency "makes it impossible for sufficient record retention and a serious issue for the Department for Libraries and Archives." *Id.* "*All state agencies* should heed the warning that the Court is forced to issue with this Opinion and Order and consider the costless task of issuing state email accounts for the Commissioners and all others similarly situated." *Id.* (emphasis added).

B. The Court erred in creating a new, categorical exception for public records stored on personal devices.

The Court should have applied this very same analysis to all responsive records sought in this case—not just those contained on Commissioners' personal email accounts. Instead, the Court took a radically different path when it came to records stored on the Commissioners' personal devices, such as text messages contained on personal cell phones. The Court held that in all cases it would be an "unreasonable burden" within the meaning of KRS 61.872(6) to ask agencies to retrieve such records. This ruling, in effect, creates

a categorical exemption to the Open Records Act that places all records stored on personal devices permanently beyond the reach of the public.

As an initial matter, this new exemption is incompatible with decades of open records law forbidding blanket exemptions. *See, e.g.*, *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013) ("the Act forbids blanket denials of ORA requests"); *City of Fort Thomas*, 406 S.W.3d at 855 (rejecting blanket exemption for police investigatory files); *Cabinet for Health & Fam. Servs.*, 382 S.W.3d at 883 (rejecting blanket exemption for child abuse records).

It also contradicts the plain text of the Act. As noted above, the General Assembly rejected a definition of "public record" that would have excluded records stored on personal devices from the Act's reach, opting instead for shielding only "purely personal" communications "unrelated to any governmental function" from disclosure. KRS 61.878(1)(r). The Court's new exception upends that choice, effectively reinstating the committee substitute that was rejected on the Senate floor. The Court was clear why it was doing so; it believed that "emails sent or received from a private email account and text messages and other private forms of communication are fundamentally different" and that "[s]ubjecting text messages and messages contained on other private channels of communication to disclosure would serve no valid public interest and would instead invade individuals' privacy interests." Order at 16. But that is not a choice for judges to make; if text messages are to be

exempted because of purported "privacy" concerns arising from officials' use of personal devices to conduct the public's business, that is a policy the General Assembly must set.

The Court's new atextual exemption for records stored on personal devices also cannot be squared with the provision on which it purports to rest. The Court held that in *every circumstance*, "text messages and other forms of communication sent or received on private devices are exempt from disclosure…pursuant to KRS 61.872(6) and general personal privacy concerns." *Id*. at 14. But KRS 61.872(6) has never been held to create blanket exemptions for entire categories of records. On the contrary, the Supreme Court has stressed that "a public agency refusing to comply with an open records request on this unreasonable-burden basis faces a high proof threshold since the agency must show the existence of the unreasonable burden 'by clear and convincing evidence.'" *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008) (quoting KRS 61.872(6)).

In *Chestnut*, the Court rejected the contention—similar to the one made by the Commission here—that responding to certain kinds of records requests is always too burdensome. The Court held that even if compliance with an open records request can be shown to be "tedious and time-consuming," that "does not mean that complying with Chestnut's open records request automatically constitutes an unreasonable burden." *Id.* Rather, such a contention amounts to nothing more than an argument that the agency's "obligations under the

open records system, even before [the requester's] case was filed, were unduly burdensome." *Id.* But "[a]ny relief" on that kind of argument "must come from the General Assembly," not a court. *Id.*

Here, the Commission did not come close to showing the kind of "clear and convincing evidence" needed to sustain its unreasonable-burden argument. Indeed—and unlike the agency in *Chestnut*—it did not even *attempt* such a showing. The Commission did not file any affidavits in circuit court. Nor did it offer any witnesses to testify as to the alleged burden. There is simply no evidence in the record of the purported burden of retrieving records from personal devices.

Had it tried to make such a showing, KOGC could have easily assuaged the kinds of concerns that appear to have motivated the Court's ruling. For example, the KOGC never asked for "the government to force state employees, officials, and volunteers to hand over their privately-owned devices for inspection of possible records." Order at 15. Rather, it simply sought the same relief the Court ordered for records sent and received on personal email accounts: that the agency ask the Commissioners to turn over all text messages and other communications that relate to their work as public officials, so that the Commission may examine wither they must be produced under the Act. *See, e.g.*, *id.* at 13-14 & n.5. There is no logical reason why the Commission cannot ask the Commissioners to hand over any text messages and other communications while retrieving relevant emails.

Moreover, any burden placed upon the agency to retrieve and produce these work-related messages is not an "unreasonable" one within the meaning of KRS 61.872(6). After all, both the Franklin Circuit Court and successive Attorney Generals have long admonished state employees for using non-governmental devices to conduct public business. Order at 17-19; 21-ORD-146 ("public agencies and their employees are still admonished to refrain from using personal devices to conduct governmental work."); 15-ORD-226 ("this office admonishes public employees against using private cell phones to carry out public work."). Public records should rarely—if ever—be stored on private devices. If an official chooses to do so for their own convenience, they run the risk of having to retrieve those messages so that those records—like all public records—"shall be open for inspection by any resident of the Commonwealth." KRS 61.872(1); *see also Chestnut*, 250 S.W.3d at 666 ("[T]he DOC should not be able to rely on any inefficiency in its own internal record keeping system to thwart and otherwise proper open records request.").

Equally unnecessary was the Circuit Court's concern that requiring production of records stored on personal devices would lead to "permitted fishing expeditions." Order at 15. If a requester seeks records stored on personal devices but the agency determines—after a reasonable search—that no such record exist, it need only affirmatively state that there are no responsive records. *See Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005)). The burden then shifts to the requester to make

a prima facie case showing that the requested records exist. *Id*.; 21-ORD-146. Only after the requester establishes a prima facie case that the records exist is the public agency required to explain the adequacy of its search or explain to the requester why the record no longer exists. *Id*.; *see also Eplion v. Burchett*, 354 S.W.3d 598 (Ky. Ct. App. 2011).

In any event, that abstract fear has no application in this case. KOGC's request is nothing like a "fishing expedition." The Commission never denied that records exist on Commissioners' devices. Nor could it; the Commission did not issue them government devices or email accounts (until recently), so all responsive communications were done on their private devices. Indeed, the Commission's website *continues* to list Commissioner's personal contact information, including phone numbers and street address, and only recently added state-funded email accounts. It is therefore unsurprising that Commissioners were explicitly told by their lawyers that public records on "personal cell phone[s] [and] personal email" must be produced under the Act unless one of its narrow exemptions applies. (Commission Training Video, 50:25-50:40). That is all that KOGC requests.

Finally, the Court's reliance on "general personal privacy concerns" about personal devices has no limiting principle. Order at 14. There is no legal reason to distinguish public records stored on nongovernment email accounts from those stored on nongovernment devices. That is precisely why (as explained above) the General Assembly chose to retain the Act's content-based

definition of public record, while protecting communications "of a purely personal nature" regardless of the kind of device they are stored on. KRS 61.878(1)(r).

III. KRS 61.878(1)(j) does not exempt the Commissioner's communications related to Commission business from the Open Records Act.

KOCG anticipates that the Commission will renew an argument here that was rejected by the Franklin Circuit Court. The Commission argues that because the Commissioners themselves are not public agencies under the Act, only records generated when a quorum of the Commissioners are present at public meetings are public records. This betrays a fundamental misunderstanding of the Open Records Act. The Open Records Act and Open Meetings Act, while both designed to increase transparency, regulate different things. It is well-understood that communications of public officials outside of public meetings are subject to disclosure under the Act unless subject to one of its narrow exemptions. *Sharp*, 416 S.W.3d 313 (holding agency staff emails must be disclosed unless subject to one of the Act's exemptions); *Baker v. Jones,* 199 S.W.3d 749, 752 (Ky. Ct. App. 2006); *Cabinet for Health & Fam. Servs. v. Regan on Behalf of Kentucky Equal Just. Ctr.*, No. 2018-CA-000842-MR, 2019 WL 5854032 (Ky. Ct. App. Nov. 8, 2019) (same). Were it otherwise, virtually no public records would be subject to disclosure because so few public records are created or used at public meetings.

This argument—one of the lynchpins of the Commission's denial—is simply beside the point. If relevant to this case in any way, it is to show that the agency willfully disregarded KOGC's rights, as explained below.

IV. The Commission willfully violated the Open Records Act by ignoring controlling precedent and refusing to provide public records it admits are stored on Commissioner's private devices and accounts.

Under the Open Records Act, "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 a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action." KRS 61.882(5). An agency acts "willfully under the statute by withholding records without plausible justification and with a conscious disregard of the requester's rights." *Cabinet for Health & Fam. Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 384 (Ky. Ct. App. 2016) (quoting 406 S.W.3d at 852).

Here, there is no doubt that the Commission acted with conscious—indeed, deliberate—disregard of KOCG's rights. The Commission failed to even acknowledge its obligations to search for public records on the Commissioner's private devices and accounts despite the plain text of the Open Records Act and caselaw establishing that all records used to conduct agency business are public records, regardless of where they are stored. Rather than attempt to search the devices on which they conduct public business for public records, and then meet their statutory burden of proving an exemption from the

records' required disclosure, the Commission took a shortcut: it pretended that communications between Commissioners about their official roles are not public records at all.

This conduct is especially willful here because the Commissioners were trained by their attorneys on precisely this point. The Commission knew that Commissioners' communications, if pertaining to Commission business, constitute public records, yet failed to even ask them to search for such records. The Commission likely will argue that the intervening OAG opinion negates any willfulness, but that argument merits no deference; after all, the Commission knew that the OAG's about-face violated the statute's clear text and caselaw (like *Cullinan*) that trumps OAG opinions. In such cases, this Court has not hesitated to impose statutory fees and penalties on agencies that invoke clearly erroneous OAG opinions to prevent the public from accessing its records. *See, e.g.*, *Teague*, 2019 WL 856756 at *4 (affirming circuit court's holding that KSP willfully violated the ORA by misusing KRS 17.150(2) even though Attorney General upheld KSP's records denial); *Courier-Journal*, 493 S.W.3d at 387 (affirming largest-ever fee and penalty award under the Act even though Attorney General had ruled for agency).

The negative implications of the Commission's willful refusal to provide records from personal accounts and devices is hard to overstate. Because Commissioners were not provided with government email addresses or devices, all records created by the Commission that did not include a non-Commission

state employee existed only on non-government devices and accounts. Thus, the Commission's position was, in essence, that it could evade obligations under the Act by simply failing to give Commissioners access to any official resources. That result runs headlong into the Supreme Court's holding that an agency "should not be able to rely on any inefficiency in its own internal record keeping system to thwart and otherwise proper open records request." *Chestnut*, 250 S.W.3d at 666.

The Commission then compounded this willful violation of the Act by trying to use the Open Meetings Act as a shield against disclosure under the Open Records Act. Similarly, it tried to recast any attempt by the public to learn about the agency's actions as an "unfettered fishing expedition." (Commission's Motion for Summary Judgment, p. 15). These arguments are so patently deficient as to constitute bad faith and should be seen for what they are: an effort to frustrate the public's right to learn what the Commission "is up to" and if they are "indeed serving the public." *Kentucky New Era, Inc.*, 415 S.W.3d at 85-86. They are a "legal strategy designated to delay, obstruct, and circumvent" the Commission's well-established obligations under the Open Records Act. *Courier-Journal*, 493 S.W.3d at 386.

This Court has the ability to decide that the Commission's conduct was willful as a matter of law and remand the case for a determination of the appropriate amount of statutory fees and penalties. *See* KRS 61.882(5). At a minimum, if it reverses the Franklin Circuit Court's "unreasonable-burden"

holding, this Court should send the question of willfulness back to the trial court for reconsideration in light of its holding.

CONCLUSION

The Commission could have avoided this case altogether by (1) maintaining an appropriate recordkeeping system in the first instance; (2) ensuring that Commissioners do not conduct public business on personal devices; and/or (3) simply asking the Commissioners to turn over any work-related communications they conducted on personal accounts and devices. Instead, they took the path of least resistance: doing nothing on the front end to ensure that the public will have access to its records, and they citing its own recordkeeping failures as a reason not to comply with the Act. Anyway you slice it, that is at least conscious disregard of its legal obligations and the public's rights. This Court should vacate the portion of the circuit court order that ruled for the Commission, order that all responsive records be produced, and remand for a determination of the appropriate amount of fees and penalties.

Respectfully submitted,

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Appendix Contents

Tab	Document	Record Cite
1	Order Granting and Denying Summary Judgment	316-337
2	City of Louisville v. Brian Cullinan, No. 1998-CA-001237-MR, 1998-CA001305-MR (Ky. App. 1999)	
3	Fish and Wildlife Commission Website	16-43
4	KOCG Open Records Request	16-43
5	Commission First Response	16-43
6	Commission Second Response	16-43
7	Commission Third Response	16-43
8	HB 302	16-43