

COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-00512

MCCLATCHY COMPANY, LLC

PLAINTIFF

v.

ORDER

JAY HARTZ, in his official capacity
As Director of KENTUCKY LEGISLATIVE
RESEARCH COMMISSION

DEFENDANTS

This matter is before the Court on Plaintiff's, McClatchy Company, LLC, Motion for Attorney's Fees pursuant to KRS 61.882. The Court issued an Opinion and Order on December 7, 2020, which granted Plaintiff's Motion for Summary Judgment, denied Defendant's Motion for Summary Judgment, and ordered the Defendants to provide copies of the documents at issue to the Plaintiff. Having reviewed the pleadings and being otherwise sufficiently advised, the Court hereby **GRANTS** the Plaintiff's Motion for Attorney's Fees.

Plaintiff's argue that the LRC has resisted compliance with the Open Records Act and willfully withheld documents from them. In response, Defendants argue that there is constitutional authority, other jurisdictional authority, and historical policies allowing them to withhold the documents.

KRS 61.882(5) states that "[a]ny 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." The Plaintiff is entitled to reasonable attorneys' fees incurred in connection with its requests for the production of

documents. The Court found that there was no basis to withhold the documents because they were a matter of public record. Plaintiff has submitted affidavits of counsel that documented accurate, contemporaneous time records, which properly document the attorneys' time and hourly rates, and any costs and expenses through January 6, 2021. The Defendants have not filed any counter-affidavit, or seriously contested the validity of the fees and expenses incurred by the Petitioner.

In addition, under KRS 61.882(5), the Court may, "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." The Court finds that in the instant case statutory penalties are not warranted because the legislative defendants based their non-compliance on good faith arguments arising from separation of powers concerns. While the Court finds these arguments to be erroneous, it does not believe the imposition of sanctions is warranted on a co-equal branch of government in these circumstances. The delay in production of these records has seriously undermined the efficacy of the Open Records Act with regard to legislative documents, and might warrant the imposition of penalties if the Court believed the delaying litigation tactics were employed to cover-up misconduct or wrongdoing. But having examined the records *in camera*, the Court is convinced that the LRC acted erroneously, but without any motive to hide misconduct in this particular case.¹

The Court is not persuaded by the Defendant's argument that there was a constitutional or other basis to withhold the documents from the Plaintiff. Here, as in *Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875 (Ky. App. 2012), the agency's

¹ The legislature has recently enacted House Bill 312, which limits the right to appeal the denial of an Open Records request for legislative documents, to address the separation of powers concerns argued by the LRC in this case.

policy was a blanket denial of the Open Records request, which constitutes a “willful” violation of the Act, and justifies the award of attorneys fees.

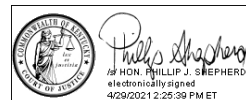
As this Court previously held in *Lexington Herald-Leader v. Cabinet for Health and Family Services*, No. 09-CI-1742:

The intent of the Kentucky Open Records Act to provide attorneys fees for willful violation is similar to the provision for attorney’s fees and costs in the Federal Freedom of Information Act. Such provision in FOIA for attorney’s fees “had a...purpose to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation.” *Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Dir. 1977). See 5 U.S.C. Sec. 552(a)(4)(E).

[*Affirmed, Commonwealth, Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875 (Ky. App. 2012)].

Accordingly, the Court has reviewed the Plaintiff’s Affidavit, and finds the charges are reasonable, and within the prevailing market rates for the services performed. Because this Court found the blanket denial of the requested documents, in accordance with the Open Records Act, to be willful, Plaintiffs are hereby awarded their requested attorneys’ fees and costs of \$33, 678 under KRS 61.882(5). Accordingly, the Court hereby awards that sum as reasonable costs and attorneys fees. All prior rulings of the Court on the merits of this case are hereby incorporated by reference under CR 54.02. This is a final and appealable order and there is no just cause for delay in its entry.

So **ORDERED** this, the 29th day of April, 2021.



PHILLIP J. SHEPHERD
electronically signed
4/29/2021 2:25:39 PM ET

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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