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

MCCLATCHY COMPANY, LLC **PLAINTIFF**

v. **OPINION & ORDER**

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

This matter is before the Court on Cross Motions for Summary Judgment. At issue in this case are internal Legislative Research Commission (LRC) documents regarding alleged misconduct by a member of the Kentucky House of Representatives. Plaintiff, the Lexington Herald-Leader, made an Open Records Act request for these documents, which was denied by the LRC staff, and the denial was later upheld by the LRC itself. Thereafter, the Plaintiff brought this action for judicial review of the LRC's denial. The LRC challenged the jurisdiction of this Court to conduct such a judicial review under the Open Records Act and KRS 7.119, but the Supreme Court upheld this Court's jurisdiction. *Harilson v. Shepherd,* 585 S.W.3d 748 (Ky. 2019). The Supreme Court directed this Court to conduct judicial review of the LRC's action and to "consider LRC's arguments that the requested records are exempt from disclosure under the eight grounds LRC cited when denying the records to the Herald-Leader, including [Ky. Const.] Section 39." *Id.* at 759. Accordingly, the case is now before the Court, after being fully briefed and argued, for a ruling on the merits of the case.

The Plaintiff argues that the exceptions contained within the Kentucky Open Records Act, the personal privacy exception and the preliminary document exception, do not apply to the

records sought in this case. Plaintiff argues that any "unwarranted" invasion of privacy can be remedied with names and other personally identifying information being redacted and, since the investigation that underlies this case ended years ago, the documents prepared during that long completed investigation have lost any preliminary status that might have been asserted when LRC's internal review was on-going.

The LRC has produced the documents in question for the Court's *in camera* review, as required by the Open Records Act, and the Court has examined those documents. The documents in question are sparse, consisting of only three pages of handwritten notes[1] related to the complaint of an LRC staff member arising out of Rep. Jim Stewart's unwanted interactions with her, and one page of brief email exchanges that merely confirm a meeting between the complaining LRC staff member and the LRC personnel office.

The Court notes that these documents reflect that the complaint was handled appropriately and in a professional manner by LRC staff and legislative leadership. They show that Rep. Stewart had directed verbal comments to an LRC staffer in a boneheaded and unprofessional manner, that he failed to realize his interaction with the LRC staffer was unwelcome and unprofessional, and that he was appropriately admonished to cease such interactions. While the documents at issue here are innocuous, the principles concerning the application of the Open Records Act to the legislative branch of government are very significant.

LRC argues that applicability and interpretation of KRS 7.119 is not the sole issue in this case; among the eight grounds that LRC cited in initially denying its request for production of records is an argument that such production would be violative of the separation of powers provisions of the Kentucky Constitution. Next, LRC also argues that this denial represents a non-

[1] The handwritten notes are dated 2/6/15 and 2/9/15, and are not signed by the author, who appears to be an LRC staff member who deals with personnel issues and complaints.

justiciable political question that should not be adjudicated by the courts. LRC also argues that judicial review of this matter infringes on the powers of each house of the General Assembly to prescribe its own rules of procedure and conduct under Section 39 of the Ky. Constitution. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS** Plaintiffs Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment, for the reasons more fully explained below.

BACKGROUND

Jay Hartz is the Director of the Legislative Research Commission ("LRC"), which is an independent agency in the legislative branch whose responsibilities, powers, and duties are assigned to it by the General Assembly or statute. *Defendant's Joint Motion for Summary Judgment*, at 1; KRS 7.090(1). Under KRS 7.119(3), open records requests are required to be directed to Hartz. On March 8, 2018, the former Chief Clerk of the Kentucky House of Representatives filed an action against the LRC ("Metcalf Complaint"). *See Brad Metcalf v. LRC*, Franklin Circuit Court, Division I, Case No. 18-CI-00245. The Metcalf Complaint contained a reference to a sexual harassment complaint filed against Representative Jim Stewart. *Defendants Joint Motion for Summary Judgment*, at 2. The same day, the Lexington Herald-Leader ("Herald-Leader") ran a story about the Metcalf Complaint and the accusation against Rep. Jim Stewart. *Id.* The next day, the Herald-Leader filed an Open Records request seeking records relating to Rep. Stewart. *Id.*

The newspaper sought records of the complaint filed against Rep. Stewart, records of meetings held with Rep. Stewart, and a copy of any agreement between Rep. Stewart and an LRC staffer to not have contact with one another. *Plaintiffs Motion for In Camera Review and Summary Judgment*, at 2. David Byerman, then acting LRC Director, responded to the Open

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Records request by refusing to provide the documents. *Id.* at 3. After the denial, the Herald-Leader sent another letter to the LRC to "reconsider" its response and for the name of any complainant to be redacted. *Defendants Joint Motion for Summary Judgment*, at 3. Further, the LRC affirmed Director Byerman's decision to deny disclosure of the requested records arguing it would violate Section 39 of the Kentucky Constitution, KRS(1)(a), (h), (i), (j), attorney-client privilege, and work-product doctrine. *Id.* at 4; *Legislative Research Commission Letter,* Exhibit B.

On May 14, 2018, Plaintiff filed its Complaint and Appeal with an Amended Complaint and Appeal to follow on May 16, 2018. *Id.* Upon receipt of the complaint, Director Byerman filed a pre-answer Motion to Dismiss arguing the court lacked subject matter jurisdiction over the claims. *Id.* This Court held that it had subject matter jurisdiction and that the General Assembly waived immunity from judicial review of its records due to its adoption of the review provisions in the Open Records Act. *Id.* The LRC appealed this Court's order to the Kentucky Court of Appeals, which affirmed this Court on the issue of jurisdiction and held the Director's immunity from suit had been waived. *Id.* at 4-5. Following a separate action by the LRC, the Kentucky Supreme Court rendered an opinion that KRS 7.119(3) grants the Franklin Circuit Court subject matter jurisdiction to review the LRC's denial of open records requests. *Id.* at 5. Lastly, this Court reviewed the documents in question via *in camera* examination, as provided for in KRS 61.8882(3), to better understand the factual and legal context of the requested materials.

STANDARD OF REVIEW

Summary judgment is appropriate when the Court concludes that no genuine issue of material fact for which the law provides relief exists. CR 56.03. Summary judgment "shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.01.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show the absence of a genuine issue of material fact. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. Ct. App. 2011). The movant will only succeed by showing "with such clarity that there is no room left for controversy." *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W. 2d 476, 482 (Ky. 1991). "The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor. The Court will only grant summary judgment when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest*, 807 S.W. 2d at 480.

The Court recognizes that the summary judgment is a device that should be used with caution and is not a substitute for trial. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Jones v. Abner*, 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

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In Open Records Act cases, the statute provides that "the burden of proof shall be on the public agency." KRS 61.882(3). The statute further provides 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." KRS 61.871.

ANALYSIS

The LRC has raised eight (8) arguments as to why the requested documents should not be disclosed to the Herald-Leader. The LRC argues that (1) this case presents a nonjusticiable political question; (2) the compelled disclosure of said records would violate the separation of powers doctrine; (3) the legislature has exclusive authority over investigations and member misconduct; (4) Section 43 of the Kentucky Constitution grants legislative immunity to the LRC; (5) General Assembly policy prohibits disclosure; (6) the requested documents are exempted from disclosure due to the personal privacy exemption; (7) the documents are exempted as preliminary documents; and (8) the documents are privileged by the attorney-client privilege and work-product doctrine. However, this Court rejects the LRC arguments, for the reasons stated below.

1. This Case Presents a Justiciable Question for the Court

First, the LRC argues that the LRC's decision to disclose or not to disclose the requested records presents a nonjusticiable political question. To support this argument, the LRC suggests that requiring disclosure of these documents would interfere with the General Assembly's rulemaking authority and plenary power over member conduct. *See* Ky. Const. § 39; *Defendant's Joint Motion for Summary Judgment and Response to Plaintiffs Motion*, at 6. If a case presents a political question the judiciary is barred from adjudicating "controversies which

revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacaen Soc.*, 478 U.S. 221, 230 (1986).

The LRC cites an Iowa case, *Des Moines Register and Tribune Co. v. Dwyer*, that challenged the Iowa Senate policy denying release of phone records under the comparable open records statute in Iowa. The court held that the challenge was a nonjusticiable political question and "[t]he proper forum for a challenge of the senate's policy on this matter lies not in the courts, but the political process." 542 N.W.2d 491, 501 (Iowa 1996). In contrast, the General Assembly in Kentucky has made LRC's denial of open records requests subject to judicial review under KRS 7.119 and KRS 61.878. The Legislature has specifically given the courts the authority to review the Director's determination through judicial review. KRS 7.119. "[O]ne of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Japan Whaling Ass'n*, 478 U.S. 221, 230 (1986).

While the legislature has the authority to adopt its own open records policies, here it has chosen to apply the Open Records Act to itself, and to grant a right of judicial review from the denial of a records request. It cannot argue that judicial review of the LRC decision is a non-justiciable political question, when the legislature itself enacted the statute providing for judicial review.

In addition, the cases that the LRC cites are distinguishable. *Beno* dealt with a subpoena to compel production of documents, and *Des Moines Register* dealt with Senate phone call records. *State v. Beno*, 341 N.W.2d 668 (Wis. 1984); *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 493. In *Des Moines Register*, the Court wrestled with the justiciability

of interpreting and enforcing legislative procedural rules, which is significantly different than the case at bar, which asks the Court to interpret statutes. *Id.* Likewise, the Court in *Beno* considered issues relating to subpoenas that raise different issues regarding the functioning of the legislative branch. 431 N.W.2d 668.

Finally, neither case involved a statute in which the legislature granted the judiciary specific statutory authority to review and interpret the applicable open records laws like the ones at issue in the present case. *See* KRS 7.119; KRS 61.878. In sum, this case presents a justiciable question for the Court to consider in the determination of whether or not the applicable statutes affirm or prohibits the denial of the open records requests. The issue of justiciability is a question of law, not a matter of factual dispute. Having enacted a statute that provides for judicial review of the LRC's Open Records decisions, the legislature cannot argue that the judicial branch lacks authority to adjudicate this dispute.

2. The Separation of Powers Clause does not bar this Court from adjudicating the issues presented

Similarly, the LRC believes that it would violate the separation of powers doctrine to have this Court compel disclosure of the requested documents. The LRC frames its argument as if the judicial branch is intervening in the legislative process. *Defendant's Joint Motion for Summary Judgment and Response to Plaintiffs Motion,* at 10. It is true that "the separation of powers doctrine is fundamental to Kentucky's tripartite system of government." *Legislative Research Com'n By and Through Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984). The LRC is correct that Section 39 of the Kentucky Constitution gives the General Assembly the power to investigate and govern member misconduct. *Defendant's Joint Motion for Summary Judgment and Response to Plaintiffs Motion*, at 11. However, the LRC misconstrues this action because

this Court is not trying to regulate or investigate member misconduct. The LRC contends "it is not for the judiciary to tell the General Assembly what it should submit to the people—or the Herald-Leader—regarding this constitutional legislative function." *Id.* Nevertheless, the Supreme Court has already addressed this issue by stating,

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule…This is the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. 137, 177-78, 1 Cranch 137, 2 L.Ed. 60 (1803). "It was long ago settled that the interpretation of statutes is a proper judicial function…" *Masonic Widows and Orphans Home and Infirmary v. Louisville*, 309 Ky. 532, 217 S.W.2d 815, 822 (1948). The writ actions before us involves that fundamental judicial function, interpretation of a controlling statute. Interpretation of a statute detailing review of a legislative records request is in no way an encroachment on the legislative function, it is a quintessentially judicial function.

Harilson v. Shepherd, 585 S.W.3d 748, 758-59 (Ky. 2019). It is the judiciary's duty to interpret the law, which is what this Court is doing in the present case. To allow the LRC to be the final arbiter of what documents can be disclosed would allow the LRC to ignore the provisions for judicial review that the General Assembly enacted in KRS 61.878 and KRS 7.119. Hence, this Court is required to interpret the law and is not barred by the separation of powers doctrine from doing so. Furthermore, there is no genuine issue of material fact concerning the separation of powers. Rather, the separation of powers requires this Court to interpret and apply the Open Records Act.

3. Disclosure of the Requested Records does not Interfere with the Legislature's Powers under Section 39 of the Ky. Constitution.

Again, the LRC suggests that requiring disclosure of the requested documents would interfere with the legislatures ability to investigate and govern member conduct. Section 39 of the Kentucky Constitution grants the General Assembly the power to determine the rules of their

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proceedings and punish member behavior and does not contain any limit on those powers except for a vote to expel a member. Ky. Const. § 39; *Defendants Joint Motion for Summary Judgment and Response to Plaintiffs Motion*, at 11. Instead, the LRC analogizes the rules governing the General Assembly to those governing the judiciary, which has adopted different procedural rules for maintaining records. The Supreme Court has already addressed this issue in LRC's original appeal. The Supreme Court rejected the LRC's argument by stating,

> LRC compares the General Assembly's adoption of KRS 7.119 and the potential for Kentucky courts to decide through their opinions whether the legislative branch must disclose records related to a constitutionally authorized investigation into a member of the House of Representatives to this Court's adoption of an open records policy which prohibits disclosure of records relating to employee complaints, investigations, or decisions. Although LRC appears to argue otherwise, the fact that the General Assembly may have adopted different record disclosure rules than the Court of Justice does not present a separation of powers issue.

Harilson, 585 S.W.3d at 769. The General Assembly chose to make the records in the custody of the General Assembly public pursuant to KRS 7.119. The General Assembly was not required to adopt the Open Records Act to govern its disclosure of public documents, and indeed the Kentucky Supreme Court has adopted its own policy related to disclosure of documents in the judicial branch. But having adopted the Open Records Act, including its provisions for judicial review, the LRC cannot argue that application of the Open Records Act infringes on legislative powers.

The Open Records request for the applicable documents does not impede the General Assembly's ability to investigation or discipline member misconduct as the LRC argues. The General Assembly can continue to investigate and discipline member misconduct as it has in the past but is still subject to the statutory guidelines as outlined in KRS 7.119 and KRS 61.878.

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Accordingly, there is no genuine issue of material fact because the disclosure of the requested records does not impede the legislature or infringe on legislative powers.

4. Section 43 does not Shield Disclosure

Next, the LRC argues that the it is cloaked by legislative immunity, which shields it from the compelled disclosure of the requested documents. The notion of legislative immunity is derived from Section 43 of the Kentucky Constitution. Section 43 of the Kentucky Constitution states, "[t]he members of the General Assembly shall…be privileged from arrest…and for any speech or debate in either House they shall not be questioned in any other place." Also, legislative immunity extends to state legislators and their staff under the common law. *Gravel v. U.S.*, 408 U.S. 606, 616 (1972). Moreover, the LRC argues that legislative immunity applies here because it is within the jurisdiction of the General Assembly to investigate and govern member conduct, which would place this matter within the legislative sphere. Ky. Const. § 39; *see also Comm'n on Ethics v. Hardy*, 212 P.3d 1098, 1104 (Nev. 2009); *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015).

However, this Court and the Kentucky Court of Appeals have already addressed this issue by stating, "the General Assembly nonetheless expressly waived legislative immunity as to open records requests submitted to the LRC." *Harilson v. Lexington H-L Services, Inc.*, 604 S.W.3d 290, 293-94 (Ky. App. 2019), *review denied* (Aug. 13, 2020). Further, the Kentucky Supreme Court has affirmed the notion that the General Assembly has provided a right for judicial review of denials of open records requests. *Harilson v. Shepherd*, 585 S.W.3d 748, 759 (Ky. 2019).

The LRC continues to argue for legislative immunity after it has been decided to be waived, citing cases that are not binding on this Court and are factually distinguishable. *See supra 1.* Legislative immunity, as it relates to denials of Open Records requests, has been statutorily waived even as it applies to legislative staffers on non-legislative matters. *Harilson v. Lexington H-L Services, Inc.*, 604 S.W.3d 290, 293–94. Moreover, it must be noted that no member of the General Assembly is named as a defendant here, and no relief is sought concerning any members of the General Assembly in the discharge of their legislative duties.

Legislative immunity, to the extent it may be relevant to this lawsuit, has been statutorily waived in Open Records cases and does not shield disclosure of the requested records. Accordingly, there is no genuine issue of material fact that legislative immunity does not bar statutorily derived judicial review of LRC open records request denials.

5. General Assembly Policy and Memoranda are not Controlling on this Court

Dating back to 1958, the LRC has adopted rules, in which it governed its personnel. *Defendants Joint Motion for Summary Judgment and Response to Plaintiffs Motion*, at 20. KRS 7.090(1) provides that "[t]he Commission shall have the duties, responsibilities, and powers assigned to it or authorized it by the General Assembly, by statute or otherwise." In addition, KRS 7.090(4) provides, "[t]he Commission shall have exclusive jurisdiction over the employment of personnel necessary to effectuate the provision of KRS 7.090 to 7.110." For these reasons, the LRC contends that they have the exclusive power to deny the records requests of the Herald-Leader.

Using these statutes, the LRC argues that internal Memoranda and policy should govern whether or not the LRC discloses the requested documents. The LRC points to memoranda from Philip Conn who was the Director at the time the Open Records Act was passed by the General

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Assembly in 1976. In his Memorandum, Director Conn, analyzing the Open Records Act, stated that it would not affect their practiced policies of not disclosing intra-agency communication and personnel records. *See Memorandum by Philip W. Conn, Director, to LRC Staff on the Confidentiality of LRC Records, June 16, 1976,* Exhibit 3. In addition to Director Conn's statements, the LRC refers to its 2002 version of the LRC Personnel Policy Manual ("Manual"). The Manual states that reports of sexual harassment "shall remain confidential." *LRC Personnel Policy Manual*, at 29, Exhibit 4.

However, the disclosure of documents is not governed by internal memoranda nor LRC policy Manuals. Instead, disclosure of the documents is governed by law. KRS 7.119, which was enacted in 2003, governs the disclosure of LRC records for distribution to the public along with KRS 61.878. The arguments that the LRC raises, using the Conn Memorandum and the Manual, on intra-agency communications and personnel records remaining confidential, are addressed below. In the present case, the Court is not tasked with interpreting and applying the policies of the General Assembly. Rather, it is the Court's constitutional duty to interpret and apply the law that the General Assembly has enacted. In consequence, there is no genuine issue of material fact because this Court must interpret and apply the law before it.

6. Redaction cures the Personal Privacy Exception in KRS 61.878

The LRC asserts that the present case would fall under the "personal privacy" exception set out in KRS 61.878(1)(a). KRS 61.878 allows exceptions to an open records request for "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." KRS 61.878(1)(a). At issue here is the personally identifying information of the LRC staffer that came forward against

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Rep. Jim. Stewart. The Herald-Leader contends that a redaction of the staffers name would satisfy the personal privacy exemption, while the LRC contends the records are exempt.

The disclosure of the LRC staffers name or identity could potentially constitute an "unwarranted invasion of personal privacy" and have a chilling affect on staff members coming forward to report. However, the Herald-Leader has agreed to receive the documents with any personally identifying information about the staff member redacted. This protects the staff member from any unwarranted invasion of personal privacy.

The only remaining privacy interest left is that of Rep. Stewart, who is an elected official and public servant. Kentucky courts have recognized the public's need for information regarding public officials. *Palmer v. Driggers,* 60 S.W.3d 591, 599 (Ky. App. 2001) (suggesting that personal privacy interests did not apply to records of disciplinary action against a police officer). Further, the requested documents contain minimal information, and no information that gives rise to any privacy interest regarding Rep. Stewart. The relevant information regarding Rep. Stewart, in substance, has already been disclosed and is already in the public domain through the related litigation filed by House Clerk Metcalf. Thus, there is no genuine issue of material fact at issue on this point. Any privacy interest of the LRC staffer will be adequately protected by the redaction of personal identifiers. Rep. Stewart has no cognizable privacy interest at stake here because of the minimal information about him in the contested documents. Moreover, his conduct as an elected official during the discharge of his public duties, while on the public payroll, cannot be considered to be subject to the personal privacy exception of the Open Records Act.

7. The Documents are not Exempt as Records of an Administrative Adjudication or as Preliminary Documents

Next, the LRC contends that the documents should be exempt as documents to be used in a potential administrative adjudication and as preliminary documents. Three sections of KRS 61.878 are pertinent in the present case. KRS 61.878(1)(h) exempts, in relevant part,

> [r]ecords of…agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations of the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective…administrative adjudication.

Further, KRS 61.878(1)(i)-(j) gives context to "preliminary documents." KRS 61.878(1)(i)-(j) exempts, "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency; (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended."

First, pursuant to KRS 61.878(1)(h), the LRC argues that the documents are protected because they are records involved in an administrative adjudication. To support this, the LRC suggests that at some point in the future the LRC could take action against Rep. Stewart and disclosure would harm the agency. *Defendant's Joint Motion for Summary Judgment and Response to Plaintiffs Motion*, at 26-27. However, this argument fails because the exemption does not apply after "enforcement action is completed or a decision is made to take no action." *Univ. of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 377 (Ky. 1992).

The requested documents reflect the position of the LRC to handle the manner in an informal way, which demonstrates a final action. LRC personnel met with Rep. Stewart and

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directed him to cease his behavior and carry on in a professional manner. Additionally, the identity of the LRC staffer will not be given because her name will be redacted, and it is already known that the matter involves Rep. Stewart. Hence, there is no genuine issue of material fact that there will be no harm to the agency through disclosure of the requested documents, identifying information will be redacted, and final agency action has occurred.

LRC also asserts the documents are exempt through KRS 61.878(1)(i) and (j)'s "preliminary documents" exception. When agency action is final, the investigative materials lose exempt status even if there is a decision to do nothing at all. *Palmer v. Driggers*, 60 S.W.3d 591, 596-97 (Ky. App. 2001); *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373 (Ky. 1992). In the present case, there is nothing preliminary about this matter. LRC has dealt with Rep. Stewart and his behavior towards the LRC staffer. Further, the requested documents affirm this because they document the resolution of the matter by directing Rep. Stewart to act professionally and cease his behavior. In sum, the LRC's "preliminary documents" argument fails as well as there is no genuine issue of material fact that final agency action has occurred.

8. The Documents do not Invoke the Attorney-Client privilege or the Work-Product doctrine

Finally, LRC contends that the requested documents are protected by the attorney-client privilege and the work product doctrine. LRC contends that Laura Hendrix, then acting General Counsel, was involved in investigating the complaint against Rep. Stewart as it related to a separate sexual harassment claims against John Arnold. *Defendants Joint Motion for Summary Judgment and Response to Plaintiffs Motion,* at 28. In order for the documents to be exempted they must "fall under the attorney-client privilege, a communication must be confidential, relate

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to the rendition of legal services, and not fall under certain exceptions." *Com., Cabinet for Health & Family Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. App. 2008) (citing KRE 503). Further, the purpose of the communication must be for the preparation of legal services. *Univ. of Kentucky v. Lexington H-L Services, Inc.*, 579 S.W.3d 858 (Ky. App. 2018).

Secondly, in order to be exempt through the work product doctrine, the documents must be prepared in anticipation of litigation. *Id.* at 858. More, "the mere potential for litigation is not sufficient to place documents within the scope of the work-product doctrine." *Id.* at 865.

The documents in question here consist of a non-substantive email exchange between an LRC staffer and Roy Collins, Assistant Director of Human Resources, regarding scheduling of a meeting, and notes of communications between the complaining witness and LRC management. It is also worth noting that the email exchange and notes provide barely any substantive information about this matter. Rather, they appear to be the bare bones of communications between individuals within the LRC.

In the email exchange, Mr. Collins sets up a meeting with the LRC staffer to discuss the conduct of Rep. Stewart towards the staffer and not the rendition of legal services. The email exchange was not between Laura Hendrix, then acting General Counsel, nor Greg Woosley, General Counsel for the LRC. Further, the email exchange, which set up a meeting to voice concerns about a Representative, was not prepared or sent in anticipation of litigation over the matter. Thus, there is no genuine issue of material fact that the email exchange does not fall under the attorney-client privilege nor the work-product doctrine.

The second component of the documents consists of notes, which appear to have been taken by an unidentified supervisor from LRC personnel staff. The notes consist of three meetings. First, there are bare bones notes on the meeting with the LRC staffer concerning the

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behavior of Rep. Stewart. Second, there are bare bones notes from a meeting between Mr. Collins, Ms. Hendrix, Brad Metcalf, and Marcia Seiler, the then acting Director. These LRC personnel met to discuss meeting with Rep. Stewart about his behavior. The third meeting consisted of a meeting with Rep. Stewart, Ms. Hendrix, and Mr. Collins informing him to cease his behavior. Like the email exchange, nothing in the notes would suggest the notes would be protected by the attorney-client privilege. The notes do not appear to consist of any rendition of legal services, but rather to be brief factual summaries of the conversations. While Ms. Hendrix was involved in two of the three meetings, there is nothing in the notes to indicate any legal advice she gave, or anything more than her mere presence at the meetings.

Neither do the notes invoke the work-product doctrine. There is no indication that the notes were taken in anticipation of litigation. In fact, there is absolutely no indication in the notes that litigation was ever mentioned, much less threatened. The notes appear to be very brief factual summaries of the meetings involving LRC staff's response to the complaint. The notes merely document LRC's response to a routine, garden variety personnel complaint involving verbal comments made by a legislator in the workplace that were inappropriate or unprofessional. Accordingly, there is no genuine issue of material fact and the Court finds that these notes do not involve either the attorney-client privilege or the work-product doctrine.

CONCLUSION

Upon review of the record, the Court concludes that there is no genuine issue of material fact and the Plaintiffs are entitled to a judgment as a matter of law. None of the statutory exemptions from disclosure under the Open Records Act asserted by the LRC applies. The LRC staffer's personal privacy interests can be fully protected by redaction of her personally identifying information. The case presents a justiciable controversy, and does not infringe on the

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legislature's powers under the separations of powers, rulemaking authority of the General Assembly, or any other constitutional provision. In fact, the judiciary has a duty to interpret and apply the Open Records Act in this case because the legislature itself has enacted a statute providing for judicial review of decisions of LRC under the Open Records Act.

WHEREFORE, for the reasons discussed above, this Court **GRANTS** the Plaintiffs Motion for Summary Judgment and **DENIES** Defendants Motion for Summary Judgment. The Defendants are directed to provide copies of all documents at issue to the Plaintiff, after redacting any personal identifiers for the complaining witness, within ten (10) days of the entry of this Order. If Defendants seek any post-judgment relief, or to stay this Order, any such motion should be filed within this ten (10) day period, and noticed for hearing within twenty (20) days of the entry of this Opinion and Order. If Defendants file such a motion, the Court will stay compliance until its ruling on such motions. Likewise, the Plaintiff should file any motion for attorneys fees or other relief under KRS 61.882, within ten (10) days of the entry of this Order, and notice such motion for hearing within twenty (20) days of the entry of this Opinion and Order. The Court requests that counsel meet and confer to agree upon hearing dates and briefing schedules for any such motions. The Court will enter a final and appealable judgment after ruling on any such motions that are filed within the ten (10) day period.

So **ORDERED** this, the 7th day of December, 2020.

/s/ HON. PHILLIP J. SHEPHERD
electronically signed
12/7/2020 11:03:24 AM ET

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

Entered 18-CI-00512 12/07/2020 Amy Feldman, Franklin Circuit Clerk

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