

**COMMONWEALTH OF KENTUCKY
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**

DEFENDANT

This matter is before the Court on Plaintiff's Motion for an Award of Additional Attorney's Fees and Costs and Other Relief. All parties fully briefed the merits of the case, oral argument was held on May 2, 2022. The Court filed Orders on May 27, 2022, June 6, 2022, and June 7, 2022 seeking clarification of the details regarding what documents Defendant produced to Plaintiff and when such documents were produced.¹ In response to these Orders, Defendant made a supplemental filing on June 3, 2022 and Plaintiff made a supplemental filing on June 7, 2022. Thereafter, the Court took the matter under submission. After full review of the record, and being otherwise sufficiently advised, this Court hereby **GRANTS** Plaintiff's motion for (1) an award of additional attorneys' fees and costs in the amount of \$5,607.22;² and, (2) a statutory penalty in the

¹ The Court of Appeals noted in its February 4, 2022 decision in this case that "Appellee states that Appellant produced the documents at issue shortly after entry of the summary judgment on appeal." *Hartz v. McClatchy Company, LLC*, 2022 WL 332866 (February 4, 2022), footnote 6. However, during the May 2 hearing, Plaintiff's counsel asserted, without objective by Defendant's counsel, that, in fact, the documents had been produced that day. Both Plaintiff and Defendant have now confirmed that Defendant produced documents to counsel for Plaintiff on May 2, 2022. Plaintiff made this representation in a June 7, 2022 filing. Plaintiff's Supplemental Filing Pursuant to the Court's June 6, 2022 Order, June 7, 2022, 1 (May 2, 2022 "was the date on which the documents were produced"). Defendant made this representation in a June 3, 2022 filing. Defendant's Supplemental Filing, June 3, 2022, 1 ("The Defendant produced the attached documents to counsel for the Plaintiff at the hearing on Plaintiff's Motion for Award of Additional Attorney's Fees and Costs held on May 2, 2022.").

² This amount, which was accrued during the period June 24, 2021 through entry of this Order, is in addition to the Court's original award of \$33,678.00 in its April 29, 2021 Order. *See* Plaintiff's Supplemental Filing Pursuant to the Court's June 6, 2022 Order, Exhibit A, June 7, 2022.

amount of \$9,200, which represents the \$25/day penalty identified in KRS 61.882(5) multiplied by the 368 days between this Court's April 29, 2021 Order and the date when the documents were produced to Plaintiff (*i.e.*, May 2, 2022).

Background

This dispute originated when Plaintiff filed requests for certain records, pursuant to the Kentucky Open Records Act ("KORA"), with the Legislative Research Commission ("LRC") on March 8 and March 26, 2018. The LRC denied the request and Plaintiff filed suit in this Court. In a November 13, 2018 Order, this Court denied a Motion to Dismiss by the LRC, which was based on arguments that the Court lacked subject matter jurisdiction and that legislative immunity prevented the Court's review.

The LRC petitioned the Court of Appeals for a writ of prohibition, which was denied. *Becky Harilson and David Floyd v. Honorable Phillip J. Shepherd and Lex H-L Services, Inc., d/b/a Lexington Herald-Leader*, Case No. 18-CA-1749-OA (February 7, 2019). The LRC appealed this denial to the Kentucky Supreme Court. Affirming the Court of Appeals' denial of the petition for a writ of prohibition, the Supreme Court rejected the LRC's argument that the doctrine of separation of powers barred the judicial branch from compelling disclosure of the records. *Becky Harilson and David Floyd v. Honorable Phillip J. Shepherd and Lex H-L Services, Inc., d/b/a Lexington Herald-Leader*, 585 S.W.3d 748 (Ky. 2019).

The LRC pursued a separate appeal from this Court's denial of its claim of legislative immunity. The Court of Appeals affirmed, concluding that any legislative immunity held by the LRC had been expressly waived as to KORA requests submitted to the LRC. *Becky Harilson et al. v. Lex H-L Services, Inc., d/b/a Lexington Herald-Leader*, 604 S.W.3d 290 (Ky. App. 2019).

Subsequently, the Court of Appeals denied a motion for rehearing and the Supreme Court denied discretionary review.

When the case came back before this Court, the parties filed cross-motions for summary judgment. After conducting an *in camera* review of the documents, on December 7, 2020, the Court entered an Order granting Plaintiff's motion and denying the LRC's motion. Further, on April 29, 2021, pursuant to a Plaintiff's motion to obtain attorney's fees and other relief, the Court issued an Order awarding attorney's fees and costs in the amount of \$33,678.00 but declined to assess the statutory penalty available under KRS 61.882(5), finding 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."

In appealing the April 29, 2021 Order, the LRC reiterated arguments from its two prior appeals and also argued: (1) an amendment to KRS 7.119, effective June 29, 2021, precluded disclosure, and (2) the General Assembly's policy of making records confidential justified its refusal to comply with the KORA. The Court of Appeals published a decision explicitly rejecting the arguments raised by the LRC in its two prior appeals. *Hartz v. McClatchy Company, LLC* 2022 WL 332866 (February 4, 2022) ("the Kentucky Supreme Court wholly rejected [the LRC's] separation of powers argument"; the "argument [under Ky. Const. § 39] was addressed and rejected by the Kentucky Supreme Court"; "a panel of this Court addressed the claim of legislative immunity as to the documents at issue"). The Court also rejected the two new arguments raised by the LRC. *Id.* at *5, *6.

On March 8, 2022, the LRC filed a Motion for an Extension of Time to seek the Kentucky Supreme Court's discretionary review of the Court of Appeals February 4 decision,

which was granted on April 6, 2022. However, on April 18, 2022, the LRC filed a notice with the Kentucky Supreme Court alerting it that it would not seek discretionary review.

Defendant finally produced the relevant documents to Plaintiff immediately prior to a hearing held before this Court on May 2, 2022,³ over four (4) years after the Open Records request was made, and almost four (4) years since the filing of this suit on May 14, 2018.

Analysis

Under KRS 61.882(5), any person who prevails against an agency regarding a violation of the KORA may be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action if the Court finds that the agency "willfully withheld" the relevant public records. In addition, the Court also has discretion to award such person \$25 per day for each day they were denied the right to inspect the records ("statutory penalty").

This Court's April 29, 2021 Order awarded attorney's fees in the amount of \$33,678.00, reasoning:

[T]here 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.

The Court of Appeals found no error in the Court's decision. *Id.* at *6. Accordingly, under the same reasoning articulated in its April 29, 2021 Order, the Court awards additional fees/expenses in the amount of \$5,607.22, which accounts for expenses arising during the period June 24, 2021 through May 23, 2022 (*i.e.*, during the course of the LRC's appeal of the April 29, 2021 Order).

³ In its June 3, 2022 supplemental filing, Defendant states "[t]he attached documents are the same as those previously submitted to the Court for *in camera* review." The Court notes that one additional document, a chain of emails, was produced for *in camera* review but not provided in the June 3 filing. The Court also notes that this document was inconsequential and unlikely to provide helpful information.

Thus, the only remaining issue is whether the Court should also award Plaintiff a statutory penalty “for each day that he was denied the right to inspect or copy” the relevant records. As with attorney’s fees, awarding a penalty will only be proper where records were withheld “willfully.” The LRC correctly states that this Court previously declined to impose the penalty because the LRC made “good faith arguments” for withholding the documents. Now, however, Plaintiff asks the Court to determine whether the “good faith” standard continued to be satisfied after entry of the April 29, 2021 Order. Clearly, there was no legitimate justification for continuing to withhold the documents at that point.

The Kentucky Supreme Court has found that “willful” withholding “connotes that the agency withheld requested records without plausible justification and with conscious disregard of the requester's rights.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). In light of this standard, the question becomes whether the LRC’s appeal of this Court’s April 29, 2021 Order (and, as such, continued withholding of documents from Plaintiff until May 2, 2022) was based on “plausible justification.”

The LRC’s most recent appeal was based almost exclusively on arguments that had already been rejected by the Court of Appeals and Supreme Court in this very case. Once those arguments were rejected by the appellate courts, they could not continue to create “plausible justification” for withholding documents from Plaintiff.

The LRC also raised two arguments that had not been addressed in prior appeals. The first argument asserts that a statutory amendment, effective two months *after* the Court’s April 29, 2021 Order, provided that the documents sought by Plaintiff were no longer subject to disclosure. The Court of Appeals dismissed this argument: “[t]his amendment was enacted long after [Plaintiff’s] action accrued, and some six months after the entry of the orders on appeal; therefore, it was not

addressed by the Franklin Circuit Court.” *Hartz v. McClatchy Company, LLC* 2022 WL 332866 at *5. The Court further points out that since the amendment did not “expressly provide for retroactive application,” it could not be applied in this case. *Id.*

The second argument raised by the LRC is that the General Assembly’s policy of making records confidential justified its refusal to comply with the KORA. The Court of Appeals also rejected this argument: “[The LRC] has cited no authority for the proposition that a policy of the General Assembly, even if longstanding, may supplant the clear language of KRS 7.119 as it existed at the time [Plaintiff’s] action accrued.” *Id.* at *6.

Each of the LRC’s arguments was soundly rejected by the Court of Appeals in a published decision released on February 4, 2022. Creating further delay, the LRC then filed a Motion for an Extension of Time to seek the Kentucky Supreme Court’s discretionary review of the Court of Appeals decision. Although that motion was granted on April 6, 2022, the LRC informed the Kentucky Supreme Court on April 18, 2022 that it would not seek discretionary review.

The Court is not persuaded that Defendant possessed a “plausible justification” for withholding the documents sought by Plaintiff after the Court’s April 29, 2021 Order. All but two of the arguments raised by Defendant on appeal had already been rejected by the Kentucky Supreme Court in this very case. The two additional arguments raised by Defendant in its 2021 appeal had no plausible basis in statute or case law. First, the Court of Appeals found no basis for retroactive application of a statutory amendment which became effective on June 29, 2021. *Hartz*, 2022 WL 332866 at *5. Moreover, with regard to Defendant’s argument that the LRC’s “policy of making records confidential and not subject to disclosure” preempted disclosure of the relevant documents to Plaintiff, the Court of Appeals found that Defendant “cited not authority

for the proposition that a policy of the General Assembly, even if longstanding, may supplant the clear language of KRS 7.119 as it existed at the time [the LRC's] action accrued." *Id.* at *6.

Further evidencing a determination to delay compliance regardless of the lack of merit of its arguments, is the fact that LRC did not provide the relevant documents to Plaintiff contemporaneously with informing the Kentucky Supreme Court that it would not seek discretionary review. The record disclosed no "plausible justification" other than delay and obstruction of the rights of the Plaintiff for withholding documents from Plaintiff at that point. Indeed, Defendant delayed production of the documents for an additional two weeks, and then ultimately produced the documents immediately prior to a hearing on this motion. This pattern of conduct by Defendant subsequent to the Court's April 29, 2021 demonstrates a lack of plausible justification for withholding the relevant documents. In these circumstances, the awarding of statutory penalties is necessary to vindicate the purpose of the Open Record Act, which provides that "open examination of public records is in the public interest ... even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871.

Conclusion

Therefore, the Court **GRANTS** Plaintiff's motion for (1) an award of additional attorneys' fees and costs in the amount \$5,607.22 (in addition to the \$33,678.00 awarded in the Order entered April 29, 2021); and, (2) a statutory penalty in the amount of \$9,200, which represents the \$25/day penalty identified in KRS 61.882(5) multiplied by the 368 days between this Court's April 29, 2021 Order and May 2, 2022. In addition, the \$14,807.22 awarded in this Order shall also include interest at the judgment rate of 6% from the date of this Order until paid, and the original Order

awarding attorneys fees of \$33,678.00 on April 29, 2021, shall bear interest at the judgment rate of 6% from that date until the date of payment.

So **ORDERED** this 14th day of June 2022.



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

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