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## CIVIL SUMMONS

Case #: 18-CI-00422

Court: CIRCUIT

County: FRANKLIN

*Plaintiff*, KENTUCKY LABOR CABINET VS. KENTUCKY PUBLIC RADIO, INC., *Defendant*

TO: MICHAEL SKOLER  
619 S. FOURTH STREET  
LOUISVILLE, KY 40202

Memo: Related party is KENTUCKY PUBLIC RADIO, INC.

The Commonwealth of Kentucky to Defendant:  
KENTUCKY PUBLIC RADIO, INC.

You are hereby notified that a **legal action has been filed against you** in this Court demanding relief as shown on the document delivered to you with this Summons. **Unless a written defense is made by you or by an attorney on your behalf within twenty (20) days** following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached complaint.

The name(s) and address(es) of the party or parties demanding relief against you or his/her (their) attorney(s) are shown on the document delivered to you with this Summons.

/s/ Amy Feldman, Franklin Circuit Clerk

Date: 04/18/2018

### Proof of Service

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CIRCUIT: 18-CI-00422 Return to Filer for Service

KENTUCKY LABOR CABINET VS. KENTUCKY PUBLIC RADIO, INC.



eFiled

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION **I**  
CIVIL ACTION NO. 18-CI- **422**

COMMONWEALTH OF KENTUCKY,  
KENTUCKY LABOR CABINET,

PLAINTIFF / APPELLANT,

v.

COMPLAINT AND NOTICE OF APPEAL

KENTUCKY PUBLIC RADIO, INC. d/b/a  
KENTUCKY CENTER FOR INVESTIGATIVE  
REPORTING,

DEFENDANT / APPELLEE.

Serve: Michael Skoler  
619 S. Fourth Street  
Louisville, Kentucky 40202

\*\*\*\*\*

The Commonwealth of Kentucky, Kentucky Labor Cabinet (the "Cabinet"), by counsel,  
and for its Complaint and Notice of Appeal, states as follows:

INTRODUCTION

(1) The Cabinet brings this action pursuant to KRS 61.880(5)(a) and 61.882 as a complaint and appeal from an Open Records Act decision of the Office of Attorney General Andy Beshear (the "OAG"). Specifically, the Cabinet appeals the OAG's determination in 18-ORD-059 that the Cabinet violated the Open Records Act "by withholding the name of a Cabinet employee whose alleged sexual harassment of a co-worker was not substantiated upon investigation."

(2) The question on appeal in this matter is straight-forward: Does the personal privacy exemption to the Open Records Act apply to the name of an individual accused of sexual harassment when the state agency's investigation into the accusation results in a non-substantiation of the claim? Stated another way, does the Open Records Act require a state agency

to disclose the name of an individual against whom an unproven accusation of harassment or similar misconduct has been made? The Cabinet believes this issue is too important to leave resolved by an OAG opinion that not only misses the mark on the purpose underlying the Open Records Act but also contradicts the OAG's own response to a similar Open Records Act request. Accordingly, the Cabinet has no option but to seek *de novo* review, and asks the Court to reverse the OAG.

### **PARTIES**

(3) The Appellant in this matter is the Kentucky Labor Cabinet, an administrative agency of the Commonwealth of Kentucky established under KRS Chapters 12 and 336. The Cabinet is a "public agency" within the meaning of KRS 61.870(1) and has a principal place of business located at 1047 U.S. Highway 127 South, Suite 4, Frankfort, Kentucky, 40601.

(4) The Appellee in this matter is Kentucky Public Radio, Inc., doing business as the Kentucky Center for Investigative Reporting (the "KCIR"). The KCIR has a principal place of business located at 619 S. Fourth Street, Louisville, Kentucky, 40202. According to the Secretary of State's records, the registered agent for the KCIR is Michael Skoler.

(5) Pursuant to KRS 61.846, the OAG is the administrative agency of the Commonwealth of Kentucky authorized to review complaints regarding suspected violations of the Open Records Act by a public agency pursuant to KRS 61.846. The OAG is not a party to this action. *See* KRS 61.880(3).

### **JURISDICTION AND VENUE**

(6) This Court has proper subject-matter jurisdiction pursuant to KRS 61.882(1). The Court has personal jurisdiction over the KCIR due to its making an Open Records Act request in the Commonwealth of Kentucky.

(7) Venue is proper in this Court pursuant to KRS 61.882(1). The Cabinet is located at 1047 U.S. Highway 127 South in Frankfort, Kentucky. Any records at issue are maintained by the Cabinet in its Frankfort, Kentucky, headquarters.

### FACTS

(8) On or about November 1, 2017, the KCIR submitted a written Open Records Act request to the Cabinet through which it sought the production of the following documents:

- *All complaints made by state employees to your agency, or an agency under your jurisdiction, related to sexual harassment, sexual discrimination or sexual assault since 1/1/2012*
- *Any/all summaries of internal investigations and the resolution of those investigations*
- *Any/all records of settlements related to these complaints*
- *Reports detailing any/all disciplinary action taken in response to the complaints, including but not limited to actions against the complainant and the subject of the complaint.*

[Ex. A].

(9) That same day, the KCIR submitted a similar Open Records Act request to the OAG. [Ex. B].

(10) Five days later, on November 6, 2017, Laura Tipton, an Assistant Attorney General in the OAG, responded to the KCIR's request on behalf of Attorney General Beshear via letter and six (6) pages of accompanying, redacted documents. [Ex. C].

(11) In the accompanying documents, the OAG produced documents evidencing a series of events that occurred in October 2013. [*Id.* at unnumbered pp. 3-8]. The accompanying documents included the OAG's redaction of the names of both an alleged victim of harassment and an alleged harasser. [*Id.*].

(12) Justifying these redactions, Ms. Tipton noted in her letter that under KRS 61.878(1)(a) and *Lawson v. Office of Attorney General*, 415 S.W.3d 59 (Ky. 2013), "the

complainant is the victim of alleged harassment, warranting the redaction of the complainant's name." [*Id.* at unnumbered p. 2]. Ms. Tipton then continued: "Further, disclosing the name of the complaineer reveals nothing to the public about how the OAG handles complaints and conducts investigations of alleged harassment. Accordingly, under the circumstances, we find that the privacy interests of the individual outweigh the public's interest in disclosure of the complaineer's name." [*Id.*].

(13) On November 21, 2017, the Cabinet, by counsel, submitted an initial letter setting forth the Cabinet's response to the KCIR's Open Records Act request. [Ex. D]. With that letter, the Cabinet provided documents that the Cabinet believed to be responsive to the KCIR's request. [Ex. E].

(14) As noted in the November 21, 2017 letter, the Cabinet redacted certain portions of those documents pursuant to the exemptions enumerated under the Open Records Act, particularly "information of a personal nature," as described in KRS 61.878(1)(a), of "any person who complained of harassment, any person alleged to have harassed a co-worker, and/or the immediate supervisor(s) for each." [*Id.* at 2].

(15) On December 5, 2017, the Cabinet produced a second Open Records Act response letter to the KCIR. [Ex. F]. Along with that letter, the Cabinet produced additional documents that it believed to be responsive to the KCIR's initial request. [Ex. G]. As it did before, the Cabinet redacted certain portions of those new documents it believed to constitute "information of a personal nature," as stated in KRS 61.878(1)(a). This time, the Cabinet redacted personal information related to "any person who complained of harassment and any person who was alleged to have harassed the complaining party where the personnel at the Office of General

Administration and Program Support for Shared Services (GAPS) determined that the claim could not be substantiated.” [Ex. F, p. 2].

(16) One month later, on January 10, 2018, the Cabinet received notice of the KCIR’s appeal to the OAG. [Ex. H]. In their appeal, the KCIR took issue with the Cabinet’s redaction of the names of both “the accused and accusers,” as well as information about their job titles and salaries. [*Id.* at unnumbered p. 2].

(17) Shortly after receiving the KCIR’s appeal, the Cabinet reached out to Ms. Kate Howard, who filed the appeal on KCIR’s behalf, and sought a resolution of this matter prior to the original response deadline of Tuesday, January 16, 2018, set by the OAG. After discussing the matter with Ms. Howard, and considering the matter further, counsel for the Cabinet, by e-mail dated January 16, 2018, provided Ms. Howard with a revised production. [Ex. I].

(18) With that communication, counsel for the Cabinet attached two PDF documents that were nearly identical to the November 21, 2017 and December 5, 2017 productions but included certain information previously redacted in those productions. [Exs. J, K].

(19) In particular, the documents produced in Exhibit J included the following:

- The name, job title, and signature of the Cabinet employee accused of sexual harassment, which the Cabinet deemed credible, previously redacted on pages 1-6, 8-12, and 33-43;
- The name, job title, and signature of the supervisors of the Cabinet employee accused of sexual harassment, which the Cabinet deemed credible, previously redacted on pages 1-6, 8-12, and 33-43;
- Draft reports produced by the Department of Workplace Standards, which were included by the employee accused of sexual harassment, previously redacted on pages 12-32;
- Handwritten notes compiled by Cabinet officials during the course of the investigation into the allegations of sexual harassment specific to this file previously redacted on pages 33-40, 42-47, and 49-50; and
- Typed notes compiled by Cabinet officials during the course of the investigation into the allegations of sexual harassment specific to this file previously redacted on pages 41 and 48.

(20) The documents produced in Exhibit K included the following:

- The name and job title of the supervisors of the Cabinet employee accused of sexual harassment, which the Cabinet could not substantiate, and of Cabinet employees interviewed previously redacted on pages 5, 17, and 18; and
- The job title and salary of the Cabinet employee accused of sexual harassment, which the Cabinet could not substantiate, previously redacted on pages 4, 10, 11, and 17.

(21) On January 18, 2018, counsel for the Cabinet submitted a letter to the OAG responding to the KCIR's appeal. [Ex. L]. In addition to laying out the timeline of events leading up to that point, the letter set forth the Cabinet's argument for why the Open Records Act permitted the Cabinet to redact personal, private information such as names, addresses, personnel numbers, Social Security numbers, employee ID numbers, and e-mail addresses of (1) any employee who complained of harassment and (2) any employee who was accused of harassment in a case that the Cabinet could not substantiate. [See generally *id.*].

(22) Less than two weeks later, on January 31, 2018, the OAG sent a follow-up letter to counsel for the Cabinet, [Ex. M], asking the Cabinet to do the following:

1. Please identify those portions of the responsive records ("Attachments H and I") that continue to be withheld/redacted upon the Cabinet's claim of attorney-client privilege and/or work-product doctrine. Although your letter of January 18, 2018, states that "KCIR does not appear to take issue with" these redactions, and that "the Cabinet sees no reason to offer any further discussion of these redactions," it will facilitate our review for you to specifically identify which portions of the record have been redacted pursuant to these exceptions. You may graphically identify these portions on the unredacted records that you will provide, or in some other manner that you believe will best aid in our understanding of which portions of the records were redacted under these exceptions.

2. As in #1 above, please identify those portions of the records that continue to be withheld/redacted pursuant to KRS 61.878(1)(i), as you referenced on page 2 of your letter of January 18, 2018.

[*Id.* at 2-3]. The OAG further sent the Cabinet a “Notification of Extension of Time for Issuance of Attorney General’s Decision in Open Records Appeal,” through which the OAG informed the Cabinet that it could expect a decision on or before March 21, 2018. [Ex. N].

(23) In response to the OAG’s supplemental request, counsel for the Cabinet submitted a letter to the OAG dated February 15, 2018. [Ex. O]. In that letter, the Cabinet explained that no documents continued to be withheld pursuant to KRS 61.878(1)(i), [*id.* at 1-2], that any information redacted under KRS 61.878(1)(a) was being produced again with highlighted text, [*id.* at 2], and that it would not disclose any information covered by the attorney-client privilege and/or work-product doctrine because it believed such disclosure to constitute a waiver of those privileges, [*id.*].

(24) Nearly four months after the date of the OAG’s initial response to the Open Records Act request it received from the KCIR, Ms. Howard contacted the OAG, by e-mail dated Friday, March 2, 2018, to follow up on the OAG’s response. [Ex. P].

(25) The following Monday, March 5, 2018, the OAG responded, by e-mail, [Ex. Q], quoting the following passage from 18-ORD-005:

This is not to suggest that the complaining employees have no cognizable privacy interest in their personal information in highly sensitive cases. Those “portions of the records that contain personally identifiable information implicating significant privacy interests but unrelated to the specific allegations [may] be withheld on the basis of KRS 61.878(1)(a).” 02-ORD-231. Pursuant to KRS 61.878(4), “[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the non-excepted material available for examination.” Thus, as to those complainants, the Department may redact “names, occupation, and other specific identifying information or non-work-related statements,” provided there is a strong interest in personal privacy and if such redaction does not “obscure ... the general nature of the complaint [or] make it unduly difficult to assess the appropriateness of the agency’s response.” 15-ORD-163.

[*Id.* at 5-6 (footnote omitted)].



(26) Later that morning, Ms. Howard, by e-mail, responded to the OAG's e-mail, stating: "Thanks - that is about complaining employees, though. We are talking about the person accused in your redactions." [Ex. R].

(27) On March 21, 2018, the OAG issued its opinion in 18-ORD-059. [Ex. S]. In response to the Cabinet's position that KRS 61.878(1)(a) permits the redaction of a public employee's identity who is accused of harassment but against whom such claims could not be substantiated, the OAG disagreed, writing:

[W]e have generally held that the privacy interest of public employees who have been disciplined for, or exonerated of charges of, misconduct in the course of their employment is outweighed by the public interest in monitoring agency action. This applies regardless of whether the complaints made are substantiated and disciplinary action imposed, or unsubstantiated and no action taken.

[*Id.* at 4].

(28) In deciding against the Cabinet, the OAG contradicted its own articulated positions in response to two requests from the KCIR.

(29) The OAG's application of one standard to itself and another, contradictory standard to an Executive Branch agency under the supervision of the Governor of the Commonwealth of Kentucky undermines the credibility and validity of the OAG's opinion in 18-ORD-059 and raises substantial questions about the OAG's ability to render impartial decisions concerning the application of the Open Records Act.

(30) The Cabinet's stated position; namely, that the personal information exemption to the Open Records Act precludes the disclosure of names of individuals who have been accused of, but ultimately vindicated of, committing sexual harassment, coincides legally with the OAG's stated position articulated in their November 6, 2017 letter to the KCIR.

(31) For the foregoing reasons, as well as those stated in the Cabinet's January 18, 2018 and February 15, 2018 letters to the OAG, the Cabinet acted consistently with the Open Records Act in withholding the identities of any employee who was accused of sexual harassment but against whom such claims could not be substantiated.

(32) Under KRS 61.882(3), the Court must conduct a *de novo* review of this matter to determine whether the Cabinet complied with the Open Records Act. That is, the Court must decide on a clean slate—without deference to the OAG's decision—whether the names of individuals accused of sexual harassment but ultimately vindicated against such claims—are exempt from disclosure under the Open Records Act.

**PRAYER FOR JUDGMENT**

**WHEREFORE**, Plaintiff / Appellant, Commonwealth of Kentucky, Kentucky Labor Cabinet, prays:

- (1) For the Court to enter a briefing schedule to facilitate its review of this matter;
- (2) For the Court to review this matter *de novo* with no deference given to the Attorney General's decision against the Cabinet;
- (3) For the Court to enter a judgment reversing the Attorney General's decision and concluding that the Labor Cabinet complied with the Open Records Act in all respects; and
- (4) For all other proper relief to which the Commonwealth of Kentucky, Kentucky Labor Cabinet may be entitled.

Respectfully submitted,

/s/Michael G. Swansburg, Jr.  
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*Counsel for Plaintiff / Appellant,  
Commonwealth of Kentucky,  
Kentucky Labor Cabinet*

Dated this 18th day of April 2018

Presiding Judge: HON. PHILLIP J. SHEPHERD (648260)

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