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THE SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY
NO. 2013-SC-000357

THE COUNCIL ON DEVELOPMENTAL DISABILITIES, INC. — APPELLANT

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-000396
v. FRANKLIN CIRCUIT COURT CASE NO. 10-CI-01325

CABINET FOR HEALTH AND FAMILY SERVICES — APPELLEE

BRIEF FOR APPELLANT, THE COUNCIL ON DEVELOPMENTAL DISABILITIES, INC.

Respectfully submitted,

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CERTIFICATE REQUIRED BY CR 76.12(6)

I certify that copies of this Brief were served upon the following by first-class mail on January 13, 2014: Mr. Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Thomas D. Wingate, Franklin Circuit Court, Franklin County Courthouse, P.O. Box 678, Frankfort, KY 40602; and Ms. Christina Heavrin, General Counsel, Cabinet for Health and Family Services, 275 East Main St., 5W-B, Frankfort, KY 40621.

Counsel for Appellant The Council on Developmental Disabilities

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THE COUNCIL ON DEVELOPMENTAL DISABILITIES, INC. **APPELLANT**

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CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

May It Please The Court:

INTRODUCTION

This is an appeal of a denial by the Cabinet for Health and Family Services of an Open Records Act request about the Cabinet's performance of its duties. The courts below affirmed the Cabinet's denial of the request based on differing interpretations of a separate confidentiality statute, none of which properly reflected the directive in KRS 61.871 that "the exceptions provided for by KRS 61.878 *or otherwise provided by law* shall be strictly construed."

STATEMENT CONCERNING ORAL ARGUMENT

The Council respectfully requests the opportunity for oral argument. The Open Records Act issues presented by this appeal involve matters of public concern and oral argument may be helpful for the Court's deliberations.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. OVERVIEW OF THIS LITIGATION

This matter involves an appeal of a decision by the Cabinet for Health and Family Services of an Open Records Act request. By letter dated July 28, 2010, appellant The Council on Developmental Disabilities, Inc. sought documents about the Cabinet's oversight of residential services funded by Kentucky taxpayers and provided to adults with intellectual disabilities who were under the Cabinet's protection. (**Appendix Tab 3** [the "Request"]) The Council had learned about the recent deaths in group home settings of at least two men who were wards of the Commonwealth and had been moved to those group homes by the Cabinet. Thus, the Council sought all documents concerning "the deaths of any other individuals who were transferred by the Cabinet for Health and Family Services from ICF/MR placements and died in community placements after January 1, 2008 through the date of your response." The Council explained in its Request that it was "a non-profit Metro United Way member agency formed in 1952" which sought "to monitor the Commonwealth's discharge of its statutory duties to vulnerable and dependent adults with intellectual disabilities, and to try to identify, address and publicize any problems in the Cabinet's performance of those duties."

On August 5, 2010, the Cabinet denied the Request based upon KRS 61.878(1)(l), which exempts "Public records or information the disclosure of which is prohibited or otherwise made confidential by enactment of the General Assembly." (**Appendix Tab 4**) The Cabinet asserted that disclosure of the requested records under the Open Records Act was prohibited by a confidentiality provision in KRS Chapter 209. That Chapter is entitled "Protection of Adults." The Cabinet contended that KRS 209.140 prevented

disclosure to information gained from Cabinet investigations except to certain categories of people or entities which did not include the Council.

However, one of the categories of people or entities who were expressly permitted to receive investigative materials was "Other medical, psychological, or social service agencies, or law enforcement agencies that have a legitimate interest in the case." KRS 209.140(3). Although the statute did not contain restrictive definitions of "social service agencies" or "legitimate interest in the case," the Cabinet imposed restrictive definitions and excluded the Council. The Cabinet not only disputed whether the Council could be deemed a "social service agency" (for reasons that were never explained), but also asserted that the Council could not establish that it had "a legitimate interest in the case" because "there are no allegations that the Council provided services to or advocated on behalf of the person whose records were sought." *Id.* In other words, the Cabinet effectively interpreted KRS 209.140(3) to create an expansive new exception from the Open Records Act. *But see* KRS 61.871:

> The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is 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.

On August 19, 2010, the Council timely appealed to the Franklin Circuit Court pursuant to KRS 61.882(2). The Council disputed the Cabinet's interpretation of KRS 209.140(3) for multiple reasons, including that it was inconsistent with the purposes of KRS Chapter 209 and the mandates of the Open Records Act. The Council also asserted that it actually did satisfy the Cabinet's requirement that it "provide[] services to or advocate[] on behalf of the person whose records were sought," based on Affidavits and

materials filed with the Council's Complaint and the Council's subsequent motion for declaratory judgment. Indeed, the Council demonstrated that it had been a leader of the successful effort to obtain legislative funding for community placements such as the group homes where the recent deaths had occurred. (R: 140-41.)

On February 9, 2011, the Circuit Court entered an Opinion and Order denying the Council's motion for declaratory judgment and dismissing the action. (**Appendix Tab 2**) The Circuit Court began by stating that "we agree with the Cabinet that the Council is most likely not a 'social service agency' as contemplated by the statute." The Circuit Court also did not provide its reasoning for this conclusion. However, the Court stated that "[w]e do not reach this question" because "the fact that the Council has not shown that it has a legitimate interest in the cases is determinative." The Court disregarded the Council's evidence and description of how its work involved monitoring residential services provided by the Cabinet to people who were the subject of its Request and providing advocacy services to those people. Instead, the Court added yet another gloss to the statutory interpretation of KRS 209.140(3), concluding that the Request should be denied because "the Council did not provide any *social* services *to the persons whose records it has requested*, and thus was involved in any investigations conducted by the Cabinet." (Emphasis added.)

The Council timely appealed on February 28, 2011. Twenty-six months later, on May 3, 2013, the Court of Appeals issued a 2-1 decision affirming the denial of the Request but leaving unresolved the legal basis for the denial. (**Appendix Tab 1**) One of the judges in the majority agreed with "the trial court's interpretation of legitimate interest" and concluded that "the Council has no legally-recognizable interest in this

case[.]" The concurring judge stated he "likely would agree with the dissent" that this analysis was erroneous, but he added still another gloss to the statutory interpretation. This judge concluded that when KRS 209.140(3) referred to "social services agencies," "the legislature intended that term to include only government agencies, not private entities such as the Council." The Cabinet had not previously suggested this argument and it had not been addressed by the parties.

To summarize: First, the Cabinet denied the Council's Request based on an assertion that *The Council on Developmental Disabilities* did not have a "legitimate interest" in investigations of deaths by people with developmental disabilities at government-regulated group homes. Then, when the Council established that its *taxpayer-funded* work actually involved monitoring those facilities and advocating for their residents, the Circuit Court denied the Request because the Council purportedly did not provide "direct" services to residents of those facilities. In fact, the Council *had* established that it did provide "direct" advocacy services to people who were moved to those facilities and died there. But the Circuit Court then added yet another interpretive gloss to the statute, requiring that the Council provide "*social* services *to the persons whose records it has requested*," and perhaps even that the Council establish that it "was involved in any investigations conducted by the Cabinet." Finally, when the Council argued in the Court of Appeals that these shifting statutory interpretations were all unjustified and contradicted the directives in the Open Records Act, a majority of the Court apparently agreed. But still the Council was denied the records because the concurring judge relied on yet another new restriction: "only government agencies" could obtain the requested records, even though the language of the statute was plainly broader.

The disposition by the Court of Appeals left unresolved how KRS 209.140(3) should be interpreted in any future attempt to examine the Cabinet's performance of its statutory duties to protect adults who are wards of the Commonwealth. But one thing was made perfectly clear: the strained and conflicting interpretations of KRS 209.140(3) provided by the Cabinet and the courts below consistently violated the directive in KRS 61.871 that "the exceptions provided for by KRS 61.878 *or otherwise provided by law* shall be strictly construed."

As this Court has recently reiterated, "the basic purpose" of the Open Records Act "is to open the operations and activities of the state's agencies to public scrutiny, to 'reveal whether the public servants are indeed serving the public,' [*Kentucky*] *Bd. of Examiners* [*of Psychologists v. Courier-Journal & Louisville Times Company*], 826 S.W.2d [324] at 328 [(Ky. 1992)], or, as the Supreme Court has put it, to enable citizens 'to be informed about what their government is up to.'" *Kentucky New Era, Inc. v. City of Hopkinsville*, __ S.W.3d __, 2012-SC-000290-DG, 2013 WL 6700223, *11 (Ky. Dec. 19, 2013) (quoting *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495 (1994)). To achieve this statutory purpose, the judgment below should be vacated and this matter remanded with directions to the Circuit Court to order immediate production of all requested documents, as sought in the Council's tendered declaratory judgment (R. 97-99).

II. THE HISTORY AND PURPOSES OF THE COUNCIL RELEVANT TO THIS ACTION

The Council on Developmental Disabilities is a nonprofit corporation organized in 1952 and located in Louisville. (*See* **Appendix Tab 5**: Affidavit of April DuVal, September 24, 2010 ["First DuVal Affidavit"], ¶ 2 [Record ("R: __"): 90].) The Council

is a member agency of the Metro United Way in Louisville, which has provided funding to the Council for several decades. The Council explains on its website, "It is the mission of The Council to initiate positive change on behalf of individuals with developmental disabilities by voicing their needs to the community; creating new choices for living, learning and participating; and ensuring the highest quality of life possible." *Id.* ¶ 3.

The Council's staff members and volunteers provide a range of services to people with intellectual disabilities and their families. (*See* **Appendix Tab 6**: "Programs and Projects" brochure attached to Complaint, Exhibit 3 [R: 18-19].) The Council helps individuals and families with legal, medical, educational, residential, guardianship and career issues. In doing so, the Council expressly monitors and acts as an advocate concerning public policies and government programs affecting individuals with intellectual disabilities, including government services those individuals receive. Neither the Cabinet nor the courts below ever explained what else the Council would have to do to qualify as a "social service agency" within the meaning of KRS 209.140(3).

The Council receives funding from various public and private sources, including the Louisville Metro Government and Metro United Way based in Louisville. (R: 89-90 [**Tab 5**, ¶¶ 3-4]) The funds provided by the Louisville Metro Government are specifically directed to pay for disseminating information and helping families obtain appropriate residential and community services, and thus avoid abuse and neglect of adults with developmental disabilities. *Id.* ¶ 4. In other words, Louisville citizens specifically pay the Council to monitor residential placements and prevent abuse of adults with intellectual disabilities – just as the Council was attempting to do in this case.

The appellee Cabinet for Health and Family Services oversees the protection of adults with disabilities who have no personal or family resources. Among other things, the Cabinet provides residential services for these adults, primarily through the federal and state-funded Medicaid program. At one time, many of these adults lived in large institutional settings generally called "ICF-MR/DDs" (Intermediate Care Facilities for people with Mental Retardation or Developmental Disabilities). *Id.* ¶ 5 [R: 90]. For more than two decades, there has been a national and statewide effort to close these institutions and promote living arrangements in community settings that are the "most integrated setting appropriate" to receive housing services. *See* Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*; *Olmstead v. L.C.*, 527 U.S. 581 (1999).

The Council has been a prominent supporter of placing adults with disabilities in appropriate community settings throughout Kentucky. *Id.* For example, in 1998-2000, the Council (then known as the Council for Retarded Citizens of Jefferson County, Ky.) was a leader in organizing a successful coalition of people with disabilities, service providers and others who advocated for and obtained $50 million in additional state and federal funding representing "Kentucky's first major new initiative on behalf of people with mental retardation in over 30 years." (*See* **Appendix Tab 7:** Affidavit of April DuVal, October 27, 2010 ["Second DuVal Affidavit"], ¶¶ 3-4 [R: 141-42].[1]) Much of the

[1] This Affidavit refers to and quotes from an appended 12-page brochure that describes the efforts by the coalition led by the Council in 1998-2000. In preparing the Council's initial Brief to the Court of Appeals, it was discovered that although the Affidavit itself was in the Record certified by the Franklin Circuit Court clerk (R. 140-41), the appended brochure was not. Whether this was a clerical error by the Council's counsel or the Franklin Circuit Court is unknown. The Affidavit is included in the Appendix as **Tab 7**, but the brochure is not included and was not provided to the Court of Appeals pursuant to CR 76.12(4)(c)(vii). Simultaneously with the filing of this Brief, the Council has filed a Motion to supplement the Record to include the brochure.

funding from this $50 million appropriation was planned for the "Supports for Community Living" program overseen by the Cabinet. But as advocates recognized at the time, independent agencies like the Council would need to monitor the operations of the Cabinet's residential services program to insure it provided adequate safety and medical protections. *See id.* ¶ 4:

> Only grassroots advocates can protect consumers' interests with the knowledge, passion and freedom from conflict of interest that guarantees fair, unbiased, consumer-based monitoring. Funder-based monitoring can see that standards set by funding bodies are being met, but only consumer-based monitoring can be loyal solely to the consumers' best interests. Therefore, an intensive grassroots monitoring program must be operational to assure program quality and consumers' rights.

III. THE PREVIOUS OPEN RECORDS ACT REQUEST CONCERNING RICHARD TARDY

The Open Records Act Request underlying this action was actually the second request by the Council summarily denied by the Cabinet. In September 2009, a man with developmental disabilities named Richard Tardy was moved by the Cabinet from a state-operated facility in Louisville, Central State Hospital, to another residential placement in Somerset. Mr. Tardy died only three months after his move. The Council wanted to know why, and what Mr. Tardy's death might signify about the Cabinet's oversight (or lack of oversight) of community placements. In fact, Mr. Tardy had been moved to a group home operated by an agency that employed three caregivers who were later indicted for allegedly abusing residents, according to a *Lexington Herald-Leader* news story published on September 25, 2010. (*See* R: 95-96 [**Tab 5**, Exhibit A].)

Accordingly, on January 27, 2010, the Council's then-Executive Director, April DuVal, made a request pursuant to Kentucky's Open Records Act, KRS 61.670 *et seq.*,

for documents maintained by the Cabinet concerning "all investigations and follow-up activities completed on behalf of Richard Tardy." (R: [unnumbered page after 11] [Complaint, Exhibit 1]; *see also* R: 90-91 [**Tab 5**, ¶ 6].) As Ms. DuVal later explained to the Attorney General's Office, "We were told by State Officials that the home Mr. Tardy was living in at the time of his death had been investigated and the results of that investigation did not warrant closure of the home. In December of 2009 he was taken to the hospital in Somerset on at least three or four occasions with death resulting during his last hospitalization." (R: 16 [Complaint, Exhibit 3])

On February 9, 2010, the Cabinet refused to produce the documents requested by the Council concerning Mr. Tardy. (R: 13 [Complaint, Exhibit 2]; *see also* R: 91 [**Tab 5**, ¶ 7].) The Cabinet's full explanation for its refusal was: "It has been determined that you are not entitled to the requested information as defined by (KRS 209.140) which delineates who is entitled to specific information."

KRS 209.140 is part of KRS Chapter 209 which addresses "Protection of Adults." KRS 209.140 is entitled "Confidentiality of Information." The key provision for this case is subsection (3), which states (emphasis added):

> **All information obtained by the department staff or its delegated representative, as a result of an investigation made pursuant to this chapter, shall not be divulged to anyone except**:
>
> (1) Persons suspected of abuse or neglect or exploitation, provided that in such cases names of informants may be withheld, unless ordered by the court;
>
> (2) Persons within the department or cabinet with a legitimate interest or responsibility related to the case;
>
> **(3) Other** medical, psychological, or **social service agencies**, or law enforcement agencies **that have a legitimate interest in the case;**

(4) Cases where a court orders release of such information; and

(5) The alleged abused or neglected or exploited person.

KRS 209.140 does not define the terms "social service agencies" or "a legitimate interest in the case."

The Council appealed the denial of its Open Records Act request concerning Mr. Tardy's death to the Attorney General's Office. (R: 16 [Complaint, Exhibit 3]; *see also* R: 91 [**Tab 5**, at ¶ 8].) The Cabinet responded, quoting the language of KRS 209.140, and opposing disclosure of the requested records to the Council because "for an interest to be legitimate, it must be more than personal or self-serving." (*See* R: 21-30 [Complaint, Exhibit 4], at 23.). The Cabinet did not explain its puzzling and derisive characterization of the Council's request as "self-serving."

On April 21, 2010, the Attorney General issued an Order denying the Council's appeal, 10-ORD-080. (R: 21-30 [Complaint, Exhibit 4]; *see also* R: 92 [**Tab 5**, at ¶ 9].) The Attorney General acknowledged that "this office has not previously had occasion to construe KRS 209.140 under the circumstances presented," but it noted that "as a rule of general application, this office has consistently deferred to agencies' reasonable interpretations of their own confidentiality provisions in a variety of contexts absent legal authority to the contrary." (R: 28-29) The Attorney General thus adopted the Cabinet's interpretation of KRS 209.140(3) and disregarded KRS 61.871 ("the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed"). The Attorney General denied the Council's appeal because "the Council did not provide services *directly to Mr. Tardy* or advocate *specifically on his behalf* while he was living, and the Council does not otherwise have a 'legitimate interest in the case' based upon the

agency's reasonable interpretation of this language[.]" (R: 29; emphasis added.) The Council, which had not engaged outside counsel in connection with its request, did not appeal the Attorney General's Order.[2]

IV. THE OPEN RECORDS ACT REQUEST IN THIS ACTION

As it happened, on May 3, 2010, the Franklin Circuit Court issued a decision in a case with significant similarities, *Lexington H-L Services, Inc. v. Cabinet for Health and Family Services*, No. 09-CI-1742. In that case, the Cabinet had likewise refused to produce documents concerning a child who died after being "placed by the Cabinet in its publicly funded foster care program for abused and neglected children." The Franklin Circuit Court rejected the Cabinet's denial and the Attorney General's decision, and ordered that the requested documents be produced. (R: 32-43 [Complaint, Exhibit 5])

Having learned of the death of another man with developmental disabilities in a state-supervised group home, after the Council's Executive Director became aware of the *Lexington H-L Services* decision, she made another Open Records Act request to the Cabinet by letter dated July 28, 2010. (R: 45-46 [**Tab 3**]; *see also* **Tab 5**, at ¶ 12 [R: 92].) This time, the Council sought two categories of documents.

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[2] The Cabinet's denial of the request seeking records concerning only one individual, Richard Tardy, did not preclude the Council's Request in this case – which involves documents relating to the deaths of all individuals who were transferred from ICF/MR placements and died in community placements after January 1, 2008. In the matter involving only Mr. Tardy, the Council was not represented by outside counsel and had little incentive to commit the agency resources that would have been needed for an appeal because the Cabinet's restrictive interpretation of KRS 209.140(3) had little practical significance. Nor was the denial of the Council's document request ever reviewed by a judicial officer. Numerous Kentucky courts have declined to apply *res judicata* for reasons that are equally applicable here, where the Council had significantly less incentive to litigate the previous decision and justice would not be served by barring the subsequent action. *See, e.g.*, *Berrier v. Bizer*, 57 S.W.3d 271, 281 (Ky. 2001); *City of Covington v. Board of Trustees*, 903 S.W.2d 517, 521-22 (Ky. 1995); *Board of Education of Covington v. Gray*, 806 S.W.2d 400, 402 (Ky. App. 1991).

First, the Council requested "copies of all investigations, coroner's report(s), and Mortality Review Committee findings related to" the death of the other man with developmental disabilities (Gary Farris). Like Mr. Tardy, Mr. Farris also had been a ward of the Cabinet, and also had died after being transferred by the Cabinet from a state facility to a community placement.

Second, the Council additionally requested all documents concerning "the deaths of any other individuals who were transferred by the Cabinet for Health and Family Services from ICF/MR placements and died in community placements after January 1, 2008 through the date of your response." *Id.* The Council's Executive Director specifically explained the Council's "legitimate interest in" these records:

> As you may know, the Council (formerly known as the Council on Mental Retardation) is a non-profit Metro United Way member agency formed in 1952. As stated on our website, "It is the mission of The Council to initiate positive change on behalf of individuals with developmental disabilities by voicing their needs to the community; creating new choices for living, learning and participating; and ensuring the highest quality of life possible." Pursuant to this statement, we have a "legitimate interest in," and indeed have a responsibility to those public and private donors who support and fund our operations, to monitor the Commonwealth's discharge of its statutory duties to vulnerable and dependent adults with intellectual disabilities, and to try to identify, address and publicize any problems in the Cabinet's performance of those duties.

On August 5, 2010, the Cabinet again refused to produce the requested documents. (R: 48-49 [**Tab 4**]; *see also* R: 93 [**Tab 5**, at ¶ 13].) The Cabinet asserted: "In light of the Attorney General's resolution of your previous request for similar information on similar grounds, the Cabinet is statutorily prohibited from releasing that information to you." (R: 49) The Cabinet argued that KRS 209.140(3) limited access

only to social services agencies who could demonstrate they "provided services to or advocated on behalf of the person whose records were sought." *See id.*:

> In the previous decision, the Attorney General found that you did not have a legitimate interest in the records you sought because there was no evidence that the Council provided services to or advocated on behalf of the person whose records were sought. 10-ORD-080, p. 9. Likewise, there are no allegations that the Council provided services to or advocated on behalf of the persons whose records are sought in this request. The request is therefore denied.

On August 19, 2010, the Council filed this action. (R: 1-50) The Council subsequently filed a motion for declaratory judgment (R: 67-99), arguing that the Cabinet's statutory interpretation was unsupported by Kentucky law, and was contrary to the expression of legislative intent in KRS Chapter 209, as well as in the Open Records Act, KRS 61.871 *et seq*. The Council also argued that the Cabinet had ignored facts demonstrating that the Council actually did satisfy the Cabinet's requirement that it "provide[] services to or advocate[] on behalf of the person whose records were sought," based upon the Council's activities "to monitor the Commonwealth's discharge of its statutory duties to vulnerable and dependent adults with intellectual disabilities, and to try to identify, address and publicize any problems in the Cabinet's performance of those duties." KRS 209.010(1)(b).[3]

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[3] The Cabinet subsequently attempted to supplement its original reason for denying the Council's Request by arguing that disclosure also would be prohibited by "the personal privacy exemption in the Open Records Act, KRS 61.878(1)(a)." (R: 117) The Council responded that the Attorney General's Office had repeatedly concluded that Kentucky law generally does not recognize personal privacy interests after death, and the Cabinet's failure to produce requested records on those grounds "constitute[s] a violation of the Act." (R: 136, citing 10-ORD-176, at 4, and 99-ORD-173, at 2-3:

> In a line of opinions dating back to 1981, the Attorney General has held that records pertaining to persons who are deceased are not protected by KRS 61.878(1)(a) because

On February 9, 2011, the Franklin Circuit Court entered an Opinion and Order denying the Council's motion for declaratory judgment and dismissing this action. (R: 182-90 [**Appendix Tab 2**]) The Court agreed with the Cabinet's interpretation of KRS 209.140(3) that the Council did not have "a legitimate interest in the case." Thus, the Court held that the Request met one of the exceptions from the Open Records Act for "Public records or information the disclosure of which is prohibited or otherwise made confidential by enactment of the General Assembly," KRS 61.878(1)(l).

The Council appealed the Circuit Court's dismissal on February 28, 2011. (R: 192-93) In view of the mandate in KRS 61.871 that "the exceptions provided for by KRS 61.878 *or otherwise provided by law* shall be strictly construed," the Council proposed that it would be reasonable to interpret the phrase "legitimate interest in the case" in KRS 209.140(3) to include any "objective good faith basis for seeking the requested information." The Cabinet dismissed this proposal as a "vague, wishy-washy standard." Cabinet Brief, at 21.

On May 3, 2013, the Court of Appeals affirmed the Circuit Court. (**Appendix Tab 1**) One of the judges in the majority agreed with the Circuit Court that the Council

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> the decedent's right of privacy terminates at the time of his or her death. ... A deceased person has no personal privacy rights and the personal privacy rights of living persons do not extend to matters concerning deceased relatives.

Citing OAG 81-149; OAG 82-590; OAG 86-31; 99-ORD-11). The Circuit Court did not adjudicate the Cabinet's new contention.

See also Kentucky New Era, Inc. v. City of Hopkinsville, __ S.W.3d __, 2012-SC-000290-DG, 2013 WL 6700223, *7 (Ky. Dec. 19, 2013) ("[W]here the disclosure of certain information about private citizens sheds significant light on an agency's conduct, we have held that the citizen's privacy interest must yield.").

did not have a "legitimate interest in the case." Slip op. at 4-6. The dissenting judge vigorously disagreed with this conclusion, *see id.* at 21:

> Based upon the many years the Council has served disabled adults, it is simply disingenuous to hold that it does not have a legitimate interest in learning the events surrounding the death of Mr. Farris. Nonetheless, the Cabinet, the circuit court, and the majority conclude that despite the opportunities for wrongdoing—or the very real appearance of such—that incubate in an environment that is hidden from the light are excepted from disclosure under KORA based on language that the Cabinet, circuit court and the majority have added to the term "legitimate interest." Disclosure is absolutely warranted in this case, and it only adds to the tragedy of Mr. Farris's death that the events leading to his death will not be exposed to public scrutiny.

The concurring judge stated "My analysis does not reach this second hurdle; if it did, I likely would agree with the dissent." *Id.* at 7. However, this judge concluded that when KRS 209.140(3) limited disclosure to "Other medical, psychological, or social service agencies, or law enforcement agencies that have a legitimate interest in the case," this only allowed disclosure to "government entities" and not the Council. *Id.* at 7-10. Yet if the General Assembly had actually meant that "only government agencies" could have access to the investigative materials, presumably it could have used those three words in the legislation instead of the more expansive phrase "Other medical, psychological, or social service agencies."

Based on these conflicting statutory interpretations, the Court of Appeals affirmed the Circuit Court's denial of the Request but left unresolved the legal basis for the denial. The Council timely moved for discretionary review, which was granted by Order entered on November 13, 2013.

ARGUMENT

> The Act ... was intended to make transparent the operations of the state's agencies. "The public's 'right to know' under the Open Records Act," we observed in [*Kentucky*] *Bd. of Examiners* [*of Psychologists v. Courier-Journal & Louisville Times Company*, 826 S.W.2d 324 (Ky. 1992)], "is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good." 826 S.W.2d at 328.

Lawson v. Office of Atty. Gen., __ S.W.3d __, 2012-SC-000201-DG, 2013 WL 6700120, *6 (Ky. Dec. 19, 2013).

I. THE STANDARD OF REVIEW

This Court's review of the statutory interpretations by the courts below of the confidentiality provisions in KRS 209.140 is *de novo*, *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007). The courts below erred by adopting unjustifiably restrictive interpretations of KRS 209.140(3), which in turn led to an overbroad exception to the Open Records Act. *See Kentucky New Era, Inc. v. City of Hopkinsville*, __ S.W.3d __, 2012-SC-000290-DG, 2013 WL 6700223, *3 (Ky. Dec. 19, 2013) ("We review the trial court's factual findings, if any, for clear error, but our review is plenary of issues concerning the construction or application of the ORA.") (citing *Commonwealth v. Chestnut*, 250 S.W.3d 655 (Ky. 2008)).

Additionally, in applying its interpretation of KRS 209.140(3), the Circuit Court further erred in concluding that "the Council did not provide any social services to the persons whose records it has requested." (**Appendix Tab 2**, at 6) To the extent this was a finding of fact supporting the conclusion that the Council did not have a "legitimate interest in the case," the Court's finding should be vacated because it was clearly

erroneous, CR 52.01; *see Commonwealth v. Reinhold*, 325 S.W.3d 272, 276 (Ky. 2010), and the affirmance by the Court of Appeals should likewise be vacated.

II. KRS 209.140 SHOULD NOT BE INTERPRETED SO AS TO DEFEAT THE PURPOSES OF THAT STATUTE AND CREATE A BROAD EXCEPTION TO THE OPEN RECORDS ACT.[4]

The Council cannot offer any analysis matching the thorough and closely-reasoned discussion by the dissenting judge Hon. Joy Moore in the decision below. *Council on Developmental Disabilities v. Cabinet for Health and Family Services*, No. 2011-CA-000396-MR, Slip op. at 10-21, 2013 WL 1844771, **5-10 (Ky. App. May 3, 2013) (**Appendix Tab 1**). Accordingly, to conserve judicial resources and avoid ill-advised duplication, the Council respectfully requests leave to adopt that opinion as if incorporated here, with only a few additional comments.

Almost four years after the Council began trying to examine the Cabinet's performance of its statutory duties to protect adults who are wards of the Commonwealth, it remains unclear how KRS 209.140(3) will be interpreted in the future. But based on the contradictory interpretations by the courts below, no entity requesting records about the Cabinet's performance is apparently going to be permitted to view those documents unless the entity actually provides direct "social services" – assuming the entity can satisfy some unknown definition for whatever that term is interpreted to mean – to specific individuals. Or perhaps no entity will be permitted to view those documents unless the entity is a government agency itself – for whatever good that will do.

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[4] The issues discussed in this section were presented to the Circuit Court in the Council's Motion for Declaratory Judgment and supporting Memorandum (R: 67-99) and Reply Memorandum in support of that Motion (R: 125-178), and were for preserved for review in the Addendum (Item No. 7) to the Council's Prehearing Statement filed in the Court of Appeals on March 15, 2011.

The courts below asserted that they were simply employing "traditional tools of statutory construction." In doing so, however, the courts gave scant attention to the repeated directives from the General Assembly and this Court that Kentucky government officials should produce public records and "strictly" construe any exceptions in the Open Records Act – "*or otherwise provided by law*" such as in KRS 209.140(3). *See Lawson*, __ S.W.3d __, 2013 WL 6700120, *3; *Central Kentucky News-Journal v. George*, 306 S.W.3d 41, 45 & n.4 (Ky. 2010).

Instead, the courts below upheld the Cabinet's expansive new exemption from the Open Records Act with no foundation in any previous judicial text. As a result, the "basic policy" of the Act has been utterly frustrated – much less the "Protection of Adults" statute. *See Kentucky New Era, Inc. v. City of Hopkinsville*, __ S.W.3d __, 2012-SC-000290-DG, 2013 WL 6700223, *3 (Ky. Dec. 19, 2013) ("[T]he ORA provides, as a general rule, that '[a]ll public records shall be open for inspection by any person.' KRS 61.872(1). This general rule, embodying the Act's basic policy of 'free and open examination of public records,' KRS 61.871, 'is premised upon the public's right to expect its agencies properly to execute their statutory functions.'") (quoting *Kentucky Board of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992)).

It should not have been this difficult.[5] The denial of the Council's Request was not based on the weighing of "attenuated" or arguably "illusory" public interests compared to significant privacy concerns, *see Kentucky New Era, Inc.*, *supra*; *Lawson v.*

[5] And perhaps it should not have taken so long. *See* KRS 61.882(4): "Except as otherwise provided by law or rule of court, *proceedings arising under this section take precedence on the docket over all other causes* and shall be assigned for hearing and trial at the earliest practicable date." (Emphasis added.)

Office of Atty. Gen., ___ S.W.3d __, 2013 WL 6700120, *9 (Scott, J., dissenting). On the contrary, the Cabinet and the courts below did just the opposite of what the General Assembly and this Court have repeatedly directed. Rather than interpret the Open Records Act broadly to favor "free and open examination of public records," and rather than "*strictly*" construe "the exceptions provided for by KRS 61.878 or otherwise provided by law" as provided in KRS 61.871, and rather than adopt a simple and less restrictive interpretation of KRS 209.140(3) offered by the Council, the Cabinet and the courts below engaged in tortured semantics in order to deny that the Council is a qualifying "social service agenc[y]" with "a legitimate interest" concerning people the Council has now served for more than sixty years.

In doing so, the courts below have erected substantial new barriers – unsupported by any clear legislative directives – to public oversight of government officials charged with protecting Kentucky adults and preventing abuse and neglect. Indeed, the decisions by the courts below will have particularly ironic and perverse effects for men like Richard Tardy and Gary Farris. Mr. Tardy and Mr. Farris were wards of the Commonwealth – which means they likely had no family members or friends or guardians to act as advocates (or obtain direct services from agencies like the Council). They and people in their vulnerable circumstances are exactly the adults with the greatest need for advocacy and protection by independent entities like the Council. Yet by upholding the Cabinet's restrictive definition of when agencies can be considered to have "a legitimate interest in the case," the courts below have essentially ensured that no independent observer will ever have access to investigative documents when men like Mr. Tardy and Mr. Farris die in group homes regulated and paid for by the Cabinet.

What will happen when men like Richard Tardy and Gary Farris are abused or die? What will happen to records of investigations of their abuse or deaths? Indeed, what will happen if *no* corrective action is ever taken, if *no* protections are ever put in place for other men and women with disabilities? What will happen if the Cabinet *never* investigates their deaths, despite statutory mandates? These are hardly imaginary concerns. Even as this litigation has been unfolding, a sadly parallel chronicle of bureaucratic inaction and stonewalling has been unfolding in the current Franklin Circuit Court litigation being prosecuted at great expense by the *Louisville Courier-Journal* and *Lexington Herald-Leader* concerning withheld and redacted records of children in foster care placements who have been abused and killed despite alleged Cabinet protection.

The leading newspapers of this Commonwealth deserve recognition and public gratitude for having often expended significant resources to litigate Open Records Act appeals against resistant government officials. Those newspapers and their counsel, and the General Assembly and this Court, have established a jurisprudence that has significantly altered the public's access to the operations of their government.

On the other hand, the reason nearly all of the significant Open Records Act precedents have been initiated by leading newspapers is because it is all but impossible for ordinary citizens and nonprofit entities to wage the long legal battles that Open Records Act cases have become. Which is troublesome enough. But that fact is even more worrisome because the day may be rapidly approaching – if it has not already arrived – when financial considerations will sharply limit how often newspapers will pursue such appeals vindicating the public interest. And meanwhile, as the Cabinet magnificently demonstrated in the final section of its Brief in the Court of Appeals

("Other Confidentiality Provisions"), government officials who want to withhold evidence of their inaction or misconduct – or who simply feel "demonized," Cabinet Brief, at 2 – will suffer no comparable loss of resources or energy in continuing to manufacture endless justifications for frustrating the directives of the Open Records Act.

Accordingly, based on the analysis and legal authorities provided by Judge Moore in her dissent below, the Council requests that this matter be remanded for entry of relief providing the Council with all responsive documents immediately. Additionally, to promote future compliance with the Act and its directives, especially in matters where ordinary citizens and nonprofit entities do not have the resources to wage long legal battles, the Council respectfully invites the Court to provide further guidance to the Cabinet and other government agencies, and to the Attorney General's Office, and to the courts below, concerning the appropriate interpretation of KRS 61.871 ("the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed") and KRS 61.882(4) ("Except as otherwise provided by law or rule of court, proceedings arising under this section take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.").

CONCLUSION

The courts below erred by upholding the Cabinet's denial of the Council's Request – even as the legal basis for that denial remains unresolved. The Circuit Court's dismissal of this action should be reversed and remanded, with instructions to the Circuit Court to enter judgment for the Council declaring that it is entitled to receive all responsive documents from the Cabinet without further delay.

Respectfully submitted,

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APPENDIX

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