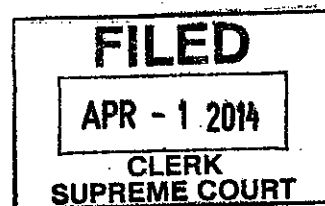


THE SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY
2013-SC-000357



THE COUNCIL ON DEVELOPMENTAL
DISABILITIES, INC.

APPELLANT

v.

APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-000386
FRANKLIN CIRCUIT COURT CASE NO. 10-CI-1325

CABINET FOR HEALTH AND
FAMILY SERVICES

APPELLEE

**BRIEF FOR APPELLEE,
CABINET FOR HEALTH AND FAMILY SERVICES**

Respectfully submitted,

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES

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CERTIFICATE REQUIRED BY CR 76.12(6)

I hereby certify that copies of this brief were served by first class mail, this 1st day of April, 2014, upon the following: Mr. Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, P.O Box 678, Frankfort KY 40602; and Mr. David Tachau, Tachau Meek PLC, 2600 National City Tower, 101 S. Fifth Street, Louisville, KY 40202-3120.

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and Family Services

STATEMENT CONCERNING ORAL ARGUMENT

The Cabinet welcomes oral argument as an opportunity to have a dialogue with this Court about the legislative history of the Kentucky Adult Protection Act and the constitutional right of privacy. This may assist this Court ascertaining and following the legislative intent of the confidentiality law codified as KRS 209.140.

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COUNTERSTATEMENT OF THE CASE

A. Introduction

The Cabinet for Health and Family Services ("Cabinet") accepts the Appellant's Statement of the Case as an accurate procedural history, but submits additional matters essential for historical context about the purpose of the Kentucky Adult Protection Act ("APA") KRS Chapter 209, and why confidentiality is necessary to achieve its goals.

This Court must decide two issues, both reviewed *de novo*, using time-honored principles of statutory construction:

1. Did the Cabinet, OAG, Franklin Circuit Court and Court of Appeals majority judges below err in their statutory construction of KRS 209.140 and the Kentucky Open Records Act ("ORA")?
2. If this Court finds the lower courts erred, should the judgment be affirmed on alternative grounds, because the Kentucky Constitution as well as other laws, such as KRS 61.878(1)(a) and the federal "HIPAA" regulations, also required the Cabinet to reject the Council's demands for law enforcement records and protected health information about private citizens?

B. Parties to the Appeal and Procedural History

Appellant, Council on Developmental Disabilities, Inc. ("Council") is a nonprofit corporation that advocates for intellectually disabled adults and children. The Department for Community Based Services ("DCBS"), Division of Protection and Permanency, Adult Protection branch, is the arm of the Cabinet that investigates any reports accepted about "adult" "abuse", "neglect" or "exploitation", as these terms are defined in KRS 209.020. This branch is often called by its generic name "Adult Protection Services" or "APS."¹ APS investigatory records are the *only* records at issue in this appeal.

¹ In some smaller county DCBS offices, the same workers investigate adult abuse and child abuse, but they follow the distinct regulations and standards of practice that apply for each set of laws.

The Council and other persons may still ask for other types of government documents if they comply with federal and state law. The Cabinet honors thousands of ORA requests every year without full denials or with only very minimal redactions when it must do so to comply with other laws.²

The Council requested APS records from DCBS under the Open Records Act (“ORA”). The Cabinet explained why it could not do so. The information sought is shielded from public disclosure under KRS 209.140, which is a confidentiality law that promotes the legislative purpose of the APA and also preserves privacy.³ The Council asked the Office of Attorney General (“OAG”) to review the denial. The OAG agreed the Cabinet’s denial was proper because KRS 209.140 made these records confidential.⁴

After failing to appeal the adverse Open Records Decision, the Council made a new request. The new request was also denied based in part on the recent OAG opinion. So the Council filed the underlying Declaratory Judgment Action on August 19, 2010 in Franklin Circuit Court [R.1]. The Cabinet answered on September 13, 2010 [R. 55]. Agreeing no facts were in dispute, the parties agreed to a briefing schedule [R. 65]. The Council filed its principal brief on September 27, 2010 [R. 69-87]. The Cabinet filed its opposing legal memorandum on October 20, 2010 [R. 102-124]. The Council replied on

² For example, the Cabinet would not oppose releasing State OIG survey records of nursing homes where a disabled adult died, if the U.S. Centers for Medicare and Medicaid Services (CMS) approves under the federal Freedom of Information Act (“FOIA”) and CMS’s “*Touhy* regulation” (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951)). CMS *must* approve before the Cabinet may produce OIG surveys. See, *Campbell v. EPI Healthcare, LLC*, 2009 WL 395498 (E.D. Ky. Feb. 18, 2009).

³ The Council argued to the courts below it was entitled to APS records because of a circuit court opinion interpreting another statute. Appellant abandons that argument in this appeal because KRS Chapter 209’s confidentiality law has no similar exceptions to the privacy shield law found in KRS 620.050, which says “[i]nformation may be publicly disclosed” in child fatality/near fatality cases. KRS 620.050(12).

⁴ See Ky. Op. Atty. Gen. 10-ORD-080 (Ky.A.G.), 2010 WL 1684688 (copy attached **Apx. Tab 1**).

November 1, 2010 [R. 125-178]. The circuit court issued its Opinion and Judgment on February 9, 2011, finding for the Cabinet and dismissing the case [R. 189-190]. On February 28, 2011, the Council timely appealed to the Court of Appeals [R. 191].

On May 3, 2013, a divided 3-judge Court of Appeals panel affirmed the judgment (2011-CA-396). Two judges agreed the Council was not entitled to the records, but did so for differing reasons. One said the Council is not an “agency.” The other agreed with the OAG and trial court it had no “legitimate interest” in “the case.” Lacking awareness of the history and goals of the APA, the dissenting judge disagreed with the majority; basing her opinion on liberally interpreting the ORA, the text of KRS 209.140(3) and the advocacy mission of the Council. [COA Opinion, Council’s Brief, Apx. Tab 1]. This Court granted discretionary review.

The Appellant, without elaboration, relies on the dissenting appellate court judge’s opinion in urging this Court to reverse and remand. The Cabinet respectfully asks this Court to affirm the judgment and offer its own authoritative opinion construing the meaning of KRS 209.140 so that the parties and others will have proper guidance in future cases.

The Cabinet supports the public policy decisions of our Legislature to provide immunity from suit for good faith reporters in KRS 209.050, and confidentiality of APS information and documents, as both provisions embolden people to make the reports the government relies on to enforce the Adult Protection Act. Yet, the APA allows the Cabinet discretion to share information with other government agencies that need it. While the Cabinet disagrees with our opponents arguments, we do not intend to cast aspersions on the Council or denigrate the legitimacy of its advocacy for intellectually

disabled adults, children or their families. The Council is a very worthwhile advocacy organization. But it does not fit within KRS 209.140(3). Consequently, as argued below, this Court must affirm the circuit court judgment.

C. Why Kentucky and Other States Enacted Adult Protection Laws

“A fundamental rule of construction is that the applicability and scope of the statute may be determined by ascertaining the Legislature’s intent and purpose, considering the evil the law was intended to remedy and other prior and contemporaneous facts and circumstances that throw intelligible light on the intention of the lawmaking body.”⁵ Before focusing on the legislative history of the APA in Kentucky and our legal analysis, some background history may help this Court’s understanding why KRS Chapter 209 was enacted, why it has been amended over the years, and why confidentiality serves the greater good in protecting disabled often older Kentuckians.

All 50 states have enacted similar adult protection laws, with their own confidentiality provisions, with basic similarities but they differ in some details. “Adult” has a special meaning under KRS 209.020(4), which is not the universal definition used in other states. In order to qualify for special services or legal protection in Kentucky, victims must fit within the statutory definition of “adult” as “dysfunctional” or “physically or mentally disabled,” and be in need of services as the law defines. Before APS has legal authority to act on a report, it must screen it to verify the victim is an “adult” under the technical definition and qualifies for services. Victims may also decline offered services. See Cabinet’s Administrative Regulations, 922 KAR 5:070, to see the standards of practice and process APS social service workers follow upon receipt of a

⁵ *Brown v. Hoblitzell*, 307 S.W.2d 739, 744 (Ky.1956); accord, *Kelly v. Marr*, 185 S.W.2d 945 (Ky. 1945).

report from initial screening, to investigation, to following up with law enforcement agencies and prosecutors.

Adult abuse, neglect and exploitation are not just matters for government social service agencies. These are serious offenses that may lead to fines or incarceration. See KRS 209.990 and published decisions.⁶ Consequently, the APA law directs APS workers to work in tandem with law enforcement agencies (and when applicable) other government social service agencies to help victims and prosecute the perpetrators. KRS Chapter 209 is thus a criminal law statute; and this Court has said records generated by public agencies investigating crimes have special privacy considerations to avoid stigmatizing or otherwise harming people that cooperate with the government.⁷

Many states have adult abuse registry laws that require any caregivers at adult care facilities who are substantiated for abuse or neglect be placed on a government database available for potential employers to examine before hiring. Those individuals “substantiated” under these registry laws have administrative appeal rights that must be exhausted before any entry on the abuse list so that the accused perpetrator’s reputational and future hiring prospects are protected. By the time this Court hears arguments in this

⁶ See e.g., *Roach v. Commonwealth*, 313 S.W.3d 101, 104 (Ky. 2010) (affirming conviction of adult exploitation under the Act, three counts of second-degree criminal possession of a forged instrument, and being a second-degree persistent felony offender, despite public policy argument from defendant that not all older adults would want to be protected at risk of being labeled “dysfunctional”).

⁷ See *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013), which will be considered at greater length in the arguments below. This Court noted, “An individual’s interest in controlling the dissemination of personal information is clearly implicated whenever the state compels the individual to disclose such information, as the state often must do in the fulfillment of its regulatory duties, and then turns around and disseminates that information to a third party. . . . [Such] individual’s interest becomes stronger with regard to personal information the dissemination of which could subject him or her to adverse repercussions. Such repercussions can include embarrassment, stigma, reprisal, all the way to threats of physical harm.” *Kentucky New Era*, at 82-83.

case, Kentucky may likely join those states with adult registry laws.⁸ If signed into law by the Governor, as expected, the new registry law coupled with attendant KRS Chapter 13B appeal rights should militate against the due process “reputational stigma” type constitutional challenges often seen with these laws.⁹

Many states have separate elder abuse laws, domestic partner abuse laws, or they may define “victims” in their adult protection laws by a qualifying age. Ohio, for example, includes those 60 years age or greater in the class presumed needing special protection. Kentucky’s law does not. But everyone agrees there is a correlation between advancing age with increased physical or mental infirmities. Thus, the probability of the adults needing protection under KRS Chapter 209 increases as the percentage of the elderly population in Kentucky increases. Census records show Kentucky’s older population is increasing in number and proportion even faster than national trends.

This Cabinet annually reports to the Legislative Research Commission in collaboration with the Kentucky Elder Abuse Committee about how the APA is working, listing the trends of reports and substantiated cases, with a special emphasis on the efforts to protect older adults.¹⁰ The Cabinet publishes videos, pamphlets, promotional media

⁸ The 2014 Kentucky General Assembly voted to pass legislation, which if signed into law, creates a system similar to the existing child abuse/neglect worker registry. *See*, 2014 Kentucky General Assembly, S.B. 98 (copy available at: <http://www.lrc.ky.gov/record/I4RS/SB98.htm>).

⁹ *See, W.B. v. Commonwealth, Cabinet for Health and Family Services*, 388 S.W.3d 108, 109 (Ky. 2012) (facial challenge to similar child abuse registry, this Court declined to consider before an administrative record developed). *See also, Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 402 (Mo. 2007) (Successful due process challenge to child abuse registry law in Missouri).

¹⁰ *See, e.g.*, 2012 annual report available at: <http://chfs.ky.gov/NR/rdonlyres/F3BADB8A-FB80-482E-B14C-8FB3231D66F0/0/2012KentuckyElderAbuseAnnualReport.pdf> (last visited March 26, 2014).

*spots. It also includes educational information on its webpage aimed at educating the public and encouraging reporting any violations of the Adult Protection Act.*¹¹

Despite these outreach efforts in Kentucky and nationally, most experts believe adult abuse is a “hidden problem,” as it so often occurs behind closed doors within families. A 2003 Congressional study included estimates that for every report received, five older adults were victimized but the offense not reported.¹² The National Center on Elder Abuse at the University of Kentucky under a grant from the U.S. Department of Health and Human Services published its most recent survey on February of 2006 for abuse, neglect and exploitation of adults over the age of 60. It shows the most common reported relationship of perpetrator to victim was adult child (32.6%), followed by other family member (21.5%), unknown relationship (16.3%), and by “spouse/intimate partner” (11.3%).¹³

Most states, including Kentucky, modeled their adult protection laws on similar existing child protection laws, typically by mandating reporting, granting immunity for reporters of abuse or neglect, and allowing for anonymous reports coupled with confidentiality laws strictly limiting who has access to the reports, or any information generated investigating them. Even so, surveys show people are less likely to report adult abuse than child abuse; and elderly victims are much less likely to self-report violations

¹¹ See, <http://chfs.ky.gov/dcbs/dpp/ea/> (last visited March 26, 2014).

¹² U.S. Sen. Subcommittee Elder Abuse, Neglect and Exploitation, Are we Doing Enough? Sep. 24, 2003 available at <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg93251/pdf/CHRG-108shrg93251.pdf>.

¹³ See, Report of Survey, available at <http://www.napsa-now.org/wp-content/uploads/2012/09/2-14-06-FINAL-60+REPORT.pdf>

of these offenses than younger adult victims. The University of Kentucky study divided the statistical cohort of adults with ages ranging from 18 to 59, and those 60 or older.¹⁴

Experts say elderly victims are often reluctant to report their children, grandchildren, or other family members who could then face criminal prosecution. Likewise, other family members may feel conflicted about taking problems outside clannish or private families and risk being ostracized. Elderly abuse victims often fear having to move from their homes to nursing homes. Many elderly victims are embarrassed and reluctant to ask for help. They often are vulnerable to being financially exploited. Criminals and disreputable businesses use telemarketing, the internet and fake lottery scams to get access to banking information of elderly victims.¹⁵ Older adults are trusting of persons in certain professions such as bankers, financial advisors, clergymen, and even attorneys. When lawyers violate client trust, it can lead to criminal charges, ethics investigations by the KBA, and disbarment proceedings.¹⁶

Estimates vary, but some think as much as 87 percent of elder exploitation cases go unreported. Most states, including Kentucky, provide anonymity or confidentiality to reporters and those reporting violations are also typically granted immunity from criminal and civil liability. Kentucky law qualifies the protection by requiring “reasonable cause” and “good faith.”¹⁷ But just passing a mandatory reporting law coupled with any qualified immunity does not guarantee reporter compliance. In this state “all persons” have a duty

¹⁴ See, 2006 National Survey, n. 13, *supra*.

¹⁵ See, Charles Pratt, *Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California*, 40 Cal. W.L. Rev. 195, 202 (2003).

¹⁶ See, *Gilfedder v. Kentucky Bar Ass'n*, 399 S.W.3d 779 (Ky. 2013) (Lawyer permanently disbarred by this Court for stealing nearly \$640,000 in Veteran's Administration and Social Security Administration benefits over 20 years that had been paid to veteran client. The opinion does not say the age of the victim).

¹⁷ KRS 209.050.

to report. KRS 209.030(2). Yet many mandated reporters such as physicians, mental health workers and family members who suspect abuse or neglect fail to do so.

Healthcare providers nationally and in Kentucky opposed mandatory reporting and surveys suggest many of them do not report adult abuse fearing court appearances, the cost of litigation where their “good faith” would be at issue, abusers’ anger against the victim, and compromising patient-physician confidentiality.¹⁸

As explained, the Cabinet works closely with faith-based organizations, the OAG Consumer Protection Division, local elder abuse volunteer committees, and other groups to inform and encourage reports about adult abuse or neglect. Informing them about the confidentiality and immunity laws allays some of this natural reluctance to report.

The APA also encourages when possible DCBS APS social service workers use a team approach. By communicating and cooperating with the courts, prosecutors, and other government social service and law enforcement agencies that are responsible to hold the perpetrators accountable, DCBS assists the twin goals of helping the victims and holding perpetrators accountable. The obvious legislative intent is to safeguard information by keeping it confidential from the public, but to allow the Cabinet to share it with other government agencies as they pursue their own criminal, civil, or administrative agendas. These parallel or joint investigations can be very simple with a quick resolution, or very complex and involve many agencies working together. For example, a report that an elderly victim had funds misappropriated by an adult child with a power-of-attorney might be investigated by the State Police and APS by conducting a joint investigation and obtaining the victim’s banking records to see how and when the money was spent.

¹⁸ See Karen P. West *et al*, *The Mandatory Reporting of Adult Victims of Violence: Perspectives from the Field*, 90 Ky. L.J. 1071, 1076 (2002) (recounting physician group opposition and candid discussions with Kentucky dentists at a state healthcare conference where domestic violence was a topic of discussion).

In contrast, a report that a large nursing home owned by a national corporation neglected care for many residents in multiple states to maximize profits, billing Medicaid and Medicare for services not rendered; with physicians and nursing staff implicated in this neglect and fraud is far more complicated. This could trigger parallel criminal, civil and administrative agencies pursuing remedies against the same target defendants; and thus result in a joint investigation or many agency referrals.

In this second hypothetical, DCBS's APS workers; the OAG Medicaid Fraud unit; the Cabinet's Office of Inspector General; the Cabinet's Department for Medicaid Services; its Department for Aging and Independent Living; the U.S. Department of Health and Human Services Inspector General; the United States Attorney; the State Medical Examiner; the Kentucky State Police; the FBI; DEA, Kentucky Board of Medical Licensure; Kentucky Board of Nursing; and their counterparts in other states could all play a role in a single investigation. Or it could result in parallel or successive investigations. Federal, state, and local government agencies have learned the value of working together, but it wasn't always this way. As will be seen, after the General Assembly studied these issues, it encouraged DCBS to share its APS information with other government agencies, but there is no evidence the Legislature wanted to rupture the shield of privacy and thus give the general public- or even advocacy organizations like the Council - access to these confidential and sensitive records.

D. Legislative History of the Kentucky Adult Protection Act

The Cabinet believes KRS 209.140 must be read in the context of the entire KRS Chapter 209, and not in isolation; and the Cabinet strongly disagrees that this helps the Council's myopic reading of the exceptions to the confidentiality shield statutes. The part

of the Adult Protection Act that most explains KRS 209.140(3) is KRS 209.030 which states:

(a) The cabinet shall, to the extent practicable, *coordinate its investigation* with the appropriate law enforcement agency and, if indicated, *any appropriate authorized agency or agencies* (emphasis added).

(b) The cabinet shall, to the extent practicable, support specialized multidisciplinary teams *to investigate* reports made under this chapter. This team may include law enforcement officers, social workers, Commonwealth's attorneys and county attorneys, *representatives from other authorized agencies, medical professionals, and other related professionals with investigative responsibilities, as necessary.*

KRS 209.030 (emphasis added).¹⁹

The Cabinet thus argues below this Court should therefore conclude that the word “agencies” in KRS 209.140(3) is the same type of investigative and prosecutorial government agencies listed in KRS 209.030 that often serve on multidisciplinary teams, referenced which have governmental investigatory powers; or that they provide the same type of governmental social services that DCBS provides victims of abuse. The APA does not say private nonprofit corporate advocacy groups have any investigatory powers or has need to see the records. Therefore, the Cabinet argues below they should not be treated as “agencies” in the confidentiality statute.

This contextual reading of KRS 209.140 is also supported when reading other parts of the APA and considering legislative history. KRS Chapter 209 was initially enacted in 1976 and named “the Kentucky Adult Protection Act” two years after the 1974 enactment by Congress of Title XX of the Social Security Act.²⁰ The Act required any

¹⁹ One of the purposes of the Adult Protection Act is “[t]o promote coordination and efficiency among agencies and entities that have a responsibility to respond to the abuse, neglect, or exploitation of adults. KRS 209.010(1)(c). Nonprofit corporations lack such responsibility.

²⁰ Kentucky Acts 1976, ch. 157 (S.B. 230) (Appendix, **Tab 2**).

person who becomes aware of adults suffering from abuse, neglect or exploitation to report such cases to the “bureau for social services of the Department for Human Resources” (now DCBS in what has been renamed CHFS).

Section 4 of the 1976 Act, codified at KRS 209.030 established the mandate that:

Any person, including but not limited to, physician, nurse, social worker, department personnel, coroner, medical examiner, alternative care facility employee, or caretaker having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation shall report or cause reports to be made in accordance with the provisions of this Act. Death of the adult does not relieve one of the responsibility for reporting the circumstances surrounding the death.

1976 Ky. Act. § 4. This is now codified at KRS 209.030(2).

Section 5 of the 1976 Act gave all persons reporting immunity from civil or criminal liability. This section codified at KRS 209.050 provided:

Anyone acting upon reasonable cause in the making of any report or investigation pursuant to this Act, including representatives of the department in the reasonable performance of their duties in good faith, and within the scope of their authority, shall have immunity from any civil or criminal liability that might otherwise be incurred or imposed. Any such person shall have the same immunity with respect to participating in any judicial proceeding resulting from a report pursuant to this Act.

This is still codified in KRS 209.050, and strengthened by later amendments.

In 1980, the General Assembly amended the APA in several significant ways with the enactment of House Bill 779 (1980 Ky. Acts, ch. 372).²¹ In Section 9 of the 1980 amendments, the Legislature strengthened the immunity statute codified in KRS 209.050. In Section 10 of the Act, it enacted the confidentiality provisions now codified in KRS 209.140, which has remained unchanged since that time. In Section 11 of the 1980 Act, it strengthened the penalties for violating the statute. In Section 3 of the 1980 Act, the General Assembly amended KRS 209.030(5) to authorize any representative of the

²¹ Copy attached, Appendix, **Tab 3**.

Department for Human Resources (now CHFS) “actively involved in in the conduct of an abuse, neglect, or exploitation investigation . . . to be allowed access the mental and physical health records of the adult which are in the possession of any individual, hospital, or other facility if necessary to complete the investigation mandated by this chapter.” New sections were also added to the APA authorizing APS to petition the court for emergency services for the protection of any adult that needs protective services.

The Kentucky Legislative Research Commission Program Review and Investigations Committee, at its August 2003 meeting, directed its staff to study how adult protective services in Kentucky could be better coordinated, especially between DCBS and law enforcement agencies. This study led to LRC Research Report No. 327, adopted November 9, 2004, entitled “Kentucky Can Improve the Coordination of Protective Services for Elderly and Other Vulnerable Adults.” This lengthy report is out of print but is available to view or download from the LRC’s webpage.²² It is very helpful for anyone who wants to understand the background to KRS Chapter 209, and how it was implemented at the time of the study.

The LRC Report came to two major conclusions: First, DCBS, law enforcement agencies and prosecutors needed to better communicate and coordinate their investigations. Second, the report found many persons were not even aware of their legal duty to report adult abuse or neglect. A county by county breakdown showed some counties with good coordinated efforts, but very few criminal prosecutions overall. The report showed a need for greater awareness within the courts and criminal prosecuting agencies so that the law would be more effective to protect victims.

²² See <http://www.lrc.ky.gov/lrcpubs/RR327.pdf> (last visited March 24, 2014).

The authors of the LRC Report made several recommendations to the General Assembly, including promoting outreach efforts to increase awareness of adult abuse, neglect and exploitation, so that more people would be aware of their duty to report. With respect to the issue of problem of lack of communication or coordinated investigations by government agencies, the LRC Report said DCBS was required by law to report to other CHFS departments if the allegation takes place in a setting regulated or inspected by the Cabinet's Office of the Inspector General, Department for Mental Health and Mental Retardation Services (now renamed the "Department for Behavioral Health, Developmental and Intellectual Disabilities), the Office of Aging Services, and the Department of Health. However, the report noted that other states have multi-disciplinary teams, and the report recommended that Kentucky state agencies involved in investigating allegations of adult abuse, neglect or exploitation create such *ad hoc* teams to better coordinate their efforts.²³

In addition to the CHFS departments above, the LRC report recommended DCBS coordinate its investigations with the OAG Medicaid Fraud Unit and Consumer Protection Division. The LRC Report also compared and contrasted our statutes and regulations that applies to allegations of child abuse or neglect.²⁴ The LRC study reported DCBS APS workers in the Louisville-Metropolitan area had a good ongoing working relationship with the "Crimes Against Seniors Unit" of the Louisville Police Department

²³ See LRC Report, p. 10

²⁴ LRC Report, pp. 24-26 and Report Table 2.1.

and noted that other Kentucky law enforcement agencies should apply for federal grants to establish similar specialized units.²⁵ Funding was and continues to be a concern.

During the very next session, the 2005 General Assembly enacted important amendments to KRS Chapter 209 all aimed at addressing the issues identified in the LRC Report. To ameliorate the reported concerns and also strengthen the confidentiality of any records disclosed by physicians, bankers, attorneys or other professionals as to violations of the APA, the General Assembly made the following amendments through House Bill 298 (2005 Ky. Acts, Ch. 132):²⁶

Section 1 of the Act added what is now codified in KRS 209.010(1)(c) to reflect that the legislative purpose of the Act is, “To promote coordination and efficiency among *agencies* and entities that have a responsibility to respond to the abuse, neglect, or exploitation of adults” (emphasis added). Section 2 of the 2005 Act also amended the definition of the term “records” now codified in KRS 209.020(15) by rewriting some text and adding the last sentence which now reads: “*These records shall not be disclosed for any purpose other than the purpose for which they have been obtained*”(emphasis added).

KRS 209.020(17) was added defining the phrase “Authorized agency” and KRS 209.030(1) was amended to make it clear that nothing in KRS Chapter 209 restricts the powers of another authorized agency to act under its own statutory authority. What is now KRS 209.030(5) and (6) were added to promote multidisciplinary investigatory teams and coordinated investigations. Paragraph (7) of KRS 209.030 also allows APS and criminal investigators access to financial records, with the last sentence added which

²⁵ LRC Report, p. 52.

²⁶ See copy, Apx, Tab 4.

also reads, "*These records shall not be disclosed for any purpose other than the purpose for which they have been obtained*" (emphasis added).

Paragraph 12 was added to require the Cabinet prepare an annual report for the State Elder Abuse Committee, Governor and Legislative Research Commission with the admonition that "*such reports be done in accordance with federal confidentiality and open records laws, and not include any identifying information about individuals who are the subject of a report of adult abuse, neglect, or exploitation*" (emphasis added).

It is also significant for purposes of reading all the statutes together when discerning legislative intent that the APA is also consistent with the guidance in the primary law mandating confidentiality for all CHFS records, which reads:

(1) The secretary shall develop and promulgate administrative regulations that *protect the confidential nature of all records and reports of the cabinet that directly or indirectly identify a client or patient or former client or patient of the cabinet* and that insure that these records are not disclosed to or by any person except as, and insofar as:

(a) The person identified or the guardian, if any, shall give consent; or

(b) Disclosure may be permitted under state or federal law.

(2) The cabinet *shall share* pertinent information from within the agency's records on clients, current and former clients, recipients, and patients as may be permitted by federal and state confidentiality statutes and regulations governing release of data *with other public, quasi-public, and private agencies involved in providing services to current or former clients or patients* subject to confidentiality agreements as permitted by federal and state law *if those agencies demonstrate a direct, tangible, and legitimate interest in the records. In all instances, the individual's right to privacy is to be respected.*

KRS 194A.060 (emphasis added).

Relying on this later statute, the OAG has held the Cabinet, a hybrid entity under HIPAA, fully complied with governing state and federal law in responding to the requests

for copies of “any and all complaints” made by a named individual or others related to the treatment of a specific patient while at Kindred Hospital in Louisville, KY; Adult Protective Services properly conditioned release of the requested records upon completion of a HIPAA complaint form, and the Office of the Inspector General properly denied access on the basis of 45 CFR sec. 164.512(c) in conjunction with KRS 61.878(1)(a),(k) and (l) and KRS 194a.060(l).²⁷

E. KRS 209.140 - The Disputed Confidentiality Statute

With this background in mind, we come at last to the text of the Kentucky APA law that shields from public disclosure all information derived from any investigations of alleged adult abuse, neglect, or exploitation, with limited exceptions which enables this agency to share information and documents with other government agencies within and outside the Cabinet that have a legitimate need for the information. It reads:

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 (emphasis added).

²⁷ See. Ky. Op. Atty. Gen. 05-ORD-054 (Ky.A.G.), 2005 WL 3844433.

Our opponent hinges its entire case on the wording of subsection (3) and accuses the Cabinet of “willfully” violating the Act by not being willing to read language into the statute that is not there. The General Assembly did not include another exception to this confidentiality law for private nonprofit advocacy groups who want to know how well APS investigates abuse reports. Contrary to what the Council supposes, perhaps being misinformed by one-sided news coverage of a clearly distinguishable case- which has not until recently been ripe for appellate review- the Cabinet does not have anything to hide.

The Cabinet’s legal position is that it must follow the law as it was enacted, not how it might have been written to serve other purposes. As argued in detail below, the Cabinet cannot find in the background, text, legislative history of the APA, or Constitution of Kentucky as interpreted by this Court, any indication that the General Assembly intended through this legislation to discourage people from reporting adult abuse or compromise anyone’s fundamental right of privacy. It is not this agency’s or this Court’s job to second guess the wisdom of that legislative policy choice.

ARGUMENT

I. THE LOWER COURTS CORRECTLY HELD APPELLANT IS NOT A “SOCIAL SERVICE AGENCY” OR IT DID NOT HAVE ANY “LEGITIMATE INTEREST” IN THE APS INVESTIGATIVE RECORDS IT REQUESTED AS REQUIRED BY KRS 209.140(3) BEFORE THE CABINET HAD ANY AUTHORITY TO RELEASE THEM; CONSEQUENTLY THIS COURT MUST AFFIRM THE JUDGMENT

This Court should affirm the judgment dismissing the Council’s declaratory judgment action, and give an authoritative construction that follows the overall legislative

intent.²⁸ The Cabinet agrees this case is one of statutory construction reviewed *de novo*. Although the appeal may be decided based on statutory construction principles alone, this is an opportunity for this Court to address whether the provision of the ORA that mandates liberality of that statute in favor of letting citizens know what the government is up to, can be read to thwart the legislative intent of a carefully crafted confidentiality statute; much less surmount the right of informational privacy that underlies one of the basic freedoms enshrined in our Kentucky Constitution, that individuals be left alone.

Guiding Principles

There are three guiding principles that the Cabinet suggests be considered construing the meaning of KRS 209.140: First, the foremost duty of the executive branch of government, as it is with the judiciary, is to follow the Constitutions and laws of the United States and Kentucky, even when it may not be popular. “The rights preserved to the people pursuant to Sections 1 through 26 of our constitution cannot be usurped by legislative fiat.” *Posey v. Commonwealth*, 185 S.W.3d 170, 176 (Ky. 2006); Ky. Const. § 26. “There are no implied exceptions to the Bill of Rights.” *Talbott v. Thomas*, 151 S.W.2d 1, 8 (Ky. 1941), citing *Commonwealth v. Jones*, 73 Ky. 725, 10 Bush. 725 (1874). “The Kentucky Constitution is, in matters of state law, the supreme law of this Commonwealth to which all acts of the legislature, the judiciary and any government agent are subordinate.” *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 681 (Ky. 1994).

Accordingly, there is a presumption when the General Assembly enacts a statute it is aware of the Constitution, previously enacted statutes and the common law, *Lewis v.*

²⁸ The Cabinet preserved its statutory construction arguments in its briefs filed with the circuit court. This Court may take judicial notice of the legislative history and other issues that reveal legislative intent. See, *Commonwealth v. Howard*, 969 S.W.2d 700, 705 (Ky. 1998).

Jackson Energy Co-op. Corp., 189 S.W.3d 87, 93 (Ky. 2005), and that it would not intend to enact an absurd or unconstitutional statute. *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). So our foundational argument is the underlying right of privacy informs this Court that all statutes must be construed if possible to save them from constitutional infirmity. Even the Open Records Act must be seen in that light.

Second, statutes are not construed in a factual or contextual vacuum. Laws must be examined in view of the evil that was intended to be addressed and the entire legislative chapter rather than only considering a few words in isolation. The plain wording of the APA reveals that our General Assembly considered the need to give those who report violations of KRS Chapter 209 both immunity from suit and confidentiality, thus enticing reporting; but also grant the Cabinet authority to share the results of its APS investigations to a narrowly defined class of government agencies that need this information to perform their own governmental functions. The Cabinet urges this Court to follow the plain meaning of the statute as written, which is sufficient to affirm the judgment below, using the conventional tools of statutory construction.

Finally, if the plain text of a statute when read in light of the constitutional privacy rights were not sufficient to resolve this appeal, the legislative history of the APA confirms the legislative intent that the Cabinet not share its APS investigations to the general public or even other government agencies or its own employees unless they have a legitimate need to perform their duties relating to giving service to adult victims or pursuing administrative, civil or criminal charges against the perpetrators of adult abuse, neglect or exploitation. Each guiding principle is expounded upon below:

A. The Kentucky Constitution Protects Informational Privacy

Longstanding case law in Kentucky interprets our State Constitution as granting our citizens a fundamental right of privacy including what is called “informational privacy.” This Court has already found an implied right of privacy in our Kentucky Constitution, based on the text and common-law traditions of our citizens’ right to be left alone, sparing this Court of deciding in the abstract whether it exists. *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992). This Court only need consider the right of privacy’s scope and breadth; as our Legislature is presumed to have followed the Constitution as interpreted by this Court. *Hale v. Commonwealth*, 396 S.W.3d 841, 845 (Ky. 2013). As the Supreme Court of the United States has explained, one of chief benefits of this canon of interpretation’s chief justifications is that it allows courts to avoid the decision of constitutional questions. “It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress [or the Kentucky General Assembly] did not intend the alternative which raises serious constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005). There are two prongs to the right of privacy. One is the due process right to make personal decisions such as deciding whom to marry or whether to use birth control; and a second prong which has been labeled the right of “informational privacy.”

United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) is a leading federal court case that discusses the scope and foundation of the right of informational privacy in the context of the U.S. Constitution. *Westinghouse* was an appeal from a subpoena duces tecum by the United States while investigating

occupational safety and health issues for the medical records of employees. The Third Circuit held the privacy right must be evaluated by weighing competing interests:

The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980).

This Court has embraced this informational privacy right in numerous cases, most often when the government or interveners asserts the personal privacy exemption to block release of private information requested in ORA requests under KRS 61.878(1)(a), but also in other contexts. In *Kentucky Bd. of Examiners of Psychologists and Div. of Occupations and Professions, Dept. for Admin. v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327-328 (Ky. 1992) this Court said the public's "right to know" under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions, which must be weighed on a case by case basis against privacy, and that "the very existence of [a] confidentiality statute is significant as demonstrating a recognition (in the public interest) of the especially personal, private nature of the relationship. . . ." And so it is here.

In *Beckham v. Board of Educ. of Jefferson County*, 873 S.W.2d 575, 578 (Ky. 1994) this Court recognized the right of privacy gave persons named in government records the right to intervene in ORA cases and advocate for their own privacy. The right is deemed so important that citizens do not have to rely on the government to invoke it.

In *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998), and again in *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006), this Court rejected facial privacy challenges to healthcare laws that allowed the government to obtain private medical records and prescription drug information; but only because these records were safeguarded from release to the general public. *See, Yeoman*, at 474 (“[W]e hold that no violation of privacy rights occurs as long as the patient's identity is fully and totally shielded from public examination”). Likewise, in *Williams* which was a criminal appeal with a facial challenge to the KASPER law,²⁹ this Court reiterated, “KASPER data is not available to the general public, but rather only to specified personnel who certify that they are conducting ‘a bona fide specific investigation involving a designated person.’” *Williams*, at 783. Both constitutional challenges failed precisely because of privacy statutes akin to KRS 209.140, contained in the healthcare law and KASPER laws.

There can be little doubt these facial privacy challenges would have succeeded, if the general public could access these same private medical records at issue in those cases simply by making an open records request, claiming a need to examine them to explore how well the government was investigating and prosecuting trafficking controlled substances, even if a requestor was a private nonprofit advocacy organization.

Medical records are not the only type government records that are considered especially private in our common law traditions. Accusing someone of committing a crime is libelous *per se*, and grand jury records are private both to protect grand jury

²⁹ KASPER stands for “Kentucky All-Schedule Prescription Electronic Reporting.” *See, Commonwealth. Cabinet for Health and Family Services v. Chauvin*, 316 S.W.3d 279 (Ky. 2010) holding statutory prohibition on disclosure of KASPER records was a privilege created pursuant to legislature's power to create substantive law, and did not violate the separation of powers doctrine.

witnesses from retaliation or intimidation, but also to protect the reputational privacy interest of persons targeted by a grand jury investigation but not indicated.³⁰ See, *Rehberg v. Paulk*, ___ U.S. ___, 132 S. Ct. 1497, 1509, 182 L. Ed. 2d 593 (2012); and *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979). Consequently, unredacted law enforcement records may not be released to the general public. In its own way, the APS privacy law shield serves the same purpose as the grand jury secrecy rules.

This Court most recently considered this heightened privacy interest in law enforcement records in *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 82 (Ky. 2013) and *Lawson v. Office of Atty. Gen.*, 415 S.W.3d 59, 69 (Ky. 2013) where this Court recognized not only persons accused of criminal activity, but also informants and people who cooperate with government investigations have significant privacy interests, which cannot be sacrificed without a compelling countervailing interest. Our opponent has not satisfied this “compelling need” standard in its demands.

As the Supreme Court of the United States has said, allegations of government misconduct are “easy to allege and hard to disprove,” *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998). Consequently, federal courts considering analogous FOIA cases “must insist on a meaningful evidentiary showing” before a private citizen’s right of privacy must yield to a demand for government records. *National Archives and Records Admin.*

³⁰ As this Court observed in *Malone v. Commonwealth*, 30 S.W.3d 180, 182 (Ky. 2000), the guarantees of the Kentucky Bill of Rights are derived from the centuries-old struggle of Englishmen to gain personal freedom. The framers of our Kentucky Constitution included in Section 12 of our State Constitution’s Bill of Rights as a check on arbitrary government prosecution by preserving the grand jury for felony offenses. It was that same centuries old tradition of liberty and personal freedom from which our right of privacy was formed. See *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 970 (1927) (discussing Warren and Brandeis, influential Harvard Law Review article published December 15, 1890 and early Kentucky privacy cases).

v. Favish, 541 U.S. 157, 175 (2004). “First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.” *Favish*, at 172.

The U.S. Supreme Court also rejected the argument made by a FOIA requestor that privacy ceases to exist at death. “Neither the deceased’s former status as a public official, nor the fact that other pictures had been made public, detracts from the weighty privacy interests involved.” *Favish*, 541 U.S. at 171. The predecessor to this Court understood this, writing more than 100 years ago in *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912), when it held a family had a right of action against a photographer that published photos of their deceased nude congenitally joined infant twins. This Court should hold that families of deceased intellectually disabled persons have as much, if not more, dignity and privacy rights as persons holding high public office such as a President’s assistant legal counsel whose suicide prompted the FOIA request in *Favish*.

“When all else is said and done common sense . . . [is] ‘not a stranger in the house of the law.’” *Cantrell v. Kentucky Unemployment Ins. Commission*, 450 S.W.2d 235, 237 (Ky. 1970). Thus, courts reject statutory construction arguments that are “unreasonable and absurd, in preference for one that is ‘reasonable, rational, sensible and intelligent’” *Johnson v. Frankfort & C.R.R.*, 303 Ky. 256, 197 S.W.2d 432, 434 (1946) (citation omitted). In addition, courts must construe statutes in a manner that saves their constitutionality whenever possible consistent with “reason and common sense.” *Diemer v. Commonwealth, Transportation Cabinet*, 786 S.W.2d 861, 863 (Ky. 1990).

Applying these principles, this Court should reject the Council's argument that by omitting the word "government" or "public" before the word "agency" in KRS 209.140(3) that the General Assembly intended for the wall of privacy to be breached by any nongovernmental actors who do not need them to conduct a joint or parallel administrative, civil, or criminal investigations of a perpetrator; or in order to provide direct services to a particular adult abuse, neglect or exploitation victim. The statute implies a particular "case" not a blanket demand for records. The statute was intended to be interpreted with a practical application and allow the Cabinet discretion to share information with other government agencies. It was not intended, as our opponent suggests, as a way outside groups can demand records. KRS 209.140 must be construed with a practical application to preserve its constitutional validity, not to destroy it.

B. General Rules of Statutory Construction Support the Cabinet

Moreover, many other conventions of statutory construction also support the Cabinet's interpretation of these laws. This Court provided a comprehensive summary of the general rules of statutory construction in Kentucky in *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 718-720 (Ky. 2012), which we block quote below in an effort to keep this brief reasonably concise and within page limits.

"The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky.2009); *Saxton v. Commonwealth*, 315 S.W.3d 293, 300 (Ky.2010) ("Discerning and effectuating the legislative intent is the first and cardinal rule of statutory construction."). This fundamental principle is underscored by the General Assembly itself in the following oft-quoted language of KRS 446.080(1): "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature...." In *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky.2011), [this Court] summarized the basic principles of statutory construction as follows:

In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.... We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.... We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one.... Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts....

(citations omitted).

Thus, [a court] first look[s] at the language employed by the legislature itself, relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions. See, e.g., *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 58 (Ky.2011) (employing dictionary to determine “common, ordinary meaning” of the verb “to arise” as used in long-arm service of process statute); *Devasier v. James*, 278 S.W.3d 625, 632 (Ky.2009) (using dictionary to determine common, everyday meaning of “communicate” in statute requiring mental health professional to warn intended victim of actual threat); *Malone v. Ky. Farm Bureau Mut. Ins. Co.*, 287 S.W.3d 656, 658 (Ky.2009) (using dictionary to define “agree” as used in Motor Vehicle Reparations Act settlement statute); *Commonwealth v. McCombs*, 304 S.W.3d 676, 681 (Ky.2009) (using dictionary to define “club” as used in statutory definition of a “deadly weapon”); *Clark v. Commonwealth*, 267 S.W.3d 668, 676–77 (Ky.2008) (using dictionary to define “employ,” “authorize,” “induce” and “produce” as used in penal statutes addressing sexual performance by minor).

The particular word, sentence or subsection under review must also be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent. *Petitioner F. v. Brown*, 306 S.W.3d 80, 85–86 (Ky.2010) (Statutory enactment must be read as a whole and in context with other parts of statute with “any language in the act ... read in light of the whole act.”); *Democratic Party of Ky. v. Graham*, 976 S.W.2d 423, 429 (Ky.1998) (Court cannot focus on “a single sentence or member of a sentence but [must] look to the provisions of the whole.”). However, this preliminary assessment may not resolve the issue if the statute's wording is ambiguous.

As cogently stated in *MPM Financial Group*,

[w]hen the undefined words or terms in a statute give rise to two mutually exclusive, yet reasonable constructions, the statute is ambiguous. *Young v. Hammond*, 139 S.W.3d 895, 910 (Ky.2004); See also *Black's Law Dictionary* 88 (8th ed.2004), (defining ambiguity as: "An uncertainty of meaning or intention, as in a contractual term or statutory provision."); *Black's Law Dictionary* 73 (5th ed.1979) (a term is "ambiguous" when "it is reasonably capable of being understood in more than one sense").

289 S.W.3d at 198.

Where the statute is ambiguous, the Court may properly resort to legislative history. *Id.*; *Fiscal Court of Jefferson Co. v. City of Louisville*, 559 S.W.2d 478, 480 (Ky.1977) ("The report of legislative committees may give some clue. Prior drafts of the statute may show where meaning was intentionally changed. Bills presented but not passed may have some bearing. Words spoken in debate may be looked at to determine the intent of the legislature."). Often legislative history is referenced, even where a statute is unambiguous, simply to underscore the correctness of a particular construction. See *Stephenson v. Woodward*, 182 S.W.3d 162, 172 (Ky.2005) (Resort to legislative history is unnecessary when the statute is "abundantly clear," but in case at bar "legislative history is enlightening and serves only to strengthen our foregoing conclusion.").

As noted, the Court may also apply time-honored canons of statutory construction. See, e.g., *Fox v. Grayson*, 317 S.W.3d 1, 8 (Ky.2010) (applying the statutory construction tenet referred to as *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another)); *Economy Optical Co. v. Ky. Bd. of Optometric Examiners*, 310 S.W.2d 783 (Ky.1958) (applying canon of "*in pari materia*" ("in the same matter"): statutes should be construed together, should be harmonized where possible and should result in effectiveness of all provisions, especially where two acts are passed at the same legislative session and become effective on the same day).

C. Legal Analysis Using General Rules of Statutory Construction

1. The Meaning of the confidentiality statute is not ambiguous, especially when read in context with the entire Adult Protection Act.

"The most commonly stated rule in statutory interpretation is that the 'plain meaning' of the statute controls. . . . "unless to do so would constitute an absurd result."

Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004).

As the Hon. Chief Judge Hon. Glenn Acree correctly observed in his concurring opinion in the Court of Appeals decision below, Black's Law Dictionary, 9th Ed. (2009) defines "agency" in the context it was expressed in the statute at issue as "3. A government body with authority to implement and administer particular legislation." And Black's Law Dictionary lists "government agency, administrative agency, public agency, and regulatory agency: as synonymous terms." This Court should apply that dictionary meaning to KRS 209.140(3). The Council is free to label itself a private "agency" but if that was all it took to fit within the statute, this privacy law would have little protection.

The most likely reason the General Assembly used the term "social service agency" was to enable Kentucky's APS unit to share information with similar government social service agencies that need the information to investigate suspected perpetrators or support the victims. For example, if the perpetrator or victim moved across state lines and Kentucky APS needed to share its records with its sister state counterpart APS agency. Similarly, the Cabinet may share these records with social service agencies that give direct benefits to a victim and need to know the victim's history. Nonprofit private corporations are not included in the dictionary definitions or the ordinary meaning of the word "agency" in the context of the statute.

Moreover, this logical dictionary reading of paragraph (3) of KRS 209.140 which begins with the word "*other*," followed by the list in the class, "*medical, psychological, or social service agencies, or law enforcement agencies that have a legitimate interest in the case*" (emphasis added) connotes a comparison meaning of like kind to the persons listed in paragraph (2), which are: "*Persons within the department or cabinet with a legitimate interest or responsibility related to the case.*" In other words, even within

DCBS and CHFS not just anyone can see the adult investigative records or evidence assembled. Rather, the need must be so the Cabinet employee may perform their governmental jobs or duties related to the case assisting the individual victim or pursuing charges against the perpetrator.

Within CHFS, the Office of Inspector General; and the Department for Medicaid Services, if a Medicaid provider operates the facility where the statutory violation occurred, would have a right to see the APS records. Likewise, the Cabinet's Department for Aging and Independent Living also might need to see the report if the victim was legally incompetent and a state guardianship appointment had been made to make personal decisions for the adult ward.

By beginning the next paragraph with the word "other," the General Assembly signaled a limitation on sharing with departmental entities of the Cabinet and similar types of government agencies. Two familiar interpretive rules of statutory construction apply: "*noscitur a sociis*," the interpretive rule that "words and people are known by their companions," See, *Maracich v. Spears*, ___ U.S. ___ 133 S. Ct. 2191, 2201, 186 L. Ed. 2d 275 (2013). Accord, *Carson & Co. v. Shelton*, 128 Ky. 248, 107 S.W. 793 (1908).³¹

The related cannon of statutory construction, "*ejusdem generis*", is a variation, which means "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Sutherland Statutory Construction*, § 47.17. The word "agencies" thereby must be assumed to be of the same character as those listed above it, or referred to by reference. The rule of *ejusdem generis* has frequently been applied by this Court:

³¹ See also, Norm and J.D. Singer, *Sutherland Statutory Construction* (7th ed. 2007) § 47.16.

“The rule of *ejusdem generis* is that where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.”

Jefferson County Fiscal Court v. Jefferson County ex rel. Grauman, 278 Ky. 68, 128 S.W.2d 230, 232-33 (1939) (quoting 24 R.C.L. 996). For example, this Court applied this rule in *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 16 (Ky. 2011) when it said the term “condition” and its use in KRS 61.600 which followed the words “bodily injury, mental illness, and disease” did not include smoking because that is not a condition, but a behavior. *Id.* Said differently, it was not of the same type as the previous class of words.

In *City of Bowling Green v. Helbig*, 399 S.W.3d 445, 449 (Ky. App. 2012), our Court of Appeals quoted *Demko v. United States*, 216 F.3d 1049, 1053 (Fed.Cir. 2000), where the federal court articulated a metaphor that is also particularly appropriate for this case: “When a statute is as clear as a glass slipper and fits without strain, courts should not approve an interpretation that requires a shoehorn.” This also applies here.

2. The Phrase “legitimate interest” is ambiguous if read alone but its meaning is made plain by context

Because the word “agency” should be interpreted to mean “government agency” it is not necessary to decide what purpose a “legitimate” interest would be for a government agency; or conversely, what would be illegitimate, but to avoid waiving any arguments this Court needs to decide this appeal, it seems clear that “legitimate interest” refers back to the purpose of the government agency that needs the records, whether to pursue a criminal, civil, or administrative action against the perpetrator of the abuse; or help a specific victim.

For example, if the KBA being a government agency with the power to discipline attorneys who financially exploit elderly victims wanted to examine the APS files this agency created on that particular case, the Cabinet would have no hesitation to share the information. Disbarring bad attorneys who exploit elderly victims is a parallel governmental function that nobody would find “illegitimate.”

But if a private bar association that promotes the rights of the elderly or disabled wanted to see specific case files the Cabinet could not release them. Private bar associations lack governmental powers and thus have no “legitimate interest in the case,” within the context intended in KRS 209.140. The Cabinet would share educational information and might agree to assist a Continuing Legal Education class on elder abuse and neglect, but it would be prohibited by law from identifying adult victims who did not consent or releasing any investigatory report. The private legal group would be free to access all public criminal court records or civil litigation records; but it could not breach the privacy wall our Legislature put around APS investigatory information and records.

3. The text of KRS 209.140 read in context with the entire KRS Chapter 209 Support the Cabinet’s Arguments to Preserve Privacy and Confidentiality

The Council, by adopting the dissenting judge’s opinion from the Court of Appeals decision below, argues KRS 209.140 must be read in context with the entire chapter; and while they are correct in this assertion, they reach the wrong conclusion.

APS investigation records are not even supposed to be shared within the Cabinet or DCBS unless the employee or department that asks for it has a “legitimate interest or responsibility related to the case.” KRS 209.140(2) and (3). Harmonizing and construing together the “records” (defined in KRS 209.020(15)), the Cabinet may obtain, and the many times the Legislature put express limitations on what the Cabinet may do with them

in KRS 209.020 and KRS 209.030(7) ("*These records shall not be disclosed for any other purpose for which they have been obtained*" (emphasis added); and the stated legislative intent for the Cabinet to coordinate its investigations with Commonwealth's attorneys, county attorneys, or their assistants, found in KRS 209.180); plus the reference to "any appropriate authorized agency or agencies" in KRS 209.030(6)(a) to the extent practicable with specialized multidisciplinary teams "to investigate reports made under this chapter" (KRS 209.030(6)(b)) and "related professionals with investigative responsibilities, as necessary" (same), it logically follows that in the context of all the words of KRS Chapter 209, that the word "agency" in KRS 209.140 is the same type of government agency referred to in these other statutes. In other words, following canons of statutory construction referred to above, APS may share with government agencies- those of the same character as Cabinet department with *investigatory* powers. It thus logically follows also the phrase, "legitimate interest in the case" found in KRS 209.140(3) was a directive that APS only share with the same type of public agencies needing it to conduct their own investigations, or a joint investigation with the Cabinet.

The OAG reasonably interpreted "legitimate interest" in 10-ORD-080 as requiring more than a general interest that the government is performing its statutory duties. To construe the words "agency" and "legitimate interest" more broadly, as the Council and dissenting appellate court judge below say the legislature intended would lead to an absurd and unconstitutional result. Doing so would violate the personal privacy interests of both the victims and accused persons named in the records, as well as those that provide evidence to the Cabinet, and nullify the repeated statutory directives to keep the records confidential, only excepting other governmental agencies with a need to see

them. The OAG made a reasonable and informed interpretation of the confidentiality statute which this Court should be adopt, affirm and uphold.

Even if the statute was as ambiguous as our opponent argues, this Court should afford deference to any permissible construction of that statute by the administrative agency charged with implementing it, here the Cabinet, and the Attorney General's authoritative Opinion. See *Bd. of Trustees of the Judicial Form Retirement Sys. v. Attorney General*, 132 S.W.3d 770, 786–87 (Ky.2003) citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984). This Court is not bound by opinions of the Attorney General, but “they have been considered ‘highly persuasive.’” *Palmer v. Driggers*, 60 S.W.3d 591, 596 (Ky. App. 2001), quoting, *York v. Commonwealth*, 815 S.W.2d 415 (Ky. App.1991). Moreover, the failure by the General Assembly to abrogate the Attorney General's published opinion interpreting KRS 209.140 through statutory amendments is persuasive evidence that the interpretation is the one the legislature intended. *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996).

The Open Records Act does not compel a different conclusion. It should not be assumed that when the government obtains private personal documents from private individuals that they are transmuted into government records under the Open Records Act. KRS 61.882(3), which provides that an agency resisting disclosure has the burden of proof to sustain its action, has to be read with KRS 61.871, which states:

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 (emphasis added).

This raises a related question, what is a “public record?” Does a private document obtained under compulsion by a police officer or a APS employee when investigating a report of adult abuse, neglect, or exploitation become a “public record” when it is placed in the government’s investigatory files?³² This Court should hold it does not.

Even if these are public records, it would be anomalous if in enacting a confidentiality statute in the APA our General Assembly intended to give a second-class lower standard of privacy protection than is afforded under KRS 61.878(1)(a), when it enacted a residual personal privacy exemption in the Open Records Act. In the *Board of Psychology* decision, this Court said the enactment of a confidentiality statute is significant in knowing that the Legislature wanted records to be private.

Also, the personal privacy exemption in the ORA flows from society’s recognition that privacy remains a basic right of the sovereign people. *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818, 821 (Ky. 2008). In another *Cape Publications* case, the Courier-Journal argued it had a right to know the names and addresses of rape victims, and that the City of Louisville’s “blanket policy” of redacting this information was improper. *Cape Publications v. City of Louisville*, 147 S.W.3d 731, 735 (Ky. 2004). This Court disagreed holding victims of sexual offenses have a significant privacy interest; and in an analogous case our Court of Appeals held the right of privacy was more compelling than a newspaper’s interest in arguing it needed to examine criminal investigatory records of an alleged rape suspect who was an unnamed University of Kentucky basketball player. *Lexington H-L Services, Inc. v. Lexington-*

³² “‘Public record’ means all books, papers, maps, photographs, cards, tapes, disks, diskettes, recordings or other documentary materials regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. ‘Public record’ shall not include any records owned by a private person or corporation that are not related to functions, activities, programs, or operations funded by state or local authority[.]” KRS 61.870(2) (emphasis added).

Fayette Urban County Government, 297 S.W.3d 579, 580 (Ky. App. 2009). This Court cited both cases with approval in its latest opinions in December.

Here, the Council's reliance on the presumption of openness of government records is even less compelling than was the media's requests for the names of rape victims or rape suspects. All the text of Chapter KRS 209 quoted in our Counterstatement of the Case reveals an overwhelming repeated desire by the legislature for the government to access or copy private banking records or medical records from third parties such as banks or hospitals *but not* share them with outsiders. The overwhelming expression of intent is for this agency to share such records only with government agencies, including law enforcement agencies, prosecutorial agencies, and social service agencies that provide direct care to specific adult abuse victims who were the subject of the specific APS investigation; and not give them to any other persons or organizations.

The dissenting judge in the Court of Appeals panel below cited *Taylor v. Barlow*, 378 S.W.3d 322 (Ky. App. 2012) as instructive in this case. With due respect, it is not. The lower court in *Taylor sua sponte* dismissed an Open Records case filed by a Tennessee citizen on behalf of a jail inmate for lack of standing and because the requesting party was not a licensed attorney. The Court of Appeals correctly said any person may request a record under our ORA. Although "*any person*" may make an open records request, as the *Taylor* court properly observed when construing KRS 61.871, it does not follow that *any person* may investigate adult abuse, neglect or exploitation, or that *any person* may gain access to Cabinet investigatory records by claiming to be a "private" social service agency under KRS 209.140(3), as that would defeat the primary objectives of the General Assembly to encourage persons to report violations of KRS

Chapter 209 knowing all information gathered be safeguarded, with sharing limited to government agencies with investigatory powers; plus a legitimate need for them.

D. The Legislative History of the Adult Abuse Act Supports the Cabinet

Although this Court does not need in this case to resort to the legislative history of the Adult Abuse Act to interpret its meaning, in this case doing so confirms the statutory construction urged by the Cabinet and also refutes the countervailing arguments of our well-intended but still wrong opponent. The Cabinet will not belabor this Court by repeating the legislative history recounted in our Counterstatement of the Case, but to summarize, Kentucky modeled its APA law on its existing Child Abuse Act. The child abuse law was drafted and then amended so that Kentucky could remain eligible for federal funding under the federal Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. § 5101 *et seq.*, which provides federal funding and resources to states to assist them in providing child and family protection services. CAPTA mandates that states wishing to receive federal funds for such services must submit a compliance plan that keep such records private and have criminal penalties for violations of confidentiality. However, CAPTA has an exception, requiring:

an assurance in the form of a certification by the Governor of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes ... provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality[.]

42 U.S.C. § 5106a(b)(2)(B)(x). Otherwise, CAPTA requires states keep these records confidential. But there is no federal funding statute that has any bearing on Kentucky's Adult Protection Act. Most states enacted their APA laws anticipating funding under federal legislation proposed but never enacted. In contrast to the Child Abuse Act, our

Legislature enacted the APA and amended it over the years understanding that privacy and confidentiality were essential to the success of the law by encouraging individuals to report violations; encourage witnesses to share knowledge without fear of retribution; and encourage medical providers, clergy, psychologists, and anyone else to report anonymously. Confidentiality and limited immunity from suit reveal the legislative intent to promote compliance with the mandatory reporting law.

The parts of the APA that speak to the Cabinet's ability to share information with other entities listed in the confidentiality statute, read in conjunction with the entire Chapter serve the secondary interest the legislature expressed for government agencies to communicate and cooperate in their joint or parallel investigations. The influential LRC Report and amendments following that report only reinforced the types of governmental agencies APS is supposed to cooperate and communicate with when they pursue perpetrators or aid specific victims.

II. EVEN IF THE LOWER COURTS ERRED, THE TRIAL COURT'S JUDGMENT SHOULD BE AFFIRMED ON OTHER GROUNDS

Even if this Court were to conclude KRS 209.140(3) entitled the Council to demand APS investigative records, this Court should affirm the judgment of the lower courts because it is well settled that an appellate court may affirm a judgment for any reason preserved and appearing in the record. "This rule applies equally to both the judgment of a trial court and the judgment of an appellate court." *Fischer v. Fischer*, 348 S.W.3d 582, 591 (Ky. 2011).

A. The Open Records Privacy Exemption

First, even if this Court was willing to disregard principles of issue preclusion, this Court's recent *Kentucky New Era* opinion would mean this agency could

categorically redact all the medical records and law enforcement type information as that would be the only practical way to comply with the type of request the Council has made to the Cabinet. Almost everything the Council asks for from the Cabinet would be private under KRS 61.878(1)(a) for the same reason this Court upheld the government's categorical redactions in that recent opinion. These investigatory records, whether or not done as part of a joint criminal investigation, should have heightened protection because, as this Court said:

[I]aw enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance. There is special reason, therefore, to give protection to this intimate personal data, to which the public does not have a general right of access in the ordinary course.... In this class of cases where the subject of the documents "is a private citizen," "the privacy interest ... is at its apex."

Kentucky New Era, at 84 (quoting *Favish*, 541 U.S. at 166, and other U.S. Supreme Court FOIA privacy decisions). This Court should therefore also hold persons interviewed as witnesses or as initial suspects in adult abuse investigations have a significant privacy interest that is also at its apex." Upholding privacy would be entirely consistent with this Court's holding in *Kentucky New Era*, and also how our courts have respected the privacy of criminal suspects not later charged with a crime such as the UK student rape investigation mentioned earlier.

The only things more stigmatizing than being accused of statutory or nonconsensual date rape in our society is being falsely accused of child molestation or harming an elderly or helpless disabled person. The stigma is so bad that prisons have to keep those convicted of child or elder abuse away from the general population. Even hardened criminals who are prisoners despise persons who prey on innocent children or

elderly adults. Corrections officials know this and keep those prisoners isolated for their own safety. This is such common knowledge that this Court found a confession made by a juvenile to killing his sister was coerced when State Police alluded to prison violence and/or rape because of the way they said inmates treat individuals convicted of a sexual crime against a child.³³ Consequently, the privacy interests here are very compelling. Our General Assembly also had constructive knowledge about all the reports of vulnerable adult victims and families being timid of reporting abuse; which is another reason it was so important that adult protection records be kept confidential. Those factors would also apply if this Court needed to look at the privacy balancing test.

B. Other Privacy Limitations in the Adult Protection Act

Moreover, because of the clear mandate of KRS 209.020(15), KRS 209.030(7), the Cabinet may acquire confidential “medical, mental, health, and financial records that are in the possession of any hospital, firm, corporation, or other facility,” if necessary to complete the investigation mandated by KRS Chapter 209, but the Cabinet *may not* share them with the Council due to the plain concluding language in these statutes stating, “These records shall not be disclosed for any purpose for which they have been obtained.” The Cabinet could not share these records with the Council even if was an “agency” with a “legitimate need” as it has argued to this Court.

C. The HIPAA Regulations

Finally, the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) 42 U.S.C. §§ 1320d, and its implementing regulations prohibits the Cabinet giving anyone not authorized by law or that does not have a release or qualified protective order any Protected Health Information (“PHI”). Health information includes:

³³ *Dye v. Commonwealth*, 411 S.W.3d 227, 234 (Ky. 2013), *reh'g denied* (Sept. 26, 2013).

any information, whether oral or recorded in any form or medium, that: (1) is created by a health care provider, health plan, public health authority, employer, life insurer, school or university or health care clearinghouse; and (2) relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual.

45 C.F.R. § 160.103.

In enacting HIPAA, Congress recognized the fact that administrative simplification and sharing medical records cannot succeed if we do not also protect the privacy and confidentiality of personal health information. The provision of high-quality health care requires the exchange of personal, often-sensitive information between an individual and their physicians. Vital to that interaction is the patient's ability to trust that the information shared will be protected and kept confidential

HIPAA contains a preemption provision that the statute and the regulations promulgated thereunder supersede "any contrary provision of State law" except as provided in 42 U.S.C. § 1320d-7 (a)(2). See 42 U.S.C. § 1320d-7(a)(1). Under this exception, HIPAA does not preempt or supersede state law if the state law relates to the privacy of individually identifiable health information and is "more stringent" than HIPAA's requirements. The Cabinet is a hybrid entity under the federal act. It is required to protect PHI in the absence of written consent to release. The federally imposed obligation is found at 45 CFR 164.502(f). In the absence of a waiver from the individual involved or the executor or other representative of the estate of the individual, PHI may not be released, even for records of a deceased person. This is logical because PHI can be misused to engage in healthcare billing fraud, as well as compromise patient privacy.

The records sought by the Council directly relate back to the past or present physical or mental health or condition of the individuals whose records were requested and therefore constitute individually identifiable health information under 45 C.F.R. 160.103. 45 C.F.R. § 164.502(f) states: "A covered entity [i.e. the Cabinet] must comply with the requirements of this subpart with respect to the protected health information of a deceased individual for a period of 50 years following the death of the individual." The Cabinet could be sanctioned if it violates HIPAA. See, 42 U.S.C. § 1320d-5. Any person claiming an entitlement to PHI must therefore comply with the applicable state regulation, 922 KAR 1:510, which mandates a signed authorization for disclosure of protection and permanency records. The Council does not qualify for PHI.

Some state courts *in dictum* have said their Open Records laws prevailed over a conflict with HIPAA, but they are not persuasive in this context and have distinguishable facts. The Supreme Court of Ohio decided that a public health department should have released lead paint citations issued to property owners because one "mere nondescript reference to 'a' child with 'an' elevated lead level" was not PHI under HIPAA. In *dictum* the court said, even if these lead paint landlord citations contained PHI, the HIPAA Privacy Rule indicated that the Health Department could release this if "disclosure is required by law." *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St. 3d 518, 844 N.E.2d 1181 (2005). The Attorney General of Kentucky sometimes cites this opinion.

But in a more recent case, the Ohio Court of Appeals said under Ohio law the health departments could redact the PHI including: "the names of parents and guardians, their Social Security and telephone numbers, their children's names and dates of birth, the names, addresses, and telephone numbers of other caregivers, and the names of and

places of employment of occupants of the dwelling unit, including the questionnaire and authorization.” See, *Cuyahoga Cty. Bd. of Health v. Lipson O’Shea Legal Group*, 2013-Ohio-5736, ___N.E.2d___ (2013). Consequently, HIPAA is not dead in Ohio; and the privacy of medical records are still protected there, as Congress obviously intended.

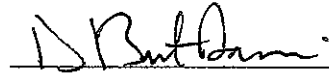
The Council concludes its arguments to this Court by making unfortunate personal attacks against the Cabinet. These are not persuasive; and are not worthy of an organization that does much good with its advocacy for intellectually disabled adults and children. It appears in the end the Council simply disagrees with the public policy directive of the General Assembly to strictly limit public access to APS investigation records; it is frustrated by the denial of records, and delays in the courts. Because it is frustrated, the Council wrongly faults the Cabinet and lower courts for simply following the law as it is written. That is not a good or sufficient cause for this Court to decide in Appellant’s favor.

CONCLUSION

For all the reasons argued above and before the lower courts, the Cabinet asks this Court to affirm the judgment of the courts below and validate the Cabinet’s interpretation of KRS 209.140 as a reasonable, constitutional, and common sense understanding of this confidentiality shield statute in view of the plain language, legislative goals, history, and conventional rules of statutory interpretation of statutes.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY
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APPENDIX

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- Tab 1: Ky.Op. Atty. Gen. 10-ORD-080 (2012 WL 1684688) (April 21, 2010)
*In re: The Council on Developmental Disabilities, Inc./Cabinet for
Health and Family Services*
- Tab 2: Acts of the General Assembly, 1976, Ch. 157 (S.B. 230).
- Tab 3: Acts of the General Assembly, 1980, Ch. 372 (H.B. 779).
- Tab 4: Acts of the General Assembly, 2005 Regular Session, Ch. 372
(H.B. 298).