COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
SUPREME COURT NO. 2011-SC-725

CITY OF FORT THOMAS **APPELLANT**

KENTUCKY COURT OF APPEALS
CASE NO. 2010-CA-1072

v.

APPEAL FROM THE CAMPBELL CIRCUIT COURT
CASE NO. 09-CI-1145

CINCINNATI ENQUIRER
d/b/a KENTUCKY ENQUIRER **APPELLEE**

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of Appellant's Reply Brief have been served via First Class U.S. Mail on this the 5th day of November, 2012, upon the following: Clerk of the Kentucky Supreme Court, New Capitol Building, Room 235, 700 Capital Avenue, Frankfort, KY 40601; Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601; Hon. Fred A. Stine, Campbell Circuit Court, 330 York Street, Second Floor, Division 2, Newport, KY 41017; Paul Alley, Graydon Head & Ritchey LLP, 2400 Chamber Center Drive, Suite 300, Fort Mitchell, KY, 41017; John Greiner, Graydon Head & Ritchey LLP, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, OH 45202; and Jon L. Fleischaker/Jeremy S. Rogers, Dinsmore & Shohl LLP, 101 S. Fifth Street, 2500 National City Tower, Louisville, KY 40202.

Jeffrey C. Mando, Esq.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. *SKAGGS* IS DIRECTLY ON POINT, NOTWITHSTANDING THE ENQUIRER'S ATTEMPT TO DISTINGUISH IT

The Enquirer argues that *Skaggs v. Redford,* 844 S.W.2d 389 (Ky. 1992) is not dispositive of the instant appeal. First, the Enquirer contends that harm was not an issue in *Skaggs* because both sides agreed that it existed. (Appellee's Brief, p. 6 – 7) That simply is not so. The plaintiff in *Skaggs* argued that "the disclosure of [the prosecutor's file], even at this late date, *would not* prejudice the Commonwealth." *Id.* at 389. The Commonwealth responded that its file was exempt because the information therein *would* harm the agency in a prospective law enforcement action. *Id.* at 390. Thus, the issue of harm was indeed disputed.

For its part, the *Skaggs* Court presumed that harm would occur *ipso facto* if the Commonwealth were required to disclose the file in question before law enforcement action was complete. After all, had the Court not made such a presumption, it would, of necessity, have addressed the harm issue before reaching the question whether prosecution was complete. Of course, the Court's presumption in that respect fully supports the City's interpretation of KRS 61.878(1)(h) in its Appellant's Brief.

Next, the Enquirer argues that *Skaggs* is distinguishable because it involved the records of a prosecutor rather than those of a municipal law enforcement agency. (Appellee's Brief, p. 7 – 9) That is an artificial distinction that is not material to the analysis. The only distinction KRS 61.878(1)(h) makes between prosecutors' files and the files of other law enforcement agencies is that prosecutors' files remain exempt even after the completion of a law enforcement action, while the files of other law enforcement

agencies are no longer exempt once the law enforcement action is complete. In that respect, KRS 61.878(1)(h) provides, in relevant part:

> ...[P]ublic records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled or maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation ... shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. ...

That distinction is irrelevant in the context of *Skaggs*, and in the context of this case. Both *Skaggs* and this case involved requests for disclosure of files that were made *before* enforcement action was completed, a point in time in which "records of law enforcement agencies" are treated the same, whether they belong to a prosecutor or to some other law enforcement agency. Of course, at that point in time, the records are exempt from disclosure.

In sum, *Skaggs* is simply not distinguishable, and for the reasons stated in the City's Brief, *Skaggs* is dispositive of this appeal.

II. KRS 61.878(1)(h) SPECIFICALLY DEFINES HARM TO OCCUR WHEN THE RESULT OF DISCLOSURE WOULD BE THE "PREMATURE RELEASE OF INFORMATION TO BE USED IN A PROSPECTIVE LAW ENFORCEMENT ACTION"

KRS 61.878(1)(h) exempts from disclosure "records of law enforcement agencies ... that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication."

The Enquirer focuses entirely on the word "if," arguing that records are only exempt "if" the City can establish harm. (Appellee's Brief, p. 9 – 12) In so doing, it

misses the City's point, and wholly ignores the remaining words in the statutory provision.

The City does not contend that it is not required to establish harm. However, what constitutes "harm" within the meaning of KRS 61.878(1)(h), is specifically defined in that provision, i.e. "if the disclosure of the information would harm the agency *by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action.*" In other words, harm is conclusively established if the disclosure would either (a) reveal the identity of informants not otherwise known or (b) prematurely release information to be used in a prospective law enforcement action.

Records are "prematurely" released if they are released before the conclusion of an existing or contemplated law enforcement action. *Skaggs, supra.*

Of course, "the exemptions in the Open Records Act should be construed in a manner sufficiently broad to protect a legitimate state interest, and the state's interest in prosecuting [a criminal defendant] is not terminated until [the defendant's] sentence is carried out." *Skaggs, supra* at 390. In light of that rule, it makes sense that a police department's *entire file* relating to a criminal investigation is exempt from disclosure until the criminal defendant's sentence is carried out. Otherwise, the police department is required to speculate about what issues may arise in a prospective law enforcement action and which pieces of its file a county attorney or Commonwealth's attorney is likely to rely on as evidence relevant to those issues. That simply is not the role of a police department.

III. THE CITY DOES NOT HAVE A DUTY TO MONITOR OTHER PUBLIC AGENCIES' DISCLOSURES

Whether a criminal defendant is entitled to obtain documents in the investigative file through discovery in his criminal case is not determinative of whether he or someone else can secure those documents as part of an open records request. 2011 Ky. AG LEXIS 167, 11-ORD-171; 2012 Ky. AG LEXIS 148, 12-ORD-132. These are two separate inquiries performed under two different sets of rules by two separate public entities. The Rules of Criminal Procedure govern the first disclosure, which is undertaken by a prosecutor. The Open Records Act governs the second disclosure, which is undertaken by a local law enforcement agency.

Requiring local law enforcement agencies to monitor what disclosures are made by a prosecutor in the course of a criminal prosecution equates Open Records provisions with the Rules of Criminal Procedure. That result was not contemplated by the legislature, as evidenced by the fact that there is no reference to the Rules of Criminal Procedure in KRS 61.878(1)(h). In that respect, had the legislature intended such a result, it certainly could have provided that records of law enforcement agencies are exempt from disclosure to the public "except for records released to a criminal defendant under the Rules of Criminal Procedure." No such language, however, exists within KRS 61.878(1)(h). Nor does any prior precedent of this Court or any other court hold that KRS 61.878(1)(h) requires a local law enforcement agency to disclose its investigative records if such records have been produced to a criminal defendant under the Rules of Criminal Procedure.

Moreover, requiring local law enforcement agencies to monitor what disclosures are made by a prosecutor in the course of a criminal prosecution is onerous and

impractical. Local police departments and sheriff's offices initiate an untold number of criminal investigations every year. They turn many of those investigations over to the Commonwealth Attorney or County Attorney so that a suspect may be prosecuted. If local law enforcement agencies are required to monitor what documents are subsequently disclosed by a prosecutor to criminal defendants so that they can then make such documents available in response to open records requests, local law enforcement agencies will have to divert substantial and important resources away from their law enforcement activities and toward tracking a prosecutor's discovery activities.

If this Court were to hold that such an obligation exists, it would be the first to so rule. Case law does not find such a duty in KRS 61.878(1)(h), nor does common sense.

IV. THE COURT OF APPEALS ENGAGED IN IMPERMISSIBLE FACT-FINDING WHEN IT RULED THAT THE CITY ACTED WILLFULLY IN DENYING THE ENQUIRER'S REQUEST

The Enquirer argues that the City's denial of its open records request was "willful" and that it is entitled to the attorney fees it expended in pursuing this appeal under KRS 61.882(5). This provision authorizes the award of attorney fees to a requesting party in an open records appeal "upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884[.]." In *Bowling v. Lexington-Fayette Urban County Govt.*, 172 S.W.3d 333 (Ky. 2005), this Court elaborated on the meaning of this language. According to the Court, the fact that a public agency misinterpreted or misapplied a provision to the Kentucky Open Records Act is not enough to justify the award of attorney fees:

> A public agency's mere refusal to furnish records based on a good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Act. In other words, a

> technical violation of the Act is not enough; the existence of bad faith is required.[1]

Id. at 343 – 344, citing *Blair v. Hendricks,* 30 S.W.3d 802 (Ky. App. 2000). In *Bowling,* the Court concluded that a city's denial of an open records request, after more than year and a half of litigation, did not amount to willfulness even though the city conceded during the proceedings that its position was erroneous. *Id.* at 344. Though there was no dispute that the city mistakenly applied the exemption under the Open Records Act, there was no evidence in the record of the city's bad faith. *Id.* at 345.

As in *Bowling,* there is no evidence whatsoever that the City claimed any exemption under the Open Records Act in bad faith. Rather, the record demonstrates that the City provided a more than reasonable interpretation of the exemption and an explanation of its applicability to this case in denying the Enquirer's open records request. And, while, the Enquirer disagrees with the City's interpretation of the Open Records Act, the City's understanding of KRS 61.878(1)(h) was (even if mistaken) at least reasonable since the Attorney General fully agreed with the City's resolution of the issue. 09-ORD-104 at p. 6. Moreover, prior to the Court of Appeals' ruling, no court had ever suggested that a local law enforcement agency had an obligation to produce records in response to an Open Records request merely because a prosecutor had released the same document to a criminal defendant under the Rules of Criminal Procedure.

With respect to the videotapes requested by the Enquirer, the City further demonstrated its good faith by promptly producing them to the Enquirer as directed by the Attorney General. If anything, this fact demonstrates the City's good faith desire to comply with the Open Records Act and the lawful orders of the Attorney General.

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[1] *Bowling,* 172 S.W.3d at 343-344 (citing *Blair v. Hendricks,* 30 S.W.3d 802, 807 (Ky. App. 2000), *overruled on other grounds by Lang v. Sapp,* 71 S.W.3d 133, 135-36 (Ky. App. 2002)).

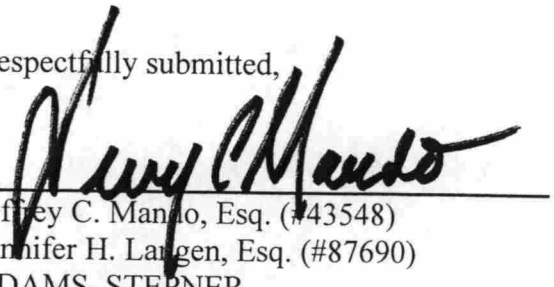
Although the City has refused to produce the McCafferty investigation file to the Enquirer, this alone is not evidence that the City has any improper desire to keep documents out of public view. As the Court in *Skaggs* noted, the Commonwealth has a legitimate state interest in prosecuting crimes which does not terminate until the criminal defendant's sentence has been carried out. *Skaggs, supra.* The City's denial of the Enquirer's request was intended only to protect and serve that interest. The fact that the City refused to compromise this interest, therefore, is not an indicia of "bad faith," but a clear demonstration of its proper and lawful motivations. Accordingly, even if the Court determines that the City's interpretation of KRS 61.878 was incorrect, there is no merit and no evidentiary basis for the Enquirer's claim for attorney fees.

In ruling otherwise, the Court of Appeals erred in an important respect. The Court of Appeals made findings of fact when it found that the City's denial was willful and that "the City offered no evidence or suggestion that the Enquirer's request created an unreasonable burden or was intended to disrupt the essential functions of the police department. ... Furthermore, the City never suggested that the Enquirer's request constituted an unreasonable burden." (Court of Appeals' Opinion, p. 13 – 14) The Court of Appeals, as a reviewing court, may not make findings of fact. *Sajko v. Jefferson County Bd. of Educ.*, 314. S.W.3d 290 (Ky. 2010). Instead of doing so, the Court of Appeals should have remanded the case to the trial court for resolution of those issues.

V. CONCLUSION

In light of the foregoing, and in light of the argument contained in its Brief, Appellant, City of Fort Thomas, respectfully requests that this Court reverse the decision of the Court of Appeals and reinstate the decision of the Campbell Circuit Court.

Respectfully submitted,



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