SUPREME COURT OF KENTUCKY
No. 2008-SC-00468-DG
No. 2009-SC-000543-DG

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DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY; AND WILLIAM M. COX, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE — APPELLANTS/CROSS-APPELLEES

COURT OF APPEALS
NO. 2007-CA-00089
APPEAL FROM FRANKLIN CIRCUIT COURT
ACTION NO. 06-CI-00381

MITZI D. WYRICK — APPELLEE/CROSS-APPELLANT

BRIEF FOR APPELLEE/CROSS-APPELLANT

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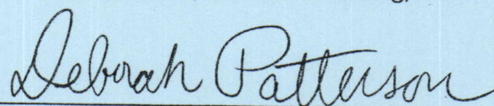
I certify that a copy of the foregoing Brief for Appellee/Cross-Appellant was mailed, first class mail, postage prepaid, this 5th day of March, 2010 to Laura M. Ferguson, Office of Legal Services for Revenue, P.O. Box 423, Frankfort, KY 40601; C. Christopher Trower, 3159 Rilman Road, N.W., Atlanta GA 30327; Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and the Honorable Phillip Shepherd, Franklin County Judicial Building, 669 Chamberlin Ave., Frankfort, KY 40601.



Deborah H. Patterson

INTRODUCTION

This Appeal is an Open Records case. The question is whether the Department of Revenue ("DOR") can foreclose access to the indisputably public records at issue here – which the Kentucky Board of Tax Appeals deemed "irrelevant" (at the DOR's insistence) in an underlying administrative proceeding – by invoking a so-called litigation exception, which is only triggered when the requested records "pertain to" "civil litigation."

On Cross-Appeal, the issue is whether the DOR waived its argument on appeal to the Circuit Court by failing to raise it for the Attorney General's review and whether the Circuit Court's Order banning discovery in all Open Records disputes became reviewable upon the "final and appealable" judgment at issue in the DOR's Appeal.

STATEMENT CONCERNING ORAL ARGUMENT

While the issue on appeal involves a question of law and statutory interpretation for which no oral argument is normally required, the Appellee/Cross-Appellant would welcome the opportunity to participate in oral argument to the extent it would assist the Court.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 1

Early & Daniels,
682 S.W.2d (Ky. 1982) 2

Armco,
748 S.W.2d 372 (Ky. 1988) 2

V.E. Anderson,
87-SC-122-DG (Nov. 5, 1987) (unpublished) 2

GTE v. Revenue Cabinet,
889 S.W.2d 788 (Ky. 1994) 2

The Open Records Request 3

The Appeal to the Attorney General 6

City of Louisville v. Brian Cullinan,
1998-CA-001237-MR (Ky. App. 1999) 9

The Appeal to the Franklin Circuit Court 10

Kentucky Lottery Corporation v. Stewart,
41 S.W.3d 860 (Ky. App. 2001) 12

The Appeal to the Court of Appeals 12

ARGUMENT 15

Hahn v. City of Louisville,
80 S.W.3d 771 (Ky. App. 2001) 15, 16

Hoy v. Ky. Indus. Revitalization Auth.,
907 S.W.2d 766 (Ky. 1995) 16

Layne v. Newberg,
841 S.W.2d 181 (Ky. 1992) 16

Beckham v. Bd. of Educ. Of Jefferson County,
873 S.W.2d 575 (Ky. 1994) 16

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE LITIGATION EXCEPTION DID NOT FORECLOSE MS. WYRICK'S REQUESTS FOR INSPECTION 17

Kentucky Lottery Corporation v. Stewart,
41 S.W.3d 860 (Ky. App. 2001) 18, 22, 23, 24, 25, 26

A. KRS 61.878(1) is Limited to Civil Litigation; It Does Not Apply to Administrative Proceedings 18

Herndon v. Herndon,
139 S.W.3d 822 (Ky. 2004) 18

Aetna Cas. & Sur. Co. v. Commonwealth,
179 S.W.3d 830 (Ky. 2005) 19

Commonwealth v. Plowman,
86 S.W.3d 47 (Ky. 2002) 19

Starr v. Comm'r of Internal Revenue,
226 F.2d 721 (7th Cir. 1995) 19

Bd. of Adjustments of the City of Richmond v. Flood,
581 S.W.2d 1 (Ky. 1978) 19, 20

1. Administrative Law Contemplates Use – Not Prohibition – of Open Records in Administrative Proceedings 20

B. KRS 61.878(1) Does Not Suspend the DOR's Duty to Comply With Open Records Requests in the Presence of Litigation 22

Medley v. Bd. of Educ., Shelby County,
168 S.W.3d 398 (Ky. App. 2004) 23

Zink v. Commonwealth,
902 S.W.2d 825 (Ky. App. 1994) 26

Hahn v. Univ. of Louisville,
80 S.W.3d 771 (Ky. App. 2001) 27, 28, 31

C. Records Irrelevant to Pending Litigation Fall Outside a Strict Construction of KRS 61.878(1) 30

Commonwealth v. Plowman,
86 S.W.3d 47 (Ky. 2002) 31

Hoy v. Ky. Indus. Revitalization Auth.,
907 S.W.2d 766 (Ky. 1995) 31

Layne v. Newberg,
841 S.W.2d 181 (Ky. 1992) 31

Beckham v. Bd. of Educ. of Jefferson County,
873 S.W.2d 575 (Ky. 1994) 31

D. The DOR's Own Admissions Establish That the Requested Documents Do Not "Pertain to" the Litigation and Thus Are Not Exempt From Disclosure Under KRS 61.878(1) 35

II. THE COURT OF APPEALS CORRECTLY REFUSED TO "IMPLY" A TIME LIMITED FOR APPEALS TO THE ATTORNEY GENERAL 37

III. THE DOR'S KRS 61.878(1) ARGUMENT WAS NOT PRESERVED 39

Urella v. Ky. Bd. of Med. Licensure,
939 S.W.2d 869 (Ky. 1997) 40

Whittaker v. Hurst,
39 S.W.3d 819 (Ky. 2001) 40

IV. THE ORDER IMPROPERLY BANNING DISCOVERY WAS APPEALABLE AND SHOULD BE REVERSED TO ALLOW DISCOVERY UPON REMAND TO THE FRANKLIN CIRCUIT COURT 41

The Discovery Ban Was Wrong 44

Board of Medical Licensure v. Courier-Journal,
663 S.W.2d 953 (Ky. App. 1983) 44

Bowling v. Lexington-Fayette Urban County Government,
172 S.W.3d 333 (Ky. 2005) 44

CONCLUSION 45

APPENDIX

INTRODUCTION

In this Open Records action, the Franklin Circuit Court upheld Appellant Department of Revenue's invocation of KRS 61.878(1) which addresses access to "materials pertaining to civil litigation" to deny Appellee's Open Records request, despite the fact that the Kentucky Board of Tax Appeals, at the DOR's insistence, had ruled the same public records "irrelevant" to the ongoing administrative proceeding between the DOR and Appellee's client. Recognizing that records deemed "irrelevant" in the underlying proceeding could not possibly "pertain to" that underlying proceeding, the Court of Appeals correctly reversed the Franklin Circuit Court Order.

The DOR now asks this Court to reverse the Court of Appeals decision and instead resurrect the original Franklin Circuit Court Order denying Appellee's right to inspect those documents under the Open Records Act and also to write a time limitation into the Open Records Act, mandating that requesters must appeal a denial to the Attorney General within 30 days – though there is no statutory language supporting such a deadline. Appellee has filed a cross-appeal, asking this Court to hold that the DOR did not preserve its argument under KRS 61.878(1) and to reverse the Franklin Circuit Court's July 17, 2006 Opinion and Order denying discovery, which became final and appealable when the Circuit Court dismissed the action in its December 11, 2006 Judgment.

COUNTERSTATEMENT OF THE CASE

As stated, this is an Open Records action. The Appellee/Cross-Appellant is Mitzi Wyrick, who on September 1, 2005 exercised the statutory right of "any person" in this Commonwealth, by requesting to inspect and copy public records maintained by the

Appellant/Cross-Appellee Kentucky Department of Revenue ("the DOR"). The records related generally to the DOR's exceedingly-public duties in interpreting and enforcing the unitary method of reporting corporate income tax.[1]

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[1] The request specified nine classes of documents:

1. Any and all training manuals or guides from 1975 to 1994 used to instruct personnel to process, audit, review, or otherwise handle unitary/combined audits and/or tax returns of taxpayers.

2. Any and all policies or procedures regarding the filing, auditing or review of tax returns under the unitary method of reporting.

3. Any correspondence, questionnaires and similar material sent to taxpayers seeking information about unitary attributes and other matters pertaining to the determination of a unitary group.

4. A copy of Revenue Cabinet policy 41P225, any preceding policies related to the filing of unitary/combined returns, and any subsequent policies regarding the filing of unitary/combined returns.

5. All memos and drafts of memos regarding the filing, auditing, review of tax returns under the unitary method and how the unitary method should be applied in Kentucky.

6. All files regarding unitary filings in Kentucky and how unitary filings should be treated, reviewed, audited, or processed.

7. All legal memos regarding the application, interpretation, or analysis of unitary filings under *Early & Daniels*, 682 S.W.2d (Ky. 1982); *Armco*, 748 S.W.2d 372 (Ky. 1988); *V.E. Anderson*, 87-SC-122-DG (Nov. 5, 1987) (unpublished); or *GTE v. Revenue Cabinet*, 889 S.W.2d 788 (Ky. 1994).

8. Any contracts, memorandums of agreement or understanding, or similar documents in which the Commonwealth of Kentucky or the Revenue Cabinet on its behalf participated in the Joint Audit Program of the Multistate Tax Commission.

9. The audit files related to all audits conducted by the Multistate Tax Commission's Joint Audit Program on behalf of the Revenue Cabinet.

[September 1, 2005 Open Records Request, RA 147-148, App. 6, hereto].

Ms. Wyrick is also an attorney. At the time of her Open Records request, she was representing Gannett Satellite Information Network, Inc. ("Gannett"), in an administrative proceeding before the Kentucky Board of Tax Appeals ("the KBTA") over a tax refund claim that had been denied by the DOR. Prior to making the Open Records request, Ms. Wyrick sought to obtain the records regarding the unitary filing method from the DOR in the administrative proceeding [*See* RA 550-577, App. 5, hereto]. The DOR objected to producing the records or answering any interrogatories relating to information in the records in the administrative proceeding, repeatedly calling the information "irrelevant" and "not relevant to the subject matter involved in the pending action" [*Id.*]. The KBTA subsequently sustained the DOR's objections.

The Open Records Request. After both the DOR and the KBTA deemed the unitary method records had absolutely nothing to do with the administrative proceeding, Ms. Wyrick sought access to these public records from the DOR directly, by and through the Kentucky Open Records Act ("the Act").[2] On September 8, 2005, Laura Ferguson, one of the DOR's attorneys who also represents the DOR in the administrative proceeding, responded to Ms. Wyrick's request stating that because of the "breadth" of the request, the DOR would not be able to "accommodate" Ms. Wyrick within the three days that the law required but would need until October 14, 2005, since "several employees in various offices" would have to be consulted [RA 150-151, App. 7, hereto].

In an effort to address the DOR's purported overbreadth concerns and facilitate timely access, Ms. Wyrick sent the DOR a follow-up request that directed Ms. Ferguson

[2] KRS 61.870, *et seq.*

to a more narrowly defined set of documents that would be responsive to the September 1 request and should be easy to locate [RA 153-154, App. 8, hereto]. The request was extremely limited in nature, asking for:

> 1. *All documents produced by the Revenue Cabinet in the Johnson Controls litigation in the Franklin Circuit Court, Civil Action No. 00-CI-00661.*

Ms. Wyrick stated, "[w]e understand, and would certainly expect, that the [DOR] maintains copies of documents produced in litigation in a centralized place" [*Id.*]. Therefore, this request "cannot possibly present any of the perceived time concerns raised by the DOR previously" [*Id.*].

Three days later, Ms. Ferguson denied the request for the *Johnson Controls* documents, claiming that the DOR itself did not have copies of the documents in its pleadings file, although not denying that its attorney might have them [RA 156-158, App. 9, hereto]. She stated that "[s]uch documents might be retained in working files used by the attorneys responsible for the case" but "the maintenance of any such working files is within the professional discretion of the responsible attorneys"[3] [RA 156]. Ms. Wyrick responded on October 11, 2005, asking that the DOR make a more thorough search for the records – beyond just the pleading files at the DOR – and to clarify whether the requested documents are in the possession of its attorney, and therefore within the custody and control of the DOR [RA 168-169, App. 10, hereto]. Ms.

[3] Ms. Ferguson also asserted that the records, though presumably not reviewed because they "do not exist," would "necessarily" constitute preliminary notes and drafts and would be excluded from disclosure anyway under KRS 61.878(1)(i) and (j) [RA 156-158].

Wyrick also identified Bates-stamped numbers for files described as "unitary memos," "unitary regulations," and "unitary legislation," which were known to have been produced by the DOR in *Johnson Controls* [RA 168]. Ms. Wyrick reiterated that the documents identified in the September 1 Open Records request would **necessarily include** those identified for the DOR on September 27 [RA 169].

When, by October 21, 2005, Ms. Wyrick still had not received a response to her request for clarification regarding the status of *Johnson Controls* documents, she sent another letter to Ms. Ferguson, which said:

> The question then remains: Is it the [DOR's] position that these documents do not exist or that they are in the possession of your counsel? If they are maintained by your counsel, please advise when and where we can inspect them.

[RA 171, App. 11, hereto.] Ms. Ferguson responded on October 25, 2005, calling the inquiry a "post-denial communication" and stating that the request for the *Johnson Controls* records was denied because 1) the records do not exist and 2) the records are exempt from inspection under KRS 61.878(1) (i) and (j) [RA 173-177, App. 12, hereto]. She refused to confirm or deny Ms. Wyrick's stated information and belief that the litigation documents were indeed being maintained by the DOR's counsel, Christopher Trower [RA 173-174]. Ms. Ferguson also refused to say whether or not the DOR's search of its records included files of its counsel or whether an inquiry of outside counsel was even made, despite her previous statement that "[s]uch documents might be retained in the working files used by the attorneys responsible for the case" [*Id.*].

While continuing to evade inspection of the very narrow set of *Johnson Controls* documents, Ms. Ferguson also issued a significantly belated formal response to Ms.

Wyrick's original September 1, 2005 request for variously specified unitary tax records, many of which would have been a part of the *Johnson Controls* production [RA 178-186, App. 13, hereto]. Remarkably, after invoking a six-week delay under KRS 61.872(5), reserved only for inspection of records "in active use, in storage, or not otherwise available," the DOR denied each request, with the exception of a one page document, saying that each request was **on its face** "not a properly framed request and need not be honored" and that each request places an undue burden on the agency [*Id.*]. As to all the requests in aggregate, the DOR raised KRS 61.878(1) as a global ground for denial, based on the August 31, 2005 Order of the KBTA, which deemed certain similar documents irrelevant to the ongoing administrative proceeding [RA 178-179]. The grounds for the DOR's denial could and should have been raised within the statute's three day response time.

The Appeal to the Attorney General. Ms. Wyrick appealed the denial to the Attorney General on November 21, 2005 [*See* RA 70]. Ms. Ferguson filed a response to the appeal which argued numerous defenses to the DOR's various denials, with one exception – the DOR completely abandoned any reliance on KRS 61.878(1), never mentioning the provision or the ongoing administrative proceeding as a basis for upholding its denial of Ms. Wyrick's Open Records request[4] [*See* RA 81].

[4] The DOR also argued Ms. Wyrick's appeal was untimely, while acknowledging that the Act "does not specify a time frame within which a denial of an Open Records Act request must be appealed to the Attorney General." The Attorney General quickly dispensed of this argument in a footnote, declining to impose a restriction that is nowhere contained in the statute [February 13, 2006 Attorney General's Open Records Opinion hereinafter referred to as "AG Opinion," p.5 n.5 (RA 17); a copy of the entire Opinion is attached at App. 14].

On February 13, 2006, the Attorney General issued a comprehensive 16-page Open Records Decision finding that "the DOR's actions were partially violative of the Act"[5] [RA 13-34, App. 14, hereto]. The violations relate to the DOR's denial of the five following requested records:

> [1.] *Any and all training manuals or guides from 1975 to 1994 used to instruct personnel to process, audit, review, or otherwise handle unitary/combined audits and/or tax returns of taxpayers.*

The Attorney General found "unpersuasive" the DOR's argument that responding to this request would require it "to comb through often incalculable numbers of widely dispersed and ill-defined records" [RA 28-29]. To the contrary, as the AG Opinion points out, Ms. Wyrick's request was for training manuals for a finite period relating to a single topic [RA 28]. The Attorney General found significant the fact that Series M0003 of the General Schedule for State Agencies requires the DOR to maintain at least one copy of outdated manuals: "Although we do not speculate regarding the records management procedures adopted by [the DOR], it stands to reason that a mechanism exists by which the [DOR's] records custodian can locate and retrieve records of an identified, limited class such as the records Ms. Wyrick seeks in request 1." [*Id.* (quoting from 04-ORD-028)]. The Attorney General also cited to two separate opinions in which its Office has advised the DOR in the past that training manuals and guides are subject to inspection under the Act [*Id.*].

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[5] *See* 06-ORD-032. The Attorney General upheld the DOR's denial of requests 3, 5, 6 and 9 based on the undue burden provisions of KRS 61.872(6), opining that the agency forecast its actual burden to locate and retrieve those records with sufficient specificity. The AG Opinion also opined that the DOR properly denied request 7 for legal memoranda based KRS 61.878(1)(l) and KRE 503.

> [2.] *Any and all policies or procedures regarding the filing, auditing or review of tax returns under the unitary method of reporting.*

* * * *

> [3.] *A copy of Revenue Cabinet policy 41P225, and any preceding policies related to the filing of unitary/combined returns, and any subsequent policies regarding the filing of unitary/combined returns.*

As to these two requests, the Attorney General rejected the DOR's cursory retort that, with the exception of Revenue Policy 41P225, it "does not own, use, possess, retain, or maintain any documents constituting 'policies and procedures' concerning the administration of the tax laws with respect to unitary returns" [RA 17-19]. The Attorney General found nothing in the record to substantiate the DOR's position that Policy 41P225 is the only policy ever implemented relating to unitary returns [RA 19]. Indeed, the DOR failed to provide "even a minimal description of the search it conducted for the responsive policies" it claims do not exist [*Id.*]. Like the training manuals from request 1, the Attorney General recognized that such policies, if they exist, must be retained by the DOR under the General Schedule for State Agencies [*Id.*]. There being no attempt to document a reasonable search or an associate unreasonable burden, the Attorney General opined that the DOR's denial of these requests violated the Open Records Law [RA 19-20].

> [4.] *Any contracts, memorandums of agreement or understanding, or similar documents in which the Commonwealth of Kentucky or the Revenue Cabinet on its behalf participated in the Joint Audit Program of the Multistate Tax Commission.*

The Attorney General found it "highly unlikely" that these requested contracts relating to the DOR's participation in the Joint Audit Program would contain protected confidential information pertaining to the tax affairs of a person's business, as the DOR suggested in denying the request [RA 23-25]. In any event, the DOR violated the Act by failing to offer any particulars to substantiate such a ground for denying access to documents, just as it failed to identify the specific burden to produce the contracts, which, according to the Attorney General, would not be more than 20 documents (one for each year of participation in the Joint Audit Program of the Multistate Tax Commission) – all of which, again, should have been retained under the General Schedule for State Agencies [RA 25].

> [5.] *All documents produced by the Revenue [DOR] in the Johnson Controls litigation in the Franklin Circuit Court, Civil Action No. 00-CI-00661.*

The DOR violated the Act, according to the Attorney General, when it denied Ms. Wyrick's request for the *Johnson Controls* records by asserting they "do not exist" and at the same time acknowledged that the records might be retained in the working files of its attorneys, including Christopher Trower [RA 30]. "[W]e find that it is incumbent on the [DOR] to retrieve the pertinent portions of Mr. Trower's working files (or the working files of other attorneys responsible for the case), to ascertain whether, in fact, responsive records were retained" [*Id.* (citing *City of Louisville v. Brian Cullinan*, 1998-CA-001237-MR (Ky. App. 1999) (rejecting City's contention that billing records maintained by its outside counsel were not public records subject to disclosure))]. "If such records were retained, it is then incumbent on the DOR to determine if all such records qualify for exclusion under KRS 61.878(1)(i) and/or (j) . . . ." [*Id.*].

As to Ms. Wyrick's complaint regarding the six-week delay between her original request and the DOR's ultimate response denying access, the Attorney General stopped short of finding any procedural violations of the law [RA 32]. The AG Opinion did, "however, encourage the DOR to treat the 'earliest date' for inspection as a date certain, and not an estimated date, for disclosure of nonexempt records, and to utilize the intervening period of time to locate and review responsive records, in the interest of insuring timely access to its records" [RA 33].

The Appeal to the Franklin Circuit Court. The DOR appealed the AG Opinion to the Franklin Circuit Court [RA 1-63]. The appeal sought reversal based in large part on KRS 61.878(1), a defense that the DOR declined to present to the Attorney General and that the Attorney General, accordingly, expressly declined to consider.

On May 10, 2006, Ms. Wyrick served a CR 30.02(6) notice of deposition on the DOR seeking discovery of matters relating to the DOR's investigation and ultimate denial of Ms. Wyrick's Open Records request. After scheduling delays by the DOR's counsel, Christopher Trower, and an eventual court-ordered deposition date [RA 213], the DOR produced Richard Craig as its designee. During Mr. Craig's deposition, it became apparent early that he knew little if anything about what efforts the DOR took to locate the requested records.[6] He testified that DOR counsel "Laura Ferguson . . . was the primary – or as far as I know, the only person who gathered – attempted to gather the documents in question." [Deposition of Richard Craig, p. 94]. Accordingly, Ms. Wyrick

[6] Interestingly, Mr. Craig did know that he has a copy of the requested manual sitting on his desk and that no one from the DOR asked him about it in connection with Ms. Wyrick's request for manuals and guides, which was denied as being overly burdensome [Deposition of Richard Craig, p. 157].

noticed the deposition of Laura Ferguson, as the only person who had firsthand knowledge of the extent of the DOR's search for records, in particular whether its counsel's files were reviewed, and the factual basis for the DOR's written denial that Ms. Ferguson herself drafted and signed [RA 220-221].

A battle of protective orders followed. The DOR noticed Ms. Wyrick's deposition and commanded her to respond to two written discovery requests [RA 202-204]. It then sought a protective order prohibiting the deposition of Ms. Ferguson because she is one of the DOR's attorneys [RA 225-230]. Ms. Wyrick filed for protection, arguing that the DOR had absolutely no right to take any discovery from her, the mere requesting person, as she had no factual information or evidence concerning the only question before the Franklin Circuit Court – whether the DOR was improperly withholding public records from public inspection, as the Attorney General found, and which, under the Act, the DOR bears the burden to prove. KRS 61.882(3) [RA 367-375]. Ms. Wyrick called the DOR's discovery blitz retaliatory and harassment.

The Circuit Court held a hearing on the parties' discovery motions on July 6, 2006. During the hearing, the judge expressed his personal disfavor over the use of the Act during litigation and queried why KRS 61.878(1) did not foreclose this entire action. On July 17, 2006, the judge entered an order that denied discovery to both parties, ruling that "[i]n de novo appeals an appealing party may not introduce new evidence that was not presented below" [RA 470-477, App. 3, hereto]. The court held that "this appeal is to be determined *de novo* upon the record compiled before the Attorney General" [*Id.*]. The Circuit Court further ordered the parties "to brief the issue as to

whether **this action** is properly before this Court at the present time pursuant to KRS 61.878(1)" [*Id.* (emphasis added)].

On December 11, 2006, in an Opinion and Order that impermissibly recites verbatim from the DOR's brief on both the facts and law, the Franklin Circuit Court answered the question posed in its July 17, 2006 order and previous hearing, holding that KRS 61.878(1) is dispositive [RA 685-692, App. 2, hereto]. Completely ignoring the Court of Appeals' mandate that "an open records request should be evaluated independently of whether or not the requester is a party or potential party to litigation,"[7] the Circuit Court adopted wholesale the DOR's contrary rendition of the scope of KRS 61.878(1), including the DOR's statement that "[i]f a 'party' who has asserted a claim against the Commonwealth could end run the limitations on the scope and timing of discovery under the Civil Rules, by merely filing an Open Records Law request for the same documents, any well-advised 'party' will take advantage of the opportunity. The first salvo in every case against the Commonwealth (whether in Circuit Court or before an administrative tribunal) will be an Open Records 'request'"[8] [*Id.*].

The Appeal to the Court of Appeals. Ms. Wyrick appealed both the December 11, 2006 "final and appealable" judgment disposing of this action under KRS 61.878(1) and the July 17, 2006 order that precludes discovery. The Court of Appeals reversed the

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[7] *Kentucky Lottery Corporation v. Stewart*, 41 S.W.3d 860, 864 (Ky. App. 2001).

[8] *See also* the DOR's Circuit Court pleading entitled Response to Appellee's Brief Regarding the "Inapplicability" of KRS 61.878(1) to this Action, at p. 12 [RA 589, App. 4, hereto].

Circuit Court's December 11, 2006 judgment in part and remanded in part. [Opinion Reversing and Remanding, App. 1 hereto.] Specifically, the Court of Appeals held that the Circuit Court "incorrectly decided that the party litigation limitation applied in this case" because (1) the exemption only applies to civil litigation – not a KBTA action – and (2) the material Ms. Wyrick requested was deemed irrelevant in the KBTA action and therefore it did not "pertain to" litigation so could not trigger KRS 61.878(1) [*Id.* p. 18].

The Court of Appeals also remanded the case, instructing the Circuit Court to determine whether any of the Act's fourteen listed exclusions applied to the material Ms. Wyrick requested. KRS 61.878(1)(a)-(n) contains fourteen categories of documents which are exempted from the general provisions of the Act. These documents can still be inspected, however, if the requester obtains a court order allowing it.

The Court of Appeals determined that the first step in reviewing an Open Records Act decision is determining whether any of the fourteen exclusions apply. According to the Court of Appeals, all documents **not** falling within one of those exclusions **must** be made available to any person requesting to inspect them. And, even if an exclusion applies, the requester **may** inspect such information upon order of a court – unless the party litigation exception applies. Thus, the analysis only proceeds to the second step – determining whether the party litigation exception bars access – if an exclusion applies. Here, however, the Court of Appeals found that the Circuit Court erroneously jumped to the second step, holding that Ms. Wyrick's request was barred under the party litigation exception without first determining whether one of the fourteen exclusions applied to the material requested.

Consequently, the Court of Appeals remanded, directing the Circuit Court to determine if one of the fourteen exclusion applies to the material requested by Ms. Wyrick. If no exclusion applies, the material is subject to inspection. And, if an exclusion does apply, then the Circuit Court may "grant access to the excluded record as in any other Open Records action" because the information sought here does **not** "pertain" to civil litigation [*Id.*].

The Court of Appeals also rejected the DOR's argument that Ms. Wyrick's appeal to the Attorney General was untimely because the Act does not contain a timeframe for challenging an agency's denial to the Attorney General [*Id.* at 9-10]. Additionally, the Court of Appeals held that Ms. Wyrick's appeal of the July 17, 2006 discovery order was not effective because that order was interlocutory and, thus, not reviewable [*Id.* at 12.]. Finally, the Court of Appeals rejected Ms. Wyrick's argument that the DOR had not properly preserved its argument under KRS 61.878(1).

Both the DOR and Ms. Wyrick, on a protective cross-appeal, have now appealed the Court of Appeals' May 30, 2008 Opinion [App. 1, hereto]. The DOR asks this Court to reverse the Court of Appeals' determination that the party litigation exception does not apply to the documents Ms. Wyrick requested to inspect and also to reverse the Court of Appeals' determination that Ms. Wyrick's appeal to the Attorney General was timely. Ms. Wyrick, on the other hand, asks this Court to reverse the Court of Appeals' determination that the July 17, 2006 order was not final and appealable and to instead reverse that order so that the parties can take discovery upon remand. She also asks this Court to reverse the Court of Appeals' determination that the DOR preserved its argument regarding the Act's litigation exception in this case.

ARGUMENT

With its enactment of the Open Records Act, the Kentucky General Assembly recognized that "free and open examination of public records is in the public interest" and further mandated that "all public records shall be open for inspection by **any person.**" KRS 61.871; KRS 61.872 (emphasis added). While certain documents are exempt from Open Records requests, the Act explicitly states that the enumerated exceptions must be strictly construed, regardless of any inconvenience or embarrassment that may result from disclosure. KRS 61.871. And, even those documents falling under an exception may be inspected upon order of a court of competent jurisdiction unless the party litigation exception applies.

The General Assembly has further recognized that free and open access to public records provides accountability of government activities, and consequently determined that any agency resisting an open records request must prove that the desired documents fit within a statutorily recognized exception. KRS 61.875; KRS 61.882(3). Thus, by explicitly allocating the burden of proof to the agency resisting disclosure, and by clearly mandating that all exemptions must be strictly construed, the General Assembly illustrated that the spirit of the Act "undoubtedly militates in favor of disclosure." *Hahn v. City of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001).[9]

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[9] The DOR's rather flippant conclusion at page 2 of its Brief to this Court that "the Open Records Law is not an 'Open Sesame!' command to the files of public agencies" ignores the law's expressed policy of openness. Its statement at page 3 that "[t]he upshot is that many, if not most, public records are in fact not open for public inspection" is just wrong and misses the whole point of the Act, including that exceptions to "open" records are just that – exceptions, definitively **not** the rule.

Despite its plain language and unmistakable bias in favor of free and open access to public records, the DOR essentially asks this Court to turn its head from the Act's unambiguous meaning and interpret the applicable provisions in such a way that would infringe substantially upon the public's right to know. But, Kentucky courts have explicitly stated that "[i]n analyzing the Open Records Act as amended in 1994, we are guided by the principle that 'under general rules of statutory construction, we may not interpret a statute at variance with its stated language.'" *Hoy v. Ky. Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995) (quoting *Layne v. Newberg*, 841 S.W.2d 181, 183 (Ky. 1992)). The courts have also acknowledged that they are "not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Hahn*, 80 S.W.3d at 774 (citing *Beckham v. Bd. of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994)).

The DOR comes to this Court with proffered interpretations of Kentucky's Open Records Act that entail stretching the law's provisions well beyond their unambiguous meaning. First, the DOR presents as a general theme that there is something inherently wrong with litigants or attorneys utilizing public records obtained pursuant to the Open Records Act in litigation, portending that, if allowed, "the first salvo" in cases against the Commonwealth will be an open records request. [Appellant's Brief, p. 25]. Case law and Attorney General Opinions confirm that the Act is not suspended during litigation. Further, by its very own words, the Act not only contemplates but in fact protects the use of "public" records in litigation. Whereas KRS 61.874 requires those who obtain public records for a commercial purpose to pay additional costs for the records, KRS

61.870(4)(b)(3) specifically excludes from that definition, and hence from additional cost,

> Use of public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties.

Had the General Assembly shared the DOR's distaste for open records requests in litigation, or the Act's use by attorneys, it certainly would not have ensured the cost efficiency of such requests. The DOR's suggestion of legislative intent is soundly defeated by the General Assembly's own words.

Next, the DOR asks this Court to hold that the litigation exception applies not only to the "civil litigation" specified in the statutory language but to administrative proceedings as well; and that its explicit application to "materials pertaining to" civil litigation also includes materials deemed wholly irrelevant to civil litigation. Finally, the DOR asks this Court to write a time limitation into the Open Records Act, requiring a requester to appeal an agency's denial to the Attorney General within 30 days of that denial – despite the fact that such a deadline is found nowhere in the statutory language. Respectfully, this Court should, as the Court of Appeals did, reject the DOR's invitation to rewrite the Open Records Act.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE LITIGATION EXCEPTION DID NOT FORECLOSE MS. WYRICK'S REQUESTS FOR INSPECTION.

The so-called "litigation exception" or "party litigation limitation" to the Open Records Act is found in the preface to the Act's enumerated exemptions and states:

> The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the

> inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.

KRS 61.878(1). The DOR, in essence, urges this Court to hold that this provision precludes inspection of records by any party to any action – whether before an agency or in a court of justice – adverse to the state government. [Appellants' Brief, pp. 25-26.] The DOR's argument completely ignores the relevant statutory language (which limits the litigation exception to "civil litigation") and the Court of Appeals' pronouncements in *Kentucky Lottery Corporation v. Stewart*, 41 S.W.3d 860, 863, 864 (Ky. App. 2001), holding that KRS 61.878(1) "does not exempt or exclude all records from the open records disclosure, in favor of discovery in litigation or anticipated litigation" and that "an open records request should be evaluated independently of whether or not the requester is a party or potential party to litigation."

A. KRS 61.878(1) is Limited to Civil Litigation; It Does Not Apply to Administrative Proceedings.

Although the DOR relies on KRS 61.878(1) as precluding disclosure of the requested records, the Court of Appeals correctly held that, by its plain language, the litigation exception applies only to **civil litigation**. The Court of Appeals concluded that the exception was completely inapplicable to this Open Records dispute because the underlying KBTA action where Gannett, through its attorney Ms. Wyrick, sought discovery of the records at issue is an administrative proceeding, not civil litigation. Case law fully supports what appeared obvious to the Court of Appeals, namely that actions before administrative agencies are quite distinct from actions in the Court of Justice. *Herndon v. Herndon*, 139 S.W.3d 822, 825 (Ky. 2004) (discussing various distinctions between "KRS 13B cases and those governed by the civil rules" and noting,

as a "fundamental" difference between administrative actions and actions in the Court of Justice, "the source of the tribunal's authority"); *see also Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 855 (Ky. 2005) (citing *Commonwealth v. Plowman*, 86 S.W.3d 47, 50-54 (Ky. 2002)) (explaining that a "suit" is any adversarial proceeding brought in a court of justice and that that term does not encompass administrative proceedings: "to characterize an administrative agency proceeding as a 'suit' is akin to saying a bulldozer is a 'building'"). Indeed, there is a "fundamental" difference in terms of both the function and the source of authority of administrative agencies and courts of law.

These differences are also very apparent in the procedures used by each of these bodies. Actions in the Court of Justice are governed by the Kentucky Rules of Civil Procedure which provide detailed instruction on the scope and methods of discovery. *See* CR 26-37. There is, however, no constitutional right to pretrial discovery in administrative proceedings. *Starr v. Comm'r of Internal Revenue*, 226 F.2d 721 (7th Cir. 1955), *cer.t denied*, 350 U.S. 993 (1956). Statutes determine what discovery is available. 2 AM.JUR.2d *Administrative Law* § 327 (2006). Thus, some administrative proceedings may involve no discovery at all. Others may have very elaborate schemes for discovery. The Rules of Civil Procedure do not apply to discovery in administrative proceedings unless specifically provided by statute. *Id.*

Case law further supports the position that the Kentucky Rules of Civil Procedure do not apply to administrative actions. In *Board of Adjustments of the City of Richmond v. Flood*, for instance, the Board of Adjustments, an administrative agency, granted a height variance at the request of Exxon and Cracker Barrel. 581 S.W.2d 1, 2 (Ky. 1978).

The Floods and the Burnams appealed to the Madison Circuit Court, naming as appellees, the Board, Exxon, and Cracker Barrel. *Id.* Exxon and Cracker Barrel filed a motion to dismiss the appeal to the circuit court on the basis that appellants failed to include the Richmond, Kentucky Planning and Zoning Commission as a party.[10] *Id.* The Madison Circuit Court dismissed the appeal, holding that the failure to make the Commission a party within thirty days was a fatal jurisdictional fault. *Id.* The Court of Appeals reversed. *Id.* This Court, however, agreed with the Circuit Court, holding that the issue was not one of indispensability of parties under CR 19.01. *Id.* The right to appeal from the action of the administrative agency was granted under a statute, and strict compliance was required. *Id.* This Court plainly stated that "[t]he civil rules do not apply in this type of litigation until after the appeal has been perfected." *Id.* (citing CR1; KRS 100.347(2)).

Likewise, cases before the KBTA are governed by KRS Chapter 13B and the regulations set forth in 802 KAR 1:010. A party who is upset by a final order of the KBTA may appeal to the Circuit Court within 30 days. KRS 131.370.

1. Administrative Law Contemplates Use – Not Prohibition – of Open Records in Administrative Proceedings.

It cannot be stated enough that Kentucky's Open Records Act is designed to give the public free and open examination of public records. Under interpretation, however, the Act offers absolutely no benefit to those engaged in disputes with administrative agencies. The DOR asserts that the records at issue are exempt because they are

[10] The appellants later joined the Commission as a party, but this was sixty-eight days

beyond that which is provided by the Rules of Civil Procedure. But, because the Rules of Civil Procedure are inapplicable to administrative agency proceedings, public records would always be beyond reach under the DOR's purported interpretation. Such a result is obviously out of line with what the General Assembly intended when enacting the Act. *See* KRS 61.8715.

Moreover, administrative agencies are given the authority to promulgate their own rules for conducting administrative hearings. As mentioned earlier, there is no constitutional right to discovery in an administrative hearing. Without the benefit of the Open Records Act, therefore, a party who has a dispute with an administrative agency, such as the DOR, would be at a severe disadvantage with respect to the availability to obtain documents and records. Once again, such a paradigm is completely contrary to the purpose behind the Act.

Finally, the General Assembly has further illustrated this policy by clarifying the relationship of the O Act to administrative hearings. KRS Chapter 13B, which deals with administrative hearings, states that

> **[c]onditions for examining and copying agency records, fees to be charged, and other matters pertaining to access to** [documentary evidence] **shall be governed by KRS 61.870 to 61.884**. To the extent required by due process, the hearing officer may order the inspection of any records excluded from the application of KRS 61.870 to KRS 61.884 under KRS 61.878 that relate to an act, transaction, or event that is a subject of the hearing, and may order their inclusion in the record under seal.

KRS 13B.090(3) (emphasis added). Clearly, the Act contemplates that parties in an administrative proceeding use the Act to obtain documentary evidence from agencies.

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after the final action of the Board. *Id.*

A hearing officer can expand the records accessible under the Act, but it cannot restrict a party's access to records otherwise available through the Act.

In sum, with all its references to "civil litigation" and the "Rules of Civil Procedure," KRS 61.878(1) does not – and cannot – apply to administrative proceedings, like the one before the KBTA here. Certainly the DOR has not proved otherwise.

This Court's inquiry into this Open Records appeal can essentially end here on this dispositive point. Affirming the Court of Appeals on this threshold issue sends the message that the Act means what it says, namely, that the "**civil** litigation exception" does not even come into play unless there is civil litigation, not administrative proceedings.

B. KRS 61.878(1) Does Not Suspend the DOR's Duty to Comply With Open Records Requests in the Presence of Litigation.

Truly, the only way to avoid the Court of Appeals' previous pronouncements regarding KRS 61.878(1) in *Kentucky Lottery Corporation v. Stewart* is to simply ignore them, which is exactly what the DOR, and thereafter the Circuit Court, did. But the Court of Appeals got it right when it reversed the Circuit Court's decision, holding true to its earlier decision in *Kentucky Lottery Corporation v. Stewart,* where it held that KRS 61.878(1) "does not exempt or exclude all records from the open records disclosure, in favor of discovery in litigation or anticipated litigation" and that "an open records request should be evaluated independently of whether or not the requester is a party or potential party to litigation."[11]

[11] *Ky. Lottery*, 41 S.W.3d at 863, 864.

Moreover, KRS 61.878(1) on its face can only – at most – be interpreted to shield from Open Records requests those "materials **pertaining to civil** litigation." As the Court of Appeals rightly determined, the DOR cannot avoid its own repeated assertions that the records requested by Ms. Wyrick are irrelevant to the application of the law and specific facts of the underlying administrative tax dispute: "The DOR is not 'permitted to feed one can of worms' to the Board of Tax Appeals and another to the circuit court in the Open records action." [Opinion Reversing and Remanding, App. 1, p. 18.]

Thus, the records do not "pertain to" the ongoing proceeding and consequently are not exempt from disclosure under KRS 61.878(1). *See id.* at 19 (quoting the Attorney General Opinion in 95-ORD-18 ("If, in fact, they have no bearing on the action, the records do not fall within the language of the amendment since they do not 'pertain[] to [the] civil litigation' to which the requester is a party."). Any other interpretation of the litigation exception would, again, produce absurd results and frustrate the driving purpose behind the Act – free and open access to public records to ensure government accountability. "The Open Records Act requires public agencies to make **all** public records open for inspection and copying by any person, except when specifically exempted."[12] The policy underlying the Act is "that 'free and open examination of public records is in the public interest . . ..'"[13]

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[12] *Ky. Lottery Corp.,* 41 S.W. 3d at 862 (emphasis added).

[13] *Medley v. Bd. of Educ., Shelby County,* 168 S.W.3d 398, 402 (Ky. App. 2004) (quoting KRS 61.871).

The DOR is simply wrong to assert, and the Franklin Circuit Court was misled to simply adopt, that the presence of litigation automatically eliminates a party's rights of access under the Act. In fact, the Attorney General has consistently held, and the Court of Appeals has affirmed, that "the presence of litigation between the requester and the public agency does not suspend the agency's duties [to disclose public records] under the Act."[14] Both the Attorney General and the Court of Appeals have recognized that, despite the presence of ongoing litigation in the background of an Open Records request, the requester stands in the same relationship with the public agency as any other person.[15] Further, the Attorney General has noted that attorneys representing a party engaged in litigation with an agency enjoy the same rights to obtain public records as do nonparties.[16] Thus, an agency is not to grant or deny – as the DOR did here – an Open Records request on the basis of any special interests a requester may have.[17]

Although the Attorney General's Office has frequently acknowledged that a public agency must comply with Open Records requests in the face of ongoing litigation, it has cautioned *in dicta* that provisions of the Act should not be used by parties to circumvent the discovery process.[18] The DOR seizes on that language in an attempt to convince this Court that it should bar Ms. Wyrick from access to the requested records,

[14] 98-ORD-39, p. 2; *see also* 03-ORD-226; 99-ORD-64; *Ky. Lottery,* 41 S.W.3d at 864.

[15] 98-ORD-87; *Ky. Lottery*, 41 S.W.3d at 863-64.

[16] *See* 99-ORD-64; *see also* 97-ORD-71.

[17] 96-ORD-144; *see also Ky. Lottery*, 41 S.W.3d at 864-65.

[18] 99-ORD-64.

claiming that she is attempting to circumvent the Civil Rules. [Appellant's Brief, pp. 24-26.] Similar arguments have been flatly rejected by the Attorney General himself.

Indeed, a 2007 Open Records decision summarizes the state of the law in response to the Kenton County Board of Education's denial of an Open Records request by a Gailen Bridges, who, at the time of the request, had three cases pending against the agency and discovery motions under consideration by the trial court.[19] The Board of Education, like the DOR here, called the Open Records request "an attempt to circumvent the rules of civil procedure governing pretrial discovery." The Attorney General disagreed and explained the law in a manner so comprehensive and so pertinent to this case that it warrants the following lengthy citation:

> Fundamental to the Board's position is the language found at KRS 61.878(1) which states:
>
>> The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that *no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.*
>
> (Emphasis added.) The Board asserts that Mr. Bridges' open records requests represent an attempt to circumvent the rules of civil procedure in contravention of the referenced provision. This position has been rejected by both the courts and the Attorney General. *Kentucky Lottery Corporation v. Stewart*, 41 S.W.3d 860 (Ky. App. 2001) is dispositive of this issue. Agreeing with those Attorney General's opinions recognizing that "an open records request should be evaluated independently of whether or not the requester is a party or potential party to litigation," the court quoted from OAG 89-65 in which this office opined:
>
>> Inspection of public records held by public agencies under Open Records provisions is provided for by statute,

[19] *See* 07-ORD-180, as published on August 28, 2007 and attached hereto as App. 15.

> without regard to the presence of litigation. There is no indication in the Open Records provisions that application of the rules therein is suspended in the presence of litigation. Requests under Open Records provisions, to inspect records held by public agencies, are founded upon a statutory basis independent of the rules of discovery. Public agencies must respond to requests made under the Open Records provisions in accordance with KRS 61.880.

OAG 89-65, p. 3, cited in *Stewart* at 864. In interpreting KRS 61.878(1), the court reasoned:

> That statute does not exempt or exclude all records from the open records disclosure, in favor of discovery in litigation or anticipated litigation cases, but limits the release of records specifically listed in KRS 61.878(1) to those records which parties can obtain through a court order. The gist of this wording is not to terminate a person's right to use an open records request during litigation, but to limit a court on an open records request *on excluded records*, to those records that could be authorized through a court order on a request for discovery under the rules of Civil Procedure governing pretrial discovery.

Kentucky Lottery Corporation v. Stewart, Ky. App., 41 S.W.3d 860, 863 (2001) (emphasis in original). Reaffirming the principle that "the Legislature clearly intended to grant any member of the public as much right to access to information as the next,"[20] and quoting from Attorney General's decisions holding that "[a]lthough there is litigation in the background of the open records request . . ., the requester . . . stands in relationship to the agency under the Open Records Law as any other person,"[21] the court refused to interpret KRS 61.878(1) in such "an absurd and unreasonable" way as to allow a nonparty's right of access while disallowing a party's right of access. Thus, Mr. Bridges "stands in relationship to" the Board of Education under the Open Records Law as any other person. Accord, 04-ORD-058; 04-ORD-208; 07-ORD-057. He is not foreclosed from accessing public records through the Open Records Act, notwithstanding the fact that he is a litigant in a case involving the Board, and our analysis proceeds accordingly.

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[20] *Zink v. Commonwealth*, 902 S.W.2d 825, 828 (Ky. App. 1994).

[21] OAG 82-169, p. 2.

The DOR's preferred interpretation of KRS 61.878(1) is directly at odds with the published authority on the issue and simply cannot trump the foregoing, as a matter of law or reason.

Further, the Attorney General has also recognized that the litigation exception

> does not prohibit access by a party litigant to **nonprivileged, nonexempt** public records in the custody of a public agency against which the litigant had brought suit or by which he had been sued. Only if the records to which the party litigant requests access are **both exempt and nondiscoverable** does KRS 61.878(1) authorize nondisclosure.[22]

Yet, the DOR asks this Court to hold the opposite: that the "party litigation limitation applies to **non-exempt records which are not excluded records.**" [Appellant's Brief, p. 26 (emphasis added)].[23] To do so, this Court would have to rewrite KRS 61.878, which

[22] 99-ORD-64 (emphasis added); *see also* 01-ORD-95.

[23] The DOR also cites *Hahn v. University of Louisville,* 80 S.W.3d 771 (Ky. App. 2001) to support its argument. In *Hahn,* a technologist at the University of Louisville's School of Medicine filed an Open Records request to review her own personnel records in relation to a claim she had recently filed against the University. While it complied with most of the requests, the University refused to produce four records on the basis of the attorney-client privilege, **relying on the exemption in KRS 61.878(1)(l).** Hahn claimed she was nevertheless entitled to inspect those documents because of her status as a University employee, citing KRS 61.878(3), which allows a public employee to inspect and copy any record that relates to her. The Court of Appeals ultimately held that Hahn was not entitled to inspect the documents because of the litigation exception. Contrary to the DOR's argument, *Hahn* does not conflict with the Court of Appeals Opinion here. The Court of Appeals has held that the litigation exception is only implicated where one of the fourteen exemptions in KRS 61.878 applies. Those categories of documents warrant special attention in the context of litigation. The fact that KRS 61.878(3) becomes part of the analysis when a public employee is requesting inspection of records that relate to her does not change the fact that the litigation exception is triggered by application of one of the exemptions in KRS 61.878. Importantly, the Court of Appeals cited *Hahn* in its Opinion here. Clearly, the Court of Appeals finds no inconsistency, therefore, between the two opinions. The DOR asks this Court to create such an inconsistency based on some implied contrary meaning. Even assuming for the sake of argument that there was such an inconsistency, the more

clearly states that the public records falling within the fourteen express exclusions are "exempted from inspection except on order of court." That statute says that even these "excluded records" may be "subject to inspection" "upon order of a court of competent jurisdiction." In the face of this clear statutory language, the DOR inexplicably tells this Court: "If a record is 'excluded' or 'exempt' from the application of the Open Records Law, a request for the record made by a 'person' or by a 'party' will be denied by the agency. The party litigation limitation never comes into play in such a case: there is no reason to limit the power of a court to order inspection, when the record sought to be inspected is 'excluded from the application' of the Open Records Law under one of the 14 categories described by KRS 61.878(1)." [Appellant's Brief, pp. 26-27.]

It is true that an agency can deny a request for a document that falls within one of the fourteen exclusions. But as the Court of Appeals has held, **that is the <u>only</u> type of case in which the party litigation "comes into play."** Just because an agency cannot grant an Open Records request for documents falling under KRS 61.878(1)(a)-(n) does not mean a court cannot. In fact, the General Assembly expressly granted courts the

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recent Opinion at issue here (which the Court of Appeals deemed significant enough to publish because it directly addresses the analysis required to determine whether the litigation exception applies) clearly trumps what the DOR says *Hahn* means.

Hahn is, however, instructive regarding the "pertaining to" language of the litigation exception. The Court of Appeals did directly address that language noting that "to the extent that the material Hahn seeks to inspect can be said to **'pertain to civil litigation'** and to go beyond discovery under the Civil Rules, its disclosure – otherwise required – is expressly exempted regardless of Hahn's status as a state employee." This interpretation of the statutory language clearly indicates that exemptions under the Act apply only to those materials that "pertain to civil litigation." *See, infra,* discussion at Part I, C.

discretion to authorize inspection of those documents, **as long as the party litigation does not apply.** KRS 61.878(1).

The Court of Appeals Opinion makes this clear. It sets forth a test, explaining the two steps a circuit court "must take in reviewing an Open Records Action decision." [Opinion Reversing and Remanding, App. 1, p. 16]. First, the circuit court must "[d]etermine whether the material requested falls under one of the fourteen listed exclusions without regard to whether the requester is a party (or a potential party) to litigation" [*Id.*]. "If it does not fall under one of the exclusions, the material is subject to inspection and the analysis ends" [*Id.* at 17]. Only if an exclusion does apply, does the circuit court "look to the party litigation limitation" [*Id.*] "If the material is pertaining to civil litigation and a party is the requester," then and only then, the limitation applies and the court cannot order inspection [*Id.*]. If, however, "the material is not pertaining to civil litigation (even if a party from civil litigation is the requester)," then the circuit court may exercise its discretion to order inspection [*Id.*]. The Court of Appeals opinion is consistent with the earlier decisions and the express terms of the statute. The DOR's position, however, is directly at odds with both.

Moreover, the language quoted above from the Attorney General in 99-ORD-64 suggests not only that the litigation exception should be construed to exclude only those documents that are both exempt and nondiscoverable, but also that the term "nondiscoverable" applies only to records that are privileged or protected from discovery because they contain sensitive information.[24] Thus, while the Attorney

[24] Several Attorney General opinions suggest that "nondiscoverable" documents under this provision are limited to those that are under seal or contain privileged information.

General has "recognized the potential pitfalls of using the Open Records Act as a discovery tool,"[25] the main purpose behind the litigation exception is to prevent a litigant from using Open Records requests to obtain privileged and/or sensitive information that otherwise could not be obtained via the discovery process – an issue of no concern here.

Indeed, there should be no concerns at all about the effect this Open Records request might have on the administrative proceeding because, as the DOR has insisted and the Court of Appeals correctly held, the requested records have nothing to do with the proceeding and, as such, cannot be used in the proceeding.

C. Records Irrelevant to Pending Litigation Fall Outside a Strict Construction of KRS 61.878(1).

The DOR asks this Court to reverse the Court of Appeals decision and instead adopt the Circuit Court's expansion of the reach of KRS 61.878(1). But, in expanding that reach of the party litigation exception, the Circuit Court opinion virtually ignored its own cited authority on statutory construction that requires statutes to be afforded

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See, e.g., 98-ORD-79 (holding that an agency's statutory duties under the Act were not suspended by the presence of litigation because there had been "no claim that the records pertaining to the litigation have been sealed or placed under a protective order"); 96-ORD-192 (noting that requester was not attempting to "do an end run around discovery" because "nothing in the order or schedule suggests that the materials pertaining to the litigation have been sealed or placed under a protective order" and consequently held that the agency had to comply with the open records requests); 94-ORD-19 (stating that because "[n]othing in the motion or order suggests that the materials pertaining to the litigation have been sealed or placed under a protective order," the agency still had to comply with the open records requests). Thus, the term "nondiscoverable" does not apply to the requested documents because they are not privileged, nor have they been placed under seal or protective order because they contain sensitive or confidential information. Rather, the DOR objected to production of the documents simply on the grounds of irrelevance.

[25] 03-ORD-226.

"their literal interpretation" and courts to "lend words of a statue their normal, ordinary, everyday meaning"[26] by applying KRS 61.887(1) to this case. It also ignores the undisputable fact that exceptions in the Open Records Act are to be "strictly construed." KRS 61.871. Not once did the Circuit Court even address the import of the words "materials pertaining to civil litigation" in KRS 61.878(1), though these words formed the basis for Ms. Wyrick's primary argument regarding the inapplicability of the statute in this case. The result was an erroneous decision, under any standard of review, and the Court of Appeals correctly reversed.

Kentucky courts have recognized that "[i]n analyzing the Open Records Act . . . we are guided by the principle that 'under general rules of statutory construction, we may not interpret a statute at variance with its stated language.'"[27] The courts also recognize that they are not to "add or subtract from the legislative enactment nor discover meanings not reasonably ascertainable from the language used."[28] Moreover, the Attorney General's Office has consistently held that all provisions of the Open Records Act must be strictly construed and has interpreted them accordingly.[29]

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[26] RA 688 (quoting *Commonwealth v. Plowman*, 86 S.W. 3d 47, 49 (Ky. 2002)).

[27] *Hoy v. Ky. Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995) (quoting *Layne v. Newberg*, 841 S.W.2d 181, 183 (Ky. 1992)).

[28] *Hahn v. Univ. of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001) (citing *Beckham v. Bd. of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994)).

[29] *See* 99-ORD-125 (affirming that provisions of the Act are to be narrowly construed); 96-ORD-263 (Attorney General employed rule of "strict construction" and rejected City's argument that potential litigant was not entitled to view certain records under KRS 61.878(1) on the grounds that she was not a "party" within the meaning of the provision); 94-ORD-19 (ruling that "consistent with the principle of strict construction of the Act," KRS 61.878(1) can only be interpreted to apply to "parties" to litigation).

Therefore, in determining the precise meaning of the litigation exception, the Court of Appeals rightly looked to and relied on the exact language of the provision.

According to its plain language, KRS 61.878(1) applies only to those **excluded materials** that "**pertain to civil litigation.**" The statute provides, in pertinent part, "that no court shall authorize the inspection by any party of any materials **pertaining to civil litigation** beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery."[30] Therefore, this provision absolutely bars from inspection only those **nondiscoverable documents** that fall within one of the fourteen exemptions and **that have some bearing on the pending litigation.**[31]

The Attorney General has supported this interpretation of the litigation exception. In 95-ORD-18,[32] Mr. Cullinan, who had brought suit against the City regarding management of the Louisville Policeman's Retirement Fund, sought through Open Records requests, access to travel and expense records regarding opposing counsel's attendance at a forum in Florida sponsored by Cullinan and other members of the Fund. The City denied the Open Records request, alleging that Cullinan was using the Act to circumvent the discovery process in violation of KRS 61.878(1).

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[30] KRS 61.878(1) (emphasis added).

[31] Ms. Wyrick respectfully submits that this language of the statute, coupled with the DOR's admissions that the requested unitary tax records are "irrelevant" to the administrative proceeding is dispositive. Even if that were not true, as previously shown, the plain language of KRS 61.878(1) also indicates that the Act does not apply to administrative proceedings, which are not "civil litigation" and are not governed by the "Rules of Civil Procedure." Either ground on its own is individually dispositive. The presence of both leaves little question that the DOR's position is unsupportable.

[32] Attached hereto as App. 15.

The City maintained that, "because the fact that the city attorney undertook an investigation of a party by attending a conference which that party also attended has no 'possible bearing' on the pending litigation," such information was not discoverable under the Rules of Civil Procedure and therefore it did not have to comply with Cullinan's Open Records requests.[33] The Attorney General flatly rejected the City's argument, holding that this provision should not be interpreted to permit public agencies to deny Open Records requests by "invoking a new exclusion" to public inspection, which would deny disclosure on the basis that the requested documents have no "possible bearing" on the litigation and are therefore not discoverable.[34] Specifically, the Attorney General stated:

> If, in fact, they have no bearing on the action, the records do not "pertain[] to [the] civil litigation" to which the requester is a party. Taken to its logical conclusion, the City [sic] argument would preclude a litigant from inspecting any and all records unrelated to litigation with the City because they have no "possible bearing" on that litigation.[35]

Thus, the Attorney General found that Cullinan was entitled to review the requested documents **despite their alleged lack of relevancy.** At least two subsequent Attorney General Opinions have cited this interpretation of the litigation exception with approval.[36]

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[33] 95-ORD-18.

[34] *Id.*

[35] *Id.* (emphasis added) (matter in brackets in original).

[36] In 96-ORD-144, the City of Nicholasville relied on KRS 61.878(1) and denied Butcher's requests to review public records concerning a claim she had brought against the City's law enforcement office. However, rather than explicitly claiming that the requested

In order for the requested records to be exempt from disclosure under KRS 61.878(1), therefore, they must be found to "pertain to" the ongoing litigation. According to the DOR, the records here do not. The Court of Appeals recognized this insurmountable deficiency in the DOR's arguments – a deficiency that eluded the Circuit Court: "the DOR cannot on the one hand argue, successfully, that the material sought in the tax appeal case is irrelevant to that litigation to defeat the discovery request, and then on the other hand argue in the Open Records proceeding that it is pertaining to that litigation and therefore subject to the limitation." [Opinion Reversing and Remanding, App. 1, p. 18].

Quite tellingly, in its brief to this Court, the DOR conveniently glosses over the "pertaining to" language of the party litigation limitation. Indeed, it never mentions this obstacle – which was integral to the Court of Appeals' decision. Instead the DOR sidesteps it by arguing that because Ms. Wyrick's requests were similar in nature to Gannett's discovery requests in the KBTA proceeding, she has somehow admitted that the litigation exception applies. [Appellants' Brief, p. 20.] The DOR, quoting KRS

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records were irrelevant, the City merely asserted that the documents were "beyond the scope of discovery" – which is essentially the same theory espoused here by the DOR. The Attorney General relied on the interpretation of the provision set forth in *Cullinan* and found that the City had failed to sustain its burden of proof because it did not explain how the requested records were beyond the scope of discovery and therefore exempt from public inspection. Consequently, the Attorney General ordered that the City must comply with Butcher's Open Record requests. The similarity of the facts here compels the same result. Additionally, although it ultimately declined to render a decision because the issue was pending before the Jefferson Circuit Court and the Kentucky Court of Appeals, in 97-ORD-163, the Attorney General's office once again cited this interpretation of KRS 61.878(1) with approval stating that records which have no bearing on the action do not "pertain to the civil litigation" and therefore do not fall within the language of the amendment. Both of these opinions are attached hereto as App. 15.

61.878(1), proclaims that because the requests for inspection covered the same documents as the discovery requests, the records requested must be "beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery." But the DOR conveniently leaves out the four words that qualify the language it quoted from KRS 61.878 – namely "pertaining to civil litigation."

Ms. Wyrick has **never** admitted that the requested documents fall within the litigation exception. The DOR's argument that she has is completely disingenuous and warrants no consideration by this Court. The applicability of the litigation exception, of course, is at the heart of the Court of Appeals opinion (even though the DOR failed to preserve its defense under KRS 61.878(1)). Despite the DOR's truncated quotation of the relevant language, this Court need only look to the plain language of KRS 61.878(1) to determine that the Court of Appeals correctly concluded that the DOR could not and did not satisfy its burden of proving that the records were exempt from disclosure under this provision.

D. The DOR's Own Admissions Establish That the Requested Documents Do Not "Pertain to" the Litigation and Thus Are Not Exempt From Disclosure Under KRS 61.878(1).

By its own admissions, the DOR established that the requested documents do not pertain to the administrative proceeding before the KBTA. The requested records are therefore not exempt from disclosure under this litigation exception. On May 12, 2005, Gannett/Courier-Journal served the DOR with interrogatories and requests for production of several documents concerning tax records and the DOR's interpretation of the tax laws. The DOR, however, objected to a majority of these discovery requests,

relying mainly on the issue of relevance.[37] Specifically, it stated that such information was "irrelevant to the application of the tax law enacted by the General Assembly to the specific facts of the Courier-Journal Co.'s case."[38]

When Gannett/Courier-Journal moved to compel discovery, the DOR again refused to comply and continued to rely heavily on the issue of relevance, asserting that "[n]othing the Revenue Cabinet can provide in answer to an interrogatory or document production request can possibly be relevant to the facts of Appellants' business during the years in question."[39] The KBTA ultimately sustained a vast majority of the DOR's objections to interrogatories on the basis of relevance. Thus, the DOR has admitted, and the KBTA agreed, that the documents in question are irrelevant to the pending proceeding. Based on their established irrelevance, the requested records do not fall within the language of KRS 61.878(1) because they do not "pertain to" the civil litigation. They simply cannot be exempt from disclosure under this provision of the Act.

Clearly, to preclude Ms. Wyrick from gaining access to these public records on the grounds of irrelevance would produce absurd results and would frustrate the legislative purpose behind the Act. Public records belong to the public, while the agencies that possess them are mere custodians, required by the law to assure free and open access to any person, unless, unlike here, the documents are specifically exempted from disclosure. No provision in this Act affords public agencies the discretion to choose

[37] RA 550-577.

[38] *Id.*

[39] RA 527-546.

to whom and when it will disclose public information. To accept the DOR's sweeping and overbroad interpretation of the litigation exception would afford public agencies involved in ongoing litigation unlimited power to withhold any document it chose on the grounds of "irrelevance." Such a result would absurdly impair the rights of those personally affected by the actions of a public agency and their attorneys to view certain records, while uninterested third parties would enjoy unrestricted access. The Court of Appeals' refusal to sanction such conduct by public agencies should be affirmed.

II. THE COURT OF APPEALS CORRECTLY REFUSED TO "IMPLY" A TIME LIMITED FOR APPEALS TO THE ATTORNEY GENERAL.

The DOR admits that the Act provides no time limit to appeal an agency's denial of a records request to the Attorney General. It says none is needed because KRS 13B.140(1) sets the deadline and chastises the Court of Appeals for allowing requesting parties to ignore Chapter 13B. On its face, though, Chapter 13B is wholly inapplicable and plays no role here.

The DOR argues that because an agency denial of an Open Records request constitutes "final agency action" (KRS 61.880(1)), then Chapter 13B is triggered. That is not true. KRS 13B.140(1) provides that, when seeking judicial review of "**final orders**" of an agency, "[a] party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service." KRS 13B.010 expressly defines "final order" as "the whole or part of the final disposition of **an administrative hearing**, whenever made effective by an agency head, whether affirmative, negative, injunctive, declaratory, agreed, imperative in form." KRS

13B.010(6). Thus, the statutory definition of a "final order," which triggers the 30-day limit for appeals under KRS 13B.140(1) clearly refers to a decision flowing from **an administrative hearing** of an agency, rather than an agency's mere denial of inspection of certain records. Indeed, KRS Chapter 13B is completely inapplicable in the open records context where, as here, the agency is a **party** to the dispute and not the final decision maker.

Further, the DOR's argument that the time limits expressed in KRS 13B should apply to appeals to the Attorney General of agency denials under the Open Records Act is illogical because nothing in the Act prevents the requesting party from simply initiating a new or revised request after an agency denial. Consequently, if an agency were to deny an Open Records request, the requesting party could, at any time, simply make a new request, which would effectively restart the 30-day time limit. Further, as evidenced here, there is often clarifying communications between a requesting party and an agency that produces revised requests, thereby making it difficult to establish if or when an agency "denial" occurs. The General Assembly no doubt recognized that a strict appeal deadline would frustrate that cooperation or result in premature/unnecessary appeals. But whatever the reason, no deadline applies and the DOR's incomprehensible interpretation of the Act is at direct variance with its plain language.

As the Court of Appeals noted, a simple reading of KRS 61.880 demonstrates the legislature's deliberate decision not to impose a time limitation on appeals to the Attorney General from agency denials under the Act. "The General Assembly chose not to attach a time limitation on a complaining party's decision to appeal to the Attorney

General, as it did on the Attorney General's time to issue a decision and on a party's time to appeal the Attorney General's decision to the Circuit Court." [Opinion Reversing and Remanding, App. 1, p. 9 (citing KRS 61.880(2)(a)-(b); (5)(a)]. Additionally, the General Assembly has chosen to attach time limitations to complainants' ability to appeal open records decisions in other contexts. *See* KRS 197.025(3) (mandating appeals to the Attorney General of a penal facility's denial of an open record request be made within 20 days). The Court of Appeals correctly rejected the DOR's argument and there is absolutely no reason to disturb that decision. If the General Assembly had wanted to impose a time limit on a requester's ability to appeal an agency's denial to the Attorney General, it would have done so – just as it imposed other time limitations in the Act.

III. <u>THE DOR'S KRS 61.878(1) ARGUMENT WAS NOT PRESERVED.</u>

Ms. Wyrick presented the Court of Appeals with several grounds for reversing the Circuit Court's Opinion and Order. The Court of Appeals correctly held that two were independently dispositive – namely that 1) the litigation exception does not apply to an administrative proceeding such as the KBTA, but only to civil litigation per the clear language of the statute; and 2) the litigation exception cannot apply in this case where the DOR has admitted that the requested records do not pertain to the ongoing proceeding [Opinion Reversing and Remanding, App. 1, pgs. 17-18]. The Court of Appeals, however, rejected and/or declined to address other issues raised by Ms. Wyrick. Because they are necessary to any full and proper review of this case, Ms. Wyrick asks this Court to hold that the DOR failed to preserve its argument that the litigation exception precluded inspection of the requested records when it abandoned it

on the appeal to the Attorney General and also that the Circuit Court's July 17, 2006 order denying discovery is reviewable and that order warrants reversal.

At no time in its lengthy briefs to the Attorney General did the DOR ever mention – much less argue the applicability of – the KRS 61.878(1) party litigation exception, which formed the sole basis for the Circuit Court's ruling that approves the DOR's refusal to grant Ms. Wyrick access to the requested public records. And, the Attorney General expressly refused to address the issue for that very reason. The Court of Appeals erred in declining to find this waiver an independently dispositive ground for overturning the circuit court's order [Opinion Reversing and Remanding, App. 1, p. 13].

It is firmly established that an issue must first be presented to the lower court in order to be heard on appeal. This same rule of law applies to appeals of administrative decisions. A party's "failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review...." *Urella v. Ky. Bd. of Med. Licensure*, 939 S.W.2d 869, 873 (Ky. 1997). *See also Whittaker v. Hurst*, 39 S.W.3d 819 (Ky. 2001). In other words, all issues must first be raised at the administrative level in order for them to be judicially reviewed.

Similarly, in appeals of Attorney General decisions, only issues presented to the Attorney General can be appealed to the courts. It is not enough, as the Court of Appeals reluctantly concedes, for a public agency simply to mention an exception in a response to an Open Records request when it totally abandons any reliance on the argument in attempting to support its nondisclosure in a formal appeal to the Attorney

General.[40] This is especially true because the Act specifically assigns the public agency the burden of proof in disputes before the Attorney General.

KRS 61.880(5)(a) grants a party the right to appeal an Open Records decision rendered by the Attorney General. If the Attorney General did not have the opportunity to rule on a question, then the question is simply not on the table for even a *de novo* review. Any other result allows public agencies to play cat and mouse with the public's efforts to ensure its rights of access to public records. It also denigrates the important role the Attorney General plays as the arbiter, potentially the **final** arbiter, of Open Records disputes.

IV. THE ORDER IMPROPERLY BANNING DISCOVERY WAS APPEALABLE AND SHOULD BE REVERSED TO ALLOW DISCOVERY UPON REMAND TO THE FRANKLIN CIRCUIT COURT.

In addition to the Circuit Court's December 11, 2006 Opinion and Order, Ms. Wyrick also appealed from the Circuit Court's July 17, 2006 order that effectively forecloses the right to discovery in any Open Records action. The Court of Appeals declined to review the discovery order, agreeing with the DOR that it was not final and appealable [Opinion Reversing and Remanding, App. 1, p. 12]. This Court's review of this case should address the status of the discovery order, which raises issues regarding the finality of trial court decisions and the appealability of pertinent and related, but arguably interlocutory, orders.

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[40] "Although we believe that the DOR probably should have raised this defense before the Attorney General, we nevertheless hold that the DOR sufficiently preserved this issue when it included the defense as an aggregate reason for denying Wyrick's request" [Opinion Reversing and Remanding, App. 1, p. 13].

This appeal originated from a hearing on a discovery dispute held by the Franklin Circuit Court on July 6, 2006. Both the DOR and Ms. Wyrick were conducting discovery and neither argued that discovery was unavailable in Open Records cases. During this hearing, the judge expressed his disfavor over the use of the Act during litigation and queried why KRS 61.878(1) did not foreclose the entire action. On July 17, 2006, the judge entered the order denying discovery and also instructing the parties "to brief the issue as to **whether this action is properly before this Court at the present time** pursuant to KRS 61.878(1)" (emphasis added).

Ultimately, the Circuit Court answered this July 17, 2006 query in its December 11, 2006 Order and Opinion, holding that KRS 61.878(1) is dispositive. In other words, the Circuit Court held that the Open Records action was not properly before the Circuit Court because of the litigation exception at KRS 61.878(1). In the Opinion, however, the Circuit Court, quoting verbatim from the DOR's brief on both the facts and law, only specifically references those requests from the September 1, 2005 request. But, in light of the July 17, 2006 Order, the Circuit Court's clear intention was to dismiss the entire action based on KRS 61.878(1), including the September 27, 2005 request. The December 11 Order was "final and appealable" and disposed of the entire action. Accordingly, Ms. Wyrick appealed to the Court of Appeals on January 9, 2007.

After the issuance of the December 11, 2006 Order and shortly before filing her Notice of Appeal, Ms. Wyrick discovered that Mark Treesh, who filed this action in the circuit court, no longer held the position of Commissioner of the DOR. On January 8, 2007, Ms. Wyrick filed a Motion for Party Substitution with the Franklin Circuit Court seeking to substitute Marian Davis, the current Commissioner of the DOR, in place of

Mark Treesh. At the hearing on this Motion, the DOR vehemently objected saying that the Circuit Court had absolutely no jurisdiction to hear any issues relating to this case upon Ms. Wyrick filing her Notice of Appeal. The Circuit Court agreed and entered the Order Denying Motion for Party Substitution for lack of jurisdiction on January 22, 2007.

Despite its previous representations that no issues remain before the Circuit Court, the DOR argued to the Court of Appeals – and now argues to this Court – that the Circuit Court's December 11, 2006 Opinion and Order was not a final order adjudicating all claims in this action, but that some claims remain within the jurisdiction of the Circuit Court. It asked the Court of Appeals to strike Ms. Wyrick's appeal as it relates to the discovery order, which, now according to the DOR, remains interlocutory. The Court of Appeals ultimately agreed and "decline[d] to review Wyrick's argument concerning the circuit court's discovery ruling" [Opinion Reversing and Remanding, App. 1, p. 12].

The Court of Appeals erred as a matter of fact and law. The December 11, 2006 Order at issue grants "a final judgment with respect to all claims of the parties arising out of the DOR's October 18 response to Appellee Wyrick's September 1, 2005 Open Records Law request." While the language of the order only specifically mentions the first request, it nevertheless must include the additional September 27, 2005 request. As the correspondence in the record confirms, Ms. Wyrick sent her second request to the DOR only after the DOR informed her that it would need until October 14, 2005, instead of the Open Records Act's three-day response time, in which to respond to the September 1 request. This "second request" was extremely limited in nature and simply asked for all documents produced by the DOR in the *Johnson Controls* litigation, which were some of the same documents identified in the "first request." Ms. Wyrick sent this

limited request to facilitate timely access to requested records. Pursuant to the language of the December 11, 2006 order and opinion, all issues related to the "second request" are disposed of with the "first request." The Circuit Court clearly intended its December 11, 2006 Order and Opinion to be a final judgment, and has specifically held that it no longer retains jurisdiction over this case. There is no indication that it only made its decision final and appealable under CR 54.02.[41]

The Discovery Ban Was Wrong. In its July 17, 2006 Order, the Circuit Court foreclosed any additional discovery by the parties on the ground that an appealing party may not introduce new evidence.[42] Implicit in the order is that discovery is simply not available in this or any Open Records appeal. Open Records Decisions of this Court and the Supreme Court confirm otherwise.

Indeed, in *Board of Medical Licensure v. Courier-Journal*, one of the seminal Open Records decisions, the Court of Appeals references and relies on evidence obtained in depositions of agency representatives taken by the Courier-Journal.[43] And, in *Bowling v. Lexington-Fayette Urban County Government,* this Court set forth the prerequisites for a requesting party to be entitled to an evidentiary hearing to challenge an agency's assertion that requested records do not exist.[44]

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[41] And, if it did, the question remains for this Court whether the related discovery Order necessarily merges into the December 11, 2006 judgment.

[42] *See* RA 470, App. 2, hereto.

[43] 663 S.W.2d 953, 955 (Ky. App. 1983).

[44] 172 S.W.3d 333, 341 (Ky. 2005) (allowing evidentiary hearing where complaining party makes a *prima facie* showing that alleged nonexistent records do exist).

The Circuit Court's Order foreclosing discovery should be overruled. If this Court upholds, as we trust it will, the Court of Appeals' determination that the litigation exception is inapplicable and remands this case, Ms. Wyrick should be allowed to conduct discovery into, for instance, the DOR's claims of undue burden associated with responding to the requests and whether or not the requested records are being maintained by its counsel. Far from a fishing expedition, the discovery is compelled by the DOR's own representations regarding its attorneys' files.

CONCLUSION

From its dilatory responses to the initial requests to its rather tart presentation to this Court, the DOR obviously has little regard for the Open Records Act and the duties the law imposes on public agencies to ensure the public's right to "free and open examination" to what is in fact the public's records. The law remains nonetheless; and the Court of Appeals correctly curtailed the DOR's unsupportable attempt to evade it. It does not even take the required strict construction of KRS 61.878(1) to confirm that the Circuit Court erred by dismissing Ms. Wyrick's Open Records request based on the so-called "litigation exception." The requested public records were not "materials pertaining to civil litigation." Rather, by the DOR's own admission, they were "materials wholly irrelevant to the administrative proceeding. For all the reasons herein, Ms. Wyrick respectfully asks this Court to affirm the Court of Appeals' Opinion on these dispositive points, as well as the Court of Appeals' holding that Ms. Wyrick's appeal to the Attorney General was not untimely.

In addition, or alternatively, Ms. Wyrick requests this Court to reverse the Court of Appeals' holding that the DOR preserved its KRS 61.878(1) argument, though not

raising it to the Attorney General, and that the Circuit Court's erroneous ban on discovery was not ripe for review.

Respectfully submitted,

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