

COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS  
CASE NO. \_\_\_\_\_

THE COMMONWEALTH OF KENTUCKY, CABINET  
FOR HEALTH AND FAMILY SERVICES and JANIE MILLER  
In her official capacity as Cabinet Secretary

APPELLANTS

v.

**MOTION TO SUSPEND DECLARATORY AND  
INJUNCTIVE RELIEF DURING PENDENCY OF APPEAL  
AND REQUEST FOR EMERGENCY RELIEF  
FROM ONE MEMBER OF THE COURT IF NECESSARY**

THE COURIER-JOURNAL, INC., LEXINGTON H-L SERVICES, Inc.  
(d/b/a The Lexington Herald-Leader) and PATRICK WATKINS

APPELLEES

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Appellants, Cabinet for Health and Family Services and the Secretary of the Cabinet for Health and Family Services, pursuant to CR 65.08(3) and CR 76.34 move this Court to stay and suspend the injunctive relief granted by the Franklin Circuit Court entered January 19, 2012, during the pendency of the appeal in order to preserve the status quo and prevent irreparable injury; because time is of the essence, this Motion respectfully includes a request for emergency relief from one member of the Court if necessary, as provided by CR 65.08(7).

The status quo means that the Cabinet will continue to release records of child fatalities and near fatalities during the pendency of this appeal, as it had previously informed the circuit court, balancing the need for transparency with its obligations to protect the best interests of the state's child welfare system and comply with *all* applicable law. Conversely, immediate compliance with the circuit court's injunction will significantly undermine the Cabinet's appellate rights while the disputed legal issues are

under review, in a way that could have serious deleterious effects on the families that the Cabinet serves. While the Cabinet's release of records and the Court's injunctive relief stem from a similar goal, i.e., accountability in and improvements to the child welfare system, there are concerns about the differing approaches that this Court should address before the Circuit Court's injunction takes effect.

Under CR 65.08(3), the Cabinet is entitled to seek relief directly from the Court of Appeals because it is "impractical" to file this Motion with the trial court first, for two reasons. *First*, the final judgment entered on January 19<sup>th</sup> mandates that the release of records under the trial court's injunction takes effect at noon on January 27<sup>th</sup> – in less than 24 hours.<sup>1</sup> The Circuit Judge assigned to the case is out of the state so the parties cannot seek relief from him. Indeed, even this Court may need to grant emergency relief to allow full consideration of the motion. *Second*, at least implicitly, the trial court order under review already considered the Cabinet's request for delayed release pending an appeal, strongly suggesting there is no merit in returning to that court again anyway.

There is no reported Kentucky case law explaining the meaning of "impractical" in this context. However, the Federal Rules of Appellate Procedure entail materially the same procedure for a stay of an injunction pending appeal (Fed. R. App. P. 8), and federal courts have found direct relief appropriate in very similar circumstances. Specifically, in a case seeking to include a political candidate on the November election

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1. The fact that this motion is being filed less than 24 hours before the injunctive is to take effect should not be viewed as unwarranted delay by the Defendants. The civil rules would normally provide 30 days within which to make a decision whether to appeal and if so, whether to seek relief from the injunction during the pendency of the appeal. Because the injunction mandates release of the records commencing on Friday January 27<sup>th</sup>, the period within which the Defendants had to evaluate their options and take action was shortened from 30 days to 7 days.

ballot, the Tenth Circuit accepted an immediate motion for stay no less than two weeks before the election date, finding that given the timing “the need for relief is so immediate that application in the district court is not necessary in these circumstances.” *Populist Party v. Herschler*, 746 F.2d 656, 657 n.1 (10<sup>th</sup> Cir. 1984). Again, in this case, compliance is required tomorrow, so the same reasoning would apply.

In addition, in *Walker v. Lockhart*, 678 F.2d 68 (8<sup>th</sup> Cir. 1982), a prisoner sought protective custody pending appeal, but the trial court had previously indicated that it deferred to prison officials on that matter. The Court ruled that “we think it unnecessary . . . to apply to first to the district court for injunctive relief.” 678 F.2d at 70. In this case, the trial court’s Final Order and Judgment specifically acknowledges that “[t]he Cabinet has also filed a motion seeking an Order allowing it to keep [the disputed portions of the records at issue] confidential until it has determined whether to seek appellate review of the Court’s ruling on that issue.” Yet, although the Court did not further engage that issue, the Court overruled all of the Cabinet’s motions. Thus, it appears the trial court already determined that release pending appeal would be warranted. Presenting this issue again would be futile, and only delay the inevitable, which is consideration of our request for relief by this Court.

If this Court does not suspend the circuit court’s mandatory injunction during this appeal, the Cabinet and the citizens of the Commonwealth will suffer irreparable injury that cannot be remedied by appeal. Accordingly, this Court must stay the lower court’s injunction.

## **FACTUAL PREDICATE FOR MOTION**

This is an open records case in which the Plaintiff-Appellees requested Cabinet records regarding child fatalities and near fatalities from 2009 and 2010. The Franklin Circuit Court held that the records of child fatalities and near fatalities are public records subject to the Kentucky Open Records Act. While the court correctly rejected the Plaintiff-Appellees' argument that in the event of a fatality or near fatality, all documents in a case file must be fully open to the public, it also held that the exemptions in the Open Records Act, that would normally be employed to protect well-established principles of confidentiality, do not apply. In their place, the circuit court has substituted a provisional set of parameters to govern the release of these records.<sup>2</sup>

As detailed herein, there are legitimate reasons why the principles embodied in the Open Records Act have been enacted into law and why the Cabinet should have the right to comply with such law as it releases these records. At a minimum, the merits of this case raise significant legal and policy questions that warrant appellate review before the circuit court's ruling takes effect, and documents that this Court may agree are confidential are irretrievably released. Such release would be detrimental to the public interest and the rule of law.

## **ARGUMENT**

If the circuit court's Order and Injunctive Relief is not suspended during the pendency of the appeal it will restrain the Commonwealth's ability to protect children and others from harm while the Cabinet exercises its appellate rights. Some examples of the types of unintended consequences that will result from records being released

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<sup>2</sup> Pursuant to CR 65.08(4) the Cabinet attaches a photocopy of its notice of appeal, the circuit court's final judgment, and the court's orders and opinions that may be necessary to a proper consideration and disposition of this motion.

under the full scope of the circuit court's Injunction, and the reasons prompting an appeal, are as follows.

### ***INTERFERENCE WITH CRIMINAL PROSECUTIONS***

The circuit court's injunction does not exempt from disclosure any records either gathered with or shared by law enforcement in cases being investigated for possible criminal charges. Witness interviews, forensic evidence, autopsy results and statements against interest made immediately following a tragic event would be prematurely released and impair the ability of County Attorneys or Commonwealth Attorneys to pursue criminal charges against adults who have killed or nearly killed a child. The Open Records Act recognizes the need for such confidentiality in **KRS 61.878(1)(h)**. Without confidence that disclosure to the Cabinet will not result in a premature release of information, law enforcement personnel and prosecutors will not provide the Cabinet with information critical in the Cabinet's determination as to the safety of children in the home nor would it have evidence to request the temporary removal of children from the home.

### ***POSSIBLE RETALIATION AGAINST REPORTING SOURCES***

The circuit court's injunction does not exempt from disclosure the names of reporting sources if they are a family member, law enforcement, school personnel, medical personnel or social service personnel. If a perpetrator of abuse or neglect suffers from mental illness, for example, knowing both the source and the substance of the reports made to law enforcement and the Cabinet which have resulted in the termination of parental rights, exposes the reporting source to retaliation and possibly violent retaliation. The Uniform Juvenile Code specifically protects anyone reporting

abuse or neglect in **KRS 620.050(11)** even from a court's decision to release a name UNLESS the court finds that the reporting source knowingly provided false information. In addition, without confidence that the Cabinet will not release the name of a reporting source, in the event of a fatality or near fatality, individuals who have valid reasons to fear retaliation will not make reports of abuse or neglect against children.

### ***POSSIBLE THREAT TO ADOPTED CHILDREN***

The circuit court's injunction does not exempt from disclosure information or records relating to the voluntary or involuntary termination of parental rights and a subsequent adoption. If a parent has posed such a threat to a child's life as to have lost custody of the child, it is foreseeable that if he/she could discover the child's whereabouts, he/she could resort to violence or to kidnapping. **KRS 625.108 and KRS 625.045** specifically protect the adopting parties in these types of cases. The ability of the Cabinet to find people willing to adopt abused or neglected children will be compromised if it cannot guarantee that the parents whose rights were terminated will not be able to simply ask the Cabinet and get records the court has sealed pursuant to law. The circuit court's injunction flatly overrides this statutory law, if a child fatality or near fatality occurs.

### ***DENIAL OF DUE PROCESS RIGHTS***

The circuit court's injunction does not exempt from disclosure information in any case file in which there has not been a final determination of abuse or neglect. Accordingly, the names of innocent parents, guardians or custodial parties who the Cabinet found guilty of abuse or neglect but who are subsequently exonerated on appeal will be denied their fundamental due process rights.

The Cabinet's administrative jurisdiction in child abuse or neglect cases is to determine by a preponderance of the evidence that abuse or neglect by the parent, guardian or custodial party resulted in a fatality or near fatality. The Cabinet must make such decisions in a short timeframe in order to protect the injured child or other children who might be in the home. Such a decision can be refuted by the innocent party in the due process hearing required by federal law. The Child Abuse Prevention and Treatment Act (CAPTA), as amended, **42 U.S.C. 5106a (b)(2)(A)(xv)** requires the Commonwealth to have an appeals process by which an individual who is officially found to have committed child abuse or neglect can appeal such a finding. By releasing information prior to this process being completed the reputation of innocent parties and harm to innocent families cannot be avoided.

**STAYING THE MANDATORY INJUNCTION WILL PRESERVE THE STATUS QUO AND PREVENT IRREPARABLE INJURY**

As our briefing on the merits will explain more fully, the circuit court independently determined what withholdings and redactions from child fatality and near fatality records it would provisionally allow, having concluded that the Cabinet's arguments for nondisclosure or redaction were without merit. The Cabinet has appealed and asks this Court to suspend the circuit court order during the pendency of appeal. This request stems from basic fairness to litigants. Indeed, Kentucky courts recognize that once privileged information is released it cannot be retrieved, and thus trial court orders to do so should receive immediate appellate review before disclosure occurs. See *The St. Luke Hospitals, Inc. v. Kopowski*, 160 S.W.3d 771 (Ky. 2005) and *Norsworthy v. Castlen*, 323 S.W.3d 764 (Ky. App. 2010) (granting writs of prohibition in recognition of irreparable injury when arguable attorney client privileged information was

ordered released); *Com., Cabinet for Health and Family Services v. Chauvin*, 316 S.W.3d 279 (Ky. 2010) (Supreme Court opinion ordering Court of Appeals to issue writ of prohibition when circuit court ordered disclosure of protected Kentucky All-Schedule Prescription Electronic Reporting (KASPER) records because release constituted irreparable injury).

The same equities that compelled these appellate courts to find irreparable injury and issue writs of prohibition in *Kopowski*, *Norsworthy*, and *Chauvin* likewise justify this Court issuing a stay suspending the circuit court's injunctive relief pursuant to CR 65.08(3) during the appeal, because "privileged information cannot be recalled once it has been disclosed." *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 800-01 (Ky. 2000); and any resulting injuries will not be cured by prevailing on appeal.

Significantly, in an equivalent context, federal courts consistently hold when federal agencies are ordered to disclosure documents pursuant to a Freedom of Information Act (FOIA) request,<sup>3</sup> that not issuing a stay deprives the federal agency of meaningful appellate review. *People for the American Way Foundation v. U.S. Dept. of Educ.*, 518 F.Supp.2d 174 (D.C. Dist. Ct. 2007). As that court observed, "Particularly in the FOIA context, courts have routinely issued stays where the release of documents would moot a defendant's right to appeal." *Id.*, at 177. See, e.g., *John Doe Agency, et al. v. John Doe Corp.*, 488 U.S. 1306, 1308-09, 109 S.Ct. 852, 102 L.Ed.2d 952 (1989) (Marshall, J., in chambers) (issuing stay in FOIA action and observing that disclosure of documents would moot defendant's ability to appeal, thereby resulting in irreparable injury).

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<sup>3</sup> See federal Freedom of Information Act, 5 U.S.C. § 552, et seq.

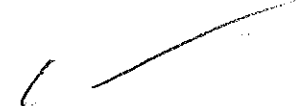
This Court should follow the common-sense reasoning set forth above, and stay the circuit court's final judgment and injunctive relief here. As noted at the outset, during the pendency of the appeal the Cabinet will continue to release records in fatality and near fatality cases and provide as much information as it can consistent with its understanding of controlling law and its position in this case. Thus, the stay will be maintaining the status quo as this Court determines if the circuit court erred in ordering the Cabinet to release the additional information that is at issue.

### **CONCLUSION**

For all the reasons argued above, the Cabinet moves this Court to enter the proposed order suspending its injunction during the pendency of the appeal.

Respectfully submitted,

**CABINET FOR HEALTH AND FAMILY SERVICES**



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**CERTIFICATE OF SERVICE**

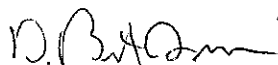
I hereby certify that on January 26, 2012, copies of this notice were served by first class mail, facsimile and emailed, upon all counsel of record and the original was filed with the clerk of the Franklin Circuit Court and the clerk of the Court of Appeals.

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