

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 11-CI-00141

ENTERED
JAN 19 2012
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

THE COURIER-JOURNAL, INC.
and
LEXINGTON H-L SERVICES, INC.

PLAINTIFFS

V.

FINAL ORDER AND JUDGMENT
GRANTING DECLARATORY AND INJUNCTIVE RELIEF

CABINET FOR HEALTH AND FAMILY SERVICES, et al.
and
PATRICK WATKINS

DEFENDANT
INTERVENING DEFENDANT

This action is before the Court on a number of post-judgment motions. The Cabinet for Health and Family Services ("the Cabinet" or "CHFS") has filed a motion to alter or amend the Court's judgment. The Cabinet has previously produced heavily redacted copies of the Internal Reviews of fatality and near fatality cases which are the subject of this Open Records action, and those redactions have been challenged by the plaintiffs. The Court has ordered the Cabinet to produce unredacted copies of those records, and the Court's ruling on the redactions is now ripe for ruling. Both plaintiffs, The Courier-Journal and The Lexington Herald-Leader, have filed motions for attorneys' fees and statutory penalties. The Cabinet has also filed a motion seeking an Order allowing it to keep the redacted portions of the Internal Reviews of fatality and near fatality cases confidential until it has determined whether to seek appellate review of the Court's ruling on that issue. The parties have fully briefed these issues, and the Court heard argument on December 21, 2011 on the Cabinet's request to maintain the confidentiality of the redactions pending its decision on whether to appeal.

For the reasons set forth in the Memorandum Opinion entered this date, and being sufficiently advised, IT IS ORDERED AND ADJUDGED:

1. The Cabinet's motion to alter or amend the Court's Order and Judgment is DENIED;
2. The Plaintiffs' motion to require production of the unredacted fatality and near fatality review is GRANTED in part, and DENIED in part. The Court has reviewed the unredacted documents, and will allow the provisional redaction of certain limited information that is set forth in the Memorandum Opinion entered herewith. The provisional redactions allowed by the Court will remain subject to any request by the plaintiffs to modify the injunctive relief granted in this Order by making additional disclosures of the redacted information, with the burden of proof on the Cabinet to demonstrate good cause and a specific exemption from disclosure under the Open Records Act.
3. The Plaintiffs' motion for attorneys' fees and statutory penalties is GRANTED. The Cabinet shall pay The Courier-Journal the sum of \$44,002.40 in attorneys' fees and costs, and it shall pay Lexington H-L Services, Inc. the sum of \$3,438.00 in attorneys fees and costs. The Plaintiffs will be granted leave to supplement the request for attorneys' fees to reflect any time and expenses incurred in post-judgment enforcement and monitoring of the injunctive relief granted by the Court (including fees and costs incurred since the filing of Plaintiffs' original motions).
4. The Cabinet is directed to pay statutory penalties to the Plaintiffs in the amount of \$9,925.00 pursuant to KRS 61.882(5), with interest at the judgment rate until paid.

5. The injunctive relief granted by the Court in its Order and Judgment entered on December 1, 2011, shall remain in effect, and in addition to the injunctive relief set forth in that Order, the Court permanently enjoins the Cabinet under CR 65 as follows:

A. The Internal Reviews of fatality and near fatality cases sought by the Plaintiffs shall be made available forthwith, with the provisional redactions made by the Court;

B. The Plaintiffs, upon request, may be granted access to any Internal Review of a fatality or near fatality case in unredacted form, after a hearing at which it is determined by the Court whether the privacy interests protected by the redaction are outweighed by the public interest in full disclosure of the unredacted record in any such case. In any such hearing, the burden of proof to sustain the redaction shall be assigned to the Cabinet.

C. The Cabinet shall produce the case files requested by the Plaintiffs, making only such redactions as have been approved by the Court in the accompanying Memorandum Opinion. The Cabinet may also redacted Social Security numbers and other identifying information regarding benefits programs, as set forth in the status reports filed with the Court. Any further redactions shall be prohibited unless the Cabinet makes an individualized showing of entitlement to keep such specific information confidential after notice and a hearing, at which the Cabinet shall bear the burden to establish a specific exemption under the Open Records Act. Any additional claims of confidentiality shall be supported by a specific claim of statutory privilege, and a log of each such redaction shall be filed with the Court, and subject to challenge by the Plaintiffs. The Court will assess attorneys' fees and costs against the Cabinet for any claim of privilege that is not sustained by the Court.

D. The Plaintiffs shall each be entitled to designate the priority of the case files that will be produced for public inspection by notifying the Cabinet of the identity of the case files they wish to examine first, and to list all case files in the order of production they choose. The Plaintiffs shall provide the prioritized list of case files within 5 days of the entry of this Order;

E. The Cabinet shall produce for public inspection the case files requested, in the order requested by the Plaintiffs, with the redactions limited to those set forth above, at a rate of *at least* 1000 pages per week until all requested files have been produced. The Cabinet shall make production of the requested documents each week, by Friday at 12:00 noon, until all such documents have been produced. With each weekly production of records, the Cabinet shall also provide its redaction log for the documents produced. The Cabinet's initial weekly production of documents shall be made on Friday, January 27, 2012, and shall continue each Friday thereafter until production is complete.

F. The newspapers shall file any request for a hearing on the redactions to the documents produced by the Friday following the production of those documents, and shall notice such hearing for this Court's regular motion hour docket on the next Wednesday morning at 9:00 a.m.

G. The parties may modify this schedule for production of documents, and hearings on any objections to redactions, by agreement without further orders of the Court. The Court may refer disputes over redactions to mediation under Local Rule 14.

5. The Courier-Journal's motion for contempt is DENIED without prejudice.

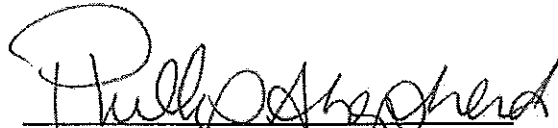
6. The Lexington Herald-Leader's motion to amend the protocol for redaction of child fatality and near fatality records is GRANTED as set forth in the Memorandum Opinion entered this date.

7. The Court's Memorandum Opinion, which accompanies this Order, setting forth the legal basis for the rulings set forth above, is incorporated by reference as if fully set forth. The Court's Opinion and Orders entered November 3, 2011, December 1, 2011 and all other interlocutory orders, are also incorporated by reference under CR 54.02.

8. The Court will retain jurisdiction to enforce the injunctive relief granted in this Order, in accordance with the provisions of CR 65.

9. This is a final and appealable judgment pursuant to CR 54.02 and there is no just cause for delay.

Dated: January 19, 2012


PHILLIP J. SHEPHERD, JUDGE
FRANKLIN CIRCUIT DIVISION I

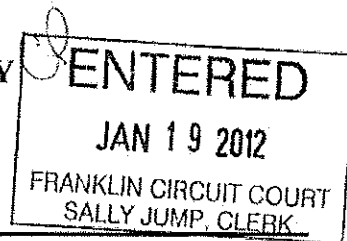
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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 11-CI-00141



THE COURIER-JOURNAL, INC.
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V.

MEMORANDUM OPINION

CABINET FOR HEALTH AND FAMILY SERVICES
and PATRICK WATKINS

DEFENDANT
INTERVENING-DEFENDANT

This action under the Kentucky Open Records Act was jointly filed by two newspapers, The Courier-Journal and The Lexington Herald-Leader, to obtain public access to a large volume of public records of the Cabinet for Health and Family Services ("the Cabinet" or "CHFS") that are related to child fatalities and near fatalities over the last several years. This Court previously has ruled that such records are required to be disclosed under the Open Records Act in the case of *Lexington-Herald Leader v. Cabinet for Health and Family Services*, No. 09-CI-1742 (Opinion and Order, May 3, 2010). The original ruling of the Court that such records were subject to public disclosure came in a case involving a request for public records related to the death of Kayden Branham, a two year old child who was killed by drinking ingredients for making methamphetamines in a meth lab to which his mother (a 15 year old child who also had been found to be abused and neglected by the Cabinet) had brought him. The Cabinet did not appeal this ruling.¹ In most cases, reports of child abuse and neglect, and records of investigations of child abuse and neglect, are confidential by statute. KRS 620.050(5) and (6).

¹ The Cabinet did appeal the Court's ruling awarding attorneys fees and costs, but did not appeal the ruling on the merits of the Open Records Act.

However, in cases in which "child abuse or neglect has resulted in a fatality or near fatality", the statute provides that "[i]nformation may be disclosed by the Cabinet." KRS 620.050(12)(a). The Kentucky Open Records Act provides that all public records are subject to public disclosure, unless there is a specific statutory exemption that protects the confidentiality of the public records. KRS 61.872. Thus, the public records of the Cabinet related to cases in which child abuse or neglect resulted in a fatality or near fatality are subject to public disclosure².

Acting upon this Court's final ruling that such records are public, the newspapers each filed Open Records requests with the Cabinet over a year ago seeking both the Internal Reviews that were conducted under KRS 620.050(12) and the underlying case files in cases involving a child fatality or near fatality. The Cabinet responded with blanket denials of the requests, even going so far as to promulgate an emergency administrative regulation purporting to re-establish the rule of confidentiality of such records. The Cabinet has never asserted specific and narrowly tailored exemptions from the right of public inspection under KRS 61.878, nor did it make any of the non-exempted public records available for inspection until so ordered by the Court almost a year after the original requests.

The newspapers filed this action to obtain declaratory and injunctive relief under the Open Records Act. The Cabinet promulgated an emergency administrative regulation that purported to circumvent the recent court ruling requiring public

² In the case involving the Cabinet's records related to Kayden Branham, the Cabinet vigorously opposed disclosure of the Internal Review conducted under KRS 620.050(12). After the Court ruled that the Internal Review records were subject to public disclosure, the Cabinet for the first time disclosed that no Internal Review had been conducted in that case. Likewise, in the case arising out of the request for records of Amy Dye (*Todd County Standard v. Cabinet for Health and Family Services*, No. 09-CI-1051), the Cabinet did not conduct an Internal Review because it maintained that her death was not the result of child abuse or neglect.

disclosure of these documents. The Cabinet then removed this action to federal court, asserting that federal law governed the question of whether the Cabinet had properly asserted the confidentiality of the requested records. The U.S. District Court for the Eastern District of Kentucky promptly rejected the Cabinet's arguments, and remanded this case to this Court for further action. See *Courier-Journal and Lexington Herald-Leader v. Cabinet for Health and Family Services*, Memorandum Opinion, June 1, 2011 (U.S. District Court, E.D. Ky), 2011 WL 2173921 (E.D. Ky).

After remand from federal court, the parties filed cross-motions for summary judgment, and this Court granted summary judgment on November 3, 2011 holding that the Cabinet had a duty to disclose the records requested by the newspapers. After the Court specifically ruled that the Cabinet was required to make public its Internal Reviews of the child fatalities or near fatalities that were conducted by the Cabinet under KRS 620.050(12)(b), the Cabinet made wholesale redactions of those records, redacting the names of the alleged perpetrators, counties, locations, and other obviously relevant and non-confidential data. Thereafter, the Court required the Cabinet to produce unredacted copies of the child fatality or near fatality reviews for *in camera* judicial review, and the Court will issue its ruling on that matter below.

The Court entered an Order and Judgment setting forth the declaratory and injunctive relief granted under CR 57 and CR 65 on December 1, 2011. The Cabinet has filed a motion to alter or amend that ruling, and the Court today DENIES the Cabinet's motion under CR 59. The Court will also address the other pending motions and related matters, so that the Cabinet can fully discharge its duty to disclose these records to the public without further delay. The Court will also address the Cabinet's supplemental

filing requesting Court approval for its proposed protocol for redactions of the requested documents. Each matter pending before the Court will be addressed in turn.

A. The Cabinet's motion under CR 59 to alter or amend the judgment is denied.

The Cabinet, in its motion to alter or amend under CR 59, seeks an Order holding that the Cabinet fully complied with its obligation to produce the public records documenting the child fatality or near fatality reviews under KRS 620.050(12)(b). There are approximately 90 such reviews that were produced, in heavily redacted form. The newspapers continue to seek the unredacted documents, and that issue will be addressed more fully below in Section B. The Cabinet further seeks judicial approval of its protocol for the redaction of the underlying case files that are the subject of the Open Records requests, and to bar any challenges to the redactions made by the Cabinet under the protocol. Finally, the Cabinet requests the Court to provide for the dissolution of injunctive relief upon the delivery of the approximately 180 redacted case files involving cases of child fatalities or near fatalities.

The protocol submitted to the Court outlining the Cabinet's redaction policy, attached to its motion to alter or amend, provides for a virtually unlimited redaction of both the fatality and near fatality reviews, and the underlying case files. The Cabinet's protocols provide for redacting not only the names of victims and siblings, but redaction of addresses, names of relatives and other information. The Cabinet proposes to redact the names of alleged perpetrators until after exhaustion of all appeals, and the names of any alleged perpetrator when the Cabinet finds the allegation unsubstantiated. The Cabinet proposes to redact the names of parents or guardians who are charged with a crime related to the allegations of child abuse or neglect, even though the criminal

charges are public. These proposed protocols are overly broad, and weigh the asserted privacy interests of perpetrators, alleged perpetrators, victims and siblings over the public's right to know in every instance. In cases in which there has been a death or near death of a child, the balance of the equities weighs more heavily in favor of public disclosure because of the urgent need, codified by the legislature, to expose the Cabinet's actions to public scrutiny when its actions or failure to act has life or death consequences.

The Court notes that prior to the Court's direction for the Cabinet to develop a protocol, the Cabinet in over a year of litigation has never yet provided a specific list of privilege claims as required under the Open Records Act in response to these two Open Records requests by the newspapers. The Open Records Act is quite specific concerning the obligation of a state agency in denying a request to inspect public documents. It states that: "An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). In light of the Cabinet's utter failure to comply with this fundamental requirement of the Open Records Act, the Court finds that the Cabinet has effectively waived the exceptions that it now seeks to apply to the production of these documents. The Open Records Act requires a specific and detailed explanation of how the asserted exemption from disclosure applies to the specific documents requested. See Edmondson v. Alig, 926 S.W.2d 856 (Ky. App. 1996). No such specific claim of exemption from disclosure has been made or supported in the record.

Nevertheless, the Court is mindful that the records sought include matters of great personal sensitivity to the victims of child abuse, and to those citizens who have come forward to report such abuse, and that those individuals have privacy interests at stake under KRS 61.878(1)(a) to the extent that such protection is compatible with the public's right to know how its child welfare agency has operated in these cases involving a fatality or near fatality under KRS 620.050(12).

The personal privacy exemption of KRS 61.878(1)(a) is limited to an "*unwarranted* invasion of personal privacy." In cases involving a death or near death of a child who the state agency has been charged with protecting, full public disclosure of such information is the rule. Full disclosure is often necessary to prevent such tragedies from reoccurring. The Cabinet's proposed protocol allows the Cabinet to keep a vast amount of this information private, without balancing the public's right to know, the need to hold the Cabinet accountable, and the necessity of policy changes to prevent such tragic outcomes in the future.

Accordingly, the Court finds that the Cabinet's proposed protocol is inadequate and unreasonable, and it fails to ensure production of records to which the public is entitled to access under the Open Records Act. The Cabinet's proposed protocol further vests the Cabinet with wide discretion in interpreting and applying the privacy exemption under KRS 61.878(1)(a). Past experience has demonstrated that the Cabinet will apply any privacy exception in the broadest possible manner, giving rise to an inevitable protracted court battle for anyone who seeks to discover the facts surrounding a child fatality or near fatality. Much of the information that would be redacted under the Cabinet's protocols is already public, because many of the cases involving child fatalities

or near fatalities already result in civil or criminal litigation, which is required to be public. See e.g., Johnson v. Simpson, 433 S.W.2d 644 (Ky. 1968). The Court, from its own examination of the Internal Reviews, finds that the information contained in those files is essentially identical to the kind of information that is discussed in open court, and disclosed in criminal and civil case files that are routinely filed in the public record in civil and criminal litigation.

The Court will allow some limited redactions that are explained more fully in Section B below, out of an abundance of caution, in order to preserve the ability of the Cabinet to make a more specific and individualized showing of a recognized exception to the rule of public disclosure codified in the Open Records Act. The Court has reviewed the child fatality and near fatality reviews that were produced for *in camera* inspection, and has provisionally made the necessary redactions, subject to the right of all parties to move to modify those redactions.³ Those documents will be provided to all parties forthwith.

With regard to the case files at issue, the Court will enforce its prior ruling that the Cabinet is required to maintain a redaction log, and to support each redaction by reference to a binding statute or court order. The Court will allow the same redactions from the case files (set forth below) that it has allowed concerning the Internal Reviews of fatality or near fatality cases, subject to the right of the newspapers to challenge any such redaction in any individual case. The newspapers will be given an opportunity to challenge all redactions, and if such a challenge is made, the Cabinet will bear the burden of proof to sustain all redactions, as required under KRS 61.882(3). Costs and attorneys

³ The Cabinet has produced 87 reviews of child fatalities or near fatalities, but those 87 reviews document the Cabinet's actions related to 90 children. One review deals with a double fatality, and two reviews deal with near fatalities involving 2 children.

fees shall be assessed against the Cabinet for any redaction that is successfully challenged by the newspapers. KRS 61.882(5).

B. The Newspapers' motion to require the Cabinet to produce all requested child fatality or near fatality reviews conducted under KRS 620.050(12(b), and to amend the protocol for redaction, is GRANTED in part and DENIED in part.

The Court has reviewed, page by page, the unredacted Internal Reviews the Cabinet provided to the Court. The Court of Appeals has held that failure of the records custodian to properly assert a defense or exception to the Open Records Act should not result in automatic disclosure, but rather requires an examination of the merits of each case, and balancing of competing interests, prior to disclosure. Edmondson v. Alig, *supra* 926 S.W.2d at 859. Having examined the Internal Reviews, the Court has determined that certain limited categories of information could warrant redaction from Internal Reviews and individual case files. The following items have been provisionally redacted by the Court after *in camera* review, subject to the right of the Plaintiffs to request a hearing (at which the Cabinet shall bear the burden of proof) on any such redaction:

1. In the case of a *near* fatality, the name of the child victim may be redacted.
2. In the case of a fatality or a near fatality:
 - a. The name of private citizen who reports the child abuse or neglect may be redacted, unless the informant is a family member. No redactions shall be made when the informant is law enforcement personnel, school personnel, medical personnel, or social service personnel;
 - b. The names of minor siblings, who are mentioned only because of their sibling relationship with a victim, may be redacted. In the individual case files, however, the siblings should be identified by "Sibling #1," "Sibling #2," etc; and
 - c. The name of a minor perpetrator may be redacted.

The provisional redactions made by the Court in the child fatality or near fatality Internal Reviews remain subject to the right of the Plaintiffs to challenge such redactions

on a case by case basis, with the Cabinet bearing the burden of proof to sustain the redactions. The Court's provisional redaction of the items set forth above reflects its attempt to balance the competing factors set forth in KRS 61.878 and the need for public disclosure under the Open Records Act.

The Court's belief is that a surviving minor victim of a near fatality should be treated in the same manner as newspapers have traditionally treated victims of sexual assault, and survivors should not be subjected to the additional trauma of being named in public accounts of the incident. Likewise, the Court has a concern that, in some cases, the names of private citizens who report child abuse or neglect may need to be kept confidential because of the potential for retaliation by a perpetrator, and the potential chilling effect on reporting if all informants are automatically subject to public disclosure in child fatality or near fatality cases⁴. The Court does not believe these concerns extend to public employees (police, EMTs, school personnel, etc) who have a legal duty to report child abuse and neglect. Likewise, the minor siblings of child abuse victims may have privacy interests that could sustain a redaction when their names appear in Internal Reviews or case files solely because of the family relationship. Finally, the Court believes that a minor perpetrator may also have privacy interests that warrant redaction.⁵

The Cabinet's proposed protocols simply continue the Cabinet's effort to blanket the operation of the child welfare system under a veil of secrecy. When considering the

⁴ The Court notes that in many of the Internal Review, confidential reporters of alleged child abuse or neglect are referred to as "anonymous" in the unredacted records.

⁵ There are only 2 cases involving a minor perpetrator. The first case involves a three year old child who stuffed tissue in the mouth of a baby sibling. The Court can find no reason why it is necessary to disclose the identity of the three year old child in that case. The second case, involve a shooting in which a minor shot a sibling, has already been the subject of news coverage by virtue of the criminal proceedings. See <http://www.courier-journal.com/article/20100329/NEWS01/3290327>.

need for confidentiality with regard to records of the child welfare system in similar litigation, other courts have required a showing of good cause to support confidential treatment, and further held that “[g]ood cause cannot ordinarily be demonstrated on the basis of some speculative harm.” Charlie H. v. Whitman, 213 F.R.D. 240, 248 (D.C. NJ 2003). There, the Court noted that “ ‘broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not support a good cause showing.... [G]ood cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.’” *Id.*

The Court further notes that in any given case, the balance of interests may vary based on the unique facts and circumstances presented. In view of the large volume of Internal Reviews and case files requested here, the Court finds that the only workable means of resolving this issue in a timely manner is for the Court to establish the general parameters of potentially permissible redactions (as set forth above), and to make the Court's ruling on this matter subject to modification regarding any Internal Review or case file, on a case by case basis, after the Cabinet's initial redactions.

Accordingly, the Court has made these provisional redactions to the Internal Reviews. The Cabinet shall be responsible for making redactions to the individual case files⁶. If the parties disagree with the Court's determination on information that may be redacted, or with any of the redactions to the case files made by the Cabinet, the parties can bring the matter before the Court by moving to modify the injunctive relief granted in

⁶ The Court's prior Orders, re-affirmed today, require the Cabinet to keep a log of all redactions, and to assert the specific legal basis for each redaction, along with a brief explanation of why an exception to the rule of public disclosure applies as required by KRS 61.880(1).

the injunctive order entered in conjunction with this Memorandum Opinion. The Cabinet will continue to bear the burden of proof to sustain any redaction in any such hearing.

C. The Newspapers' motion for attorneys fees, costs and statutory penalties is GRANTED.

The Court finds that the Cabinet's withholding of the public records requested here has been willful, and in direct violation of the rules set forth by this Court in its prior ruling on the exact same issue in *Lexington Herald-Leader v. Cabinet for Health and Family Services*, No. 09-CI-1742. In these circumstances, the award of attorneys fees, costs, and statutory penalties is both warranted and necessary.

The arguments asserted for and against attorneys fees in this case are virtually identical to the arguments made in *Lexington Herald-Leader v. Cabinet for Health and Family Services*, No. 09-CI-1742, where the Court awarded attorneys fees and costs to the plaintiffs. (Opinion and Order, September 29, 2010). The Court finds that the same result is required here, for the same reasons. No individual or newspaper can afford to challenge the Cabinet's blanket policy of secrecy, which the Cabinet's actions in this case have demonstrated is intractable and unyielding, if the party seeking to open these records to public scrutiny is required to bear full financial burden of litigation. The Cabinet has demonstrated that it is unwilling to modify its policy of shielding these documents from public scrutiny without a protracted legal struggle, in which the taxpayers pay the entire cost of defending the Cabinet's policy of secrecy. It is unfair, and unconscionable, to force the parties who have successfully challenged this policy to be penalized by having to pay their own lawyers and costs. The situation before the Court is exactly what the legislature provided for by giving Courts the authority to award

attorneys fees and costs to parties who successfully challenge the state's assertion of secrecy. KRS 61.882(5).

The Court makes a specific finding of fact that these records of child fatalities and near fatalities have been willfully withheld by the Cabinet in violation of KRS 61.870 to 61.884. The Court further finds that the hourly rates charged by the plaintiffs are reasonable and within the range of the market for legal services on similar matters before this Court, and that the number of hours expended by the plaintiffs' attorneys is reasonable. The Court further finds that the actions of the Cabinet, in failing to make specific responses to the initial Open Records request as required by law, in promulgating an administrative regulation to delay or deny access to these records, and in removing this action to federal court, all caused the plaintiffs to expend substantial amounts of time and money to defend against the Cabinet's legal strategy of protracting, delaying and subverting the implementation of the prior rulings of this Court that require public disclosure of this information regarding child fatalities and near fatalities.

The motions for attorneys fees and costs have been properly supported by affidavit, and by contemporaneous time and expense records. In light of these factors, the Plaintiffs are entitled to the full amount of attorneys fees and costs that have been requested. See Meyers v. Chapman Printing Co. 840 S.W.2d 814, 825 (Ky.1992); see also Detroit Free Press v. Department of Justice, 73 F.3d 93 (6th Cir. 1996).

Finally, the Court notes that it rejected the plaintiffs' claims for the imposition of civil penalties in *The Lexington Herald-Leader v. Cabinet for Health and Family Services*, No. 09-CI-1742 (Opinion and Order, Sept. 29, 2011). There, this Court recognized that the Cabinet's position, though legally erroneous, was based on internal

precedent, and had previously been upheld by Opinions of the Attorney General. In those circumstances, this Court reasoned that it would be unfair to impose sanctions.

Here, by contrast, the Court's ruling that these documents are subject to public disclosure has been established by a final, unappealed ruling on the merits. Notwithstanding this ruling, the Cabinet has continued to deny access to these records, delay through litigation tactics, and to attempt to obstruct public access through the administrative process. In these circumstances, the award of costs and attorneys fees are is required in order to vindicate the legislative policy of the Open Records Act. It would be an abuse of discretion to deny attorneys fees in these circumstances. *See Cincinnati Enquirer v. City of Fort Thomas*, ___ S.W.3d ___, (2011 WL 5008308) (Ky. App. 2011).


The award civil penalties is discretionary, even when the agency's action is willful. *Lang v. Sapp*, 71 S.W.3d 133, 135(Ky. App. 2002). Under KRS 61.882(5), the maximum penalty is \$25 a day for each day the newspapers were denied the right to inspect or copy the records at issue. Here, the willfulness of the Cabinet's actions in denying and obstructing the public's right of action is evidenced by the emergency administrative regulation that was promulgated solely to provide a basis to deny the request, but then abandoned without submission of an permanent administrative regulation as required by KRS 13A.190. Here, the only basis for the "emergency" was the Cabinet's unyielding policy of denying public access to records that the Court had ruled were subject to public inspection under the Open Records Act. This conduct illustrates the Cabinet's willful decision to deny and obstruct public access to these documents. This willful denial of public access supports imposition of the civil

penalties remedy specifically provided for in the Act, and the Court imposes a civil penalty under KRS 61.882(5) in the amount of \$25 per day, for a total of \$9,925.00.⁷

D. The Cabinet is permanently enjoined to comply with the injunctive orders of this Court requiring public access to the Cabinet's records in cases involving a child fatality or near fatality.

This Court has previously granted injunctive relief to require the production of the requested Cabinet Internal Reviews of fatalities and near fatalities, and the case files. The Court today re-affirms those injunctive orders and modifies them in the form of a permanent injunction that will ensure the timely production of all such documents, with minimal redactions required by law. As set forth in the Final Order that accompanies this Memorandum Opinion, the Cabinet is directed to make the requested documents available for inspection by the Plaintiffs, under the terms and conditions set forth in this Memorandum Opinion, on the timetable required by the Final Order.

SO ORDERED this 19th day of January, 2012.


PHILLIP J. SHEPHERD
JUDGE, FRANKLIN CIRCUIT COURT

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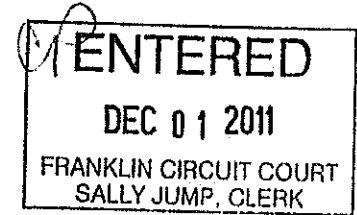
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⁷ These penalties run from December 17, 2010, the date of the original request, until the entry of this Order on January 19, 2012.

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PLAINTIFFS

V. ORDER AND JUDGMENT

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and
PATRICK WATKINS

DEFENDANT
INTERVENING
DEFENDANT

This matter came before the Court on November 30, 2011 on Plaintiffs' Motion for Temporary Injunctive Relief. Present on behalf of the Plaintiffs The Courier-Journal, Inc. and Lexington H-L Services, Inc. were Hon. Jon. L. Fleischaker and Hon. Kif H. Skidmore, respectively. Present on behalf of the Defendant Cabinet for Health and Family Services (CHFS) were Hon. Christina Heavrin, Hon. D. Brent Irvin, and Hon. Mona Womack. Counsel was not present on behalf of the Intervening Defendant, Patrick Watkins. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED:

1. Plaintiffs' Motion for Injunctive Relief is GRANTED in part and DENIED in part under CR 65 as set forth below.
2. Defendant CHFS shall within ten (10) days from the date of entry of this Order produce to Plaintiffs copies of the approximately ninety (90) written summaries of Internal Reviews of fatalities or near fatalities that CHFS prepared under KRS 620.050(12).

3. Defendant CHFS shall implement the plan that it presented to the Court for hiring temporary staff to assist with reviewing and redacting, where appropriate, the roughly 180 case files to which the Plaintiffs requested access.
4. Defendant CHFS shall develop a written protocol for its staff to follow regarding redaction of the requested files, which shall be filed with the Court and served on the Plaintiffs within ten (10) days of the entry of this Order
5. Defendant CHFS shall keep a redaction log on each file, which shall be produced with each individual file. CHFS bears the burden of showing the basis under the Open Records Act for any redactions.
6. Understanding the substantial administrative burden that Plaintiffs' request poses on CHFS, the Court nevertheless expects prompt production of the requested files at a rate approximating CHFS' proposal in open court of ten to fifteen files per week. The Cabinet shall file a monthly status report documenting the steps it has taken to produce these records, including the hiring and training of temporary staff, within thirty (30) days of the entry of this Order, and every thirty (30) days thereafter until all requested documents have been produced.
7. Any dispute between the parties regarding the compliance with this Order, or the redactions to the documents produced, shall be brought before the Court by motion to be noticed for hearing at the regular motion hour dockets of the Court.
8. The Court's Opinion and Order entered November 3, 2011 is incorporated by reference and adopted as if fully set forth herein, and the Plaintiffs' request for declaratory and injunctive relief is GRANTED under KRS 418.040, CR 57 and

CR 65 to the full extent set forth in that Opinion and Order, as supplemented herein.

9. Plaintiffs' request for attorney's fees, civil penalties, and costs shall be determined by separate order. The plaintiffs are directed to document their requests for this relief, with an affidavit setting forth in detail their attorneys fees and costs, to be filed within ten (10) days of the entry of this Order. After the filing of this request, the parties are directed to meet and confer in an attempt to resolve those issues, and if no resolution can be reached within twenty (20) days thereafter, the Cabinet shall file its response and the plaintiffs shall set the matter for a hearing before the Court.

10. This is a final and appealable judgment and there is no just cause for delay.

SO ORDERED this 1st day of December, 2011.



PHILLIP J. SHEPHERD
JUDGE, FRANKLIN CIRCUIT COURT

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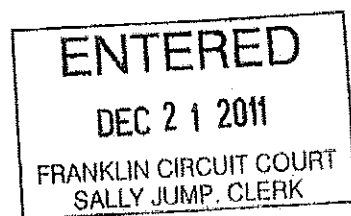
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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 11-CI-00141



THE COURIER-JOURNAL, INC.
and
LEXINGTON H-L SERVICES, INC.

PLAINTIFFS

V.

ORDER

CABINET FOR HEALTH AND FAMILY SERVICES, et al.
and
PATRICK WATKINS

DEFENDANT
INTERVENING
DEFENDANT

This matter came before the Court on December 21, 2011 on Defendant the Cabinet for Health and Family Services' Motion to Alter or Amend the Court's December 1, 2011 Order. Also before the Court was Plaintiffs' Motion to Hold the Cabinet in Contempt and to Alter the Protocol for Redaction of Child Fatality or Near Fatality Records. Present on behalf of the Plaintiff The Courier-Journal, Inc. were Hon. Jon. L. Fleischaker and Hon. Jeremy Rogers. Present on behalf of the Plaintiff Lexington H-L Services, Inc. was Hon. Kif H. Skidmore. Present on behalf of the Defendant Cabinet for Health and Family Services (CHFS) were Hon. Christina Heavrin and Hon. D. Brent Irvin. Counsel was not present on behalf of the Intervening Defendant, Patrick Watkins. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED:

1. The Cabinet shall, by the close of business on December 22, 2011, produce to the Court, pursuant to KRS 61.882(3), complete and unredacted copies of the approximately ninety (90) written summaries of Internal Reviews of fatalities or

near fatalities that CHFS prepared and previously provided to the plaintiffs in redacted form. After review, the Court will enter an Order either making the unredacted records public, or sustaining the Cabinet's redactions in whole or in part.

2. The Court will take under submission the Cabinet's motion to alter or amend, and the Plaintiffs' motions for sanctions and to alter the protocol for redaction. The Court will enter a more detailed Order setting forth the required procedure for compliance with this Court's prior order and judgment requiring production of the Cabinet's records in the child abuse and neglect cases resulting in a fatality or near fatality.

SO ORDERED this 21st day of December, 2011.


PHILLIP J. SHEPHERD
JUDGE, FRANKLIN CIRCUIT COURT

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 11-CI-00141

ENTERED
NOV 03 2011
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

THE COURIER-JOURNAL, INC. and
LEXINGTON H-L SERVICES, INC.

PLAINTIFFS

V.

OPINION AND ORDER

CABINET FOR HEALTH AND FAMILY SERVICES, et al.
and PATRICK WATKINS

DEFENDANT
INTERVENING DEFENDANT

I. Introduction

This action is before the Court for review of the decision of the Cabinet for Health and Family Services on a request by The Courier-Journal and the Lexington Herald Leader for access to public records concerning child fatalities in the Commonwealth of Kentucky under the Kentucky Open Records Act. Also before the Court is a Motion to Intervene filed on behalf of four anonymous persons who claim a privacy interest in the records sought by the newspapers. For the reasons stated below, the Motion for Summary Judgment by the newspapers is GRANTED and the Motion to Intervene filed by the anonymous intervenors is DENIED.

II. The motion to intervene is untimely and the interests of the anonymous intervenors are adequately represented by the Cabinet.

Two Motions to Intervene have been filed in this action. The first was filed by Patrick Watkins, a criminal defendant who asserts that the opening of the public records at issue could adversely affect his rights related to the criminal charges pending against him, which arise out of one of the child fatalities at issue. The Court GRANTED Mr.

Watkins' motion to intervene following the arguments of his counsel at the hearing held on August 17, 2011.

Mr. Watkins, along with his wife, Joy Watkins, was charged with and tried for the murder of their daughter, Michaela Watkins. Both were convicted in September 2008 and sentenced in October 2008 to life sentences. Subsequently, an appeal for both was filed. In April 2011, the case for Mr. Watkins was reversed by the Supreme Court of Kentucky in 2008-SC-000798-MR. The Commonwealth filed a petition for rehearing/petition for modification, which was denied by the Supreme Court on September 22, 2011. The case was remanded to Clark County Circuit Court for a retrial. A pretrial conference is set for December 8, 2011, but no trial date has been scheduled.

The second motion to intervene was filed by Jane Does 1, 2, 3, and 4. The parties were heard in open court on August 17, 2011. The matter was held in abeyance for ten (10) days to allow Jane Does 1, 2, 3, and 4 to file supplemental legal authority to support the right to proceed anonymously. Having considered the arguments of the parties, reviewed the record, and being otherwise sufficiently advised, the Court hereby issues the following Order DENYING the Jane Does' motion to intervene.

The Jane Does assert a privacy interest based on information that is contained in public records in the custody and control of CHFS. They argue that pursuant to CR 24.01 they are entitled to intervene as a matter of right. CR 24.01(a) provides for intervention by right "when a statute confers an unconditional right to intervene." In the present case, there is no statutory authority conferring an unconditional right to intervene. In support of their argument for intervention by right under CR 24.01(a), proposed intervenors point to KRS 61.878(1)(a), which exempts from Kentucky's Open Records Act "[p]ublic records

containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." KRS 61.878(1)(a), while creating an exemption, does not amount to an unconditional right to intervene.

CR 24.01(b) also provides for intervention by right when the moving party has an interest in the subject matter of the action and "is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately protected by existing parties." In the present case, proposed intervenors' asserted interest is already adequately protected by CHFS, an existing party. The Jane Does are asserting a privacy interest in the records in the possession of CHFS. The Cabinet, in its response to the newspapers' open records request and the ensuing litigation, has vigorously asserted the privacy rights of these intervenors, and all other persons similarly situated. In fact, the Cabinet's legal arguments rely heavily on the privacy interests of these adults, who have been involved in child welfare cases that have resulted in fatalities to children. The arguments advanced by the Cabinet are identical to the arguments asserted by the proposed intervenors on these points, and there has been no showing that the interests of the proposed intervenors are not fully protected.

Proposed intervenors cite Beckham v. Bd. of Education, 873 S.W.2d 575 (Ky. 1994) as authority for their intervention by right under 24.01(a). Beckham, however, is distinguishable from the present case. First, the appellants in Beckham were not seeking to intervene, but rather were seeking to establish standing. Second, the appellants in Beckham were identified by name, unlike the anonymous parties in the present case. Finally, Beckham involved teacher disciplinary records in possession of the Board of

Education rather than child fatality/near fatality records in possession of CHFS, and the specific statutory and privacy interests at stake substantially differ. In this Court's view, the controlling statutes explicitly provide that adults who have been involved in abuse and neglect investigations by the Cabinet have a greatly diminished expectation of privacy in cases that have resulted in a child fatality.

Lastly, even if they were to intervene, by right or permissively, the Jane Does have no right to proceed anonymously. The Jane Does have not cited, nor have we found, any prior decisions which recognize or discuss the right of similarly situated individuals to proceed anonymously. CR 10.01 provides that the "style of the action shall include the names of all the parties." The Kentucky Rules of Civil Procedure do not provide for anonymous plaintiffs. There is no Kentucky case discussing the right to proceed anonymously.

Other courts, however, have recognized an exception to the general rule that a complaint must state the name of all parties and allow a party to proceed anonymously in special circumstances. Doe v. Harlan Co. Sch. Dist., 96 F. Supp. 2d. 667 (E.D. Ky. 2007). Nevertheless, courts have been reluctant to find "special circumstances" and have done so only extraordinary situations such as when a party receives actual threats of violence due to religious beliefs. Doe v. Stegall, 653 F.2d 180 (5th Cir. 2001). Fear of a hostile public reaction or retaliation is very rarely sufficient to justify anonymity in judicial proceedings. Doe v. Stegall, 653 F.2d 180 (5th Cir. 2001); Jane Endangered and Jane Imperiled v. Louisville/Jefferson County Metro Gov't Dep't of Inspections, 2007 WL 509695 (W.D. Ky.). The present case does not present the sort of "special circumstances" necessary to proceed anonymously.

It is a bedrock principle of our judicial system that judicial proceedings, both civil and criminal, are to be conducted in the open, subject to the full scrutiny of the public. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580, n. 17 (1980); Gannett v. Depasquale, 443 U.S. 368, n. 15 (1979).

As the Court noted in Doe v. Frank, *supra*:

...Lawsuits are public events. A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of a physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough.

951 F.2d 320, 324.

Because the Jane Does do not have an unconditional right to intervene by statute and because CHFS is already adequately protecting their privacy interests, the Motion to Intervene is DENIED.

III. The newspapers have a right to obtain the requested public records.

Factual and Procedural Background:

The newspapers brought this action under KRS 61.882 to appeal the decision of the Cabinet for Health and Family Services ("the Cabinet") to deny an open records request. The newspapers also seek injunctive and declaratory relief relating to the Cabinet's refusal to disclose public records. The Plaintiffs, The Courier-Journal, Inc. and Lexington H-L Services, Inc., are newspapers that seek access to the public records of the Cabinet. The public records sought by the newspapers concern the Cabinet's discharge of its duties to minors in the custody and control of the Cabinet. Specifically, the public records sought by Plaintiff The Courier-Journal, Inc. concern all of the Cabinet's child fatality reviews conducted from July 1, 2009 to the date of the request (December 17,

2010), as well as fatality reviews of Robert Ross Jr., an infant, who died July 30, 2008 and Christopher Allen, age 2, who died August 28, 2008. The public records sought by Plaintiff Lexington H-L Services, Inc. concern "any person under the age of 18 who died while under the supervision, control or monitoring of the Cabinet" from July 1, 2009 to June 30, 2010.

The newspapers filed open records requests and the Cabinet denied public access to the records on the grounds that the records are confidential pursuant to KRS 620.050¹ and KRS 61.878(1)(k)². The Plaintiffs filed a Complaint with this Court on January 27, 2011 alleging that the Cabinet violated the Open Records Act³ and asking for an injunction to prohibit the enforcement of the emergency regulation the Cabinet promulgated.

Plaintiffs have filed a joint motion for summary judgment, and the Cabinet filed a cross-motion for partial summary judgment. The issues have been fully briefed and the Court has heard oral arguments on the motions. For the reasons stated below, the Cabinet's cross-motion is DENIED and the Plaintiffs' motion is GRANTED.

IV. Discussion

The present case addresses the issue of whether statutory mandates protecting the confidentiality of public records concerning children who are in the custody and control

¹ This statute governs reports of child abuse and neglect, and provides for confidentiality of child abuse and neglect reports, with certain enumerated exceptions, including a provision that "[i]nformation may be publicly disclosed by the cabinet in a case where the child abuse or neglect has resulted in a child fatality or near fatality." KRS 620.050(12)(a).

² This statute prohibits the disclosure of records or information prohibited under federal law. Federal law requires states receiving funding under The Child Abuse Prevention and Treatment Act ("CAPTA") to have a plan describing methods in place "... to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians." 42 U.S.C. § 5106a(b)(2)(A)(viii). A clear exception, however, provides that a state's plan should also contain "provisions which allow for the public disclosure of findings or information about the case of child abuse or neglect which as resulted in a child fatality or near fatality." 42 U.S.C. § 5106a(b)(2)(A)(x).

³ KRS 620.050(12)(a) and 42 U.S.C. § 5106a(b)(2)(A)(x).

of the state's publicly funded child welfare system can also be used to protect the Cabinet itself from scrutiny when a child in its care and supervision has died. The record before this Court presents no legal basis to deny public access to these records. The Court notes that these exact issues were litigated fully in Lexington H-L Services, Inc. and The Courier-Journal, Inc. vs. Cabinet for Health and Family Services, Franklin Circuit Court Case No. 09-CI-1742. The Cabinet's arguments in this cases mirror and reiterate the arguments advanced there, although the Cabinet's briefing has gone into greater detail regarding the legal and policy considerations and historical background of the rule of confidentiality that applies to child welfare matters in general and reports of child abuse and neglect in particular.

The Court is fully aware of the legal and policy reasons supporting the application of confidentiality to reports of child abuse and neglect. However, the Court is also aware that this general rule of confidentiality has one clear, explicit, and, under Kentucky law, mandatory exception that applies in cases that have resulted in a child fatality or near fatality. After reviewing the briefs filed in this case, the Court must conclude that the Cabinet is so immersed in the culture of secrecy regarding these issues that it is institutionally incapable of recognizing and implementing the clear requirement of the law that the general rule of confidentiality is subject to a specific exception in cases that have resulted in a child fatality or near fatality. In these circumstances, it is the duty of the judicial branch of government to require compliance with the clear command of the law.

a. The Cabinet is bound by *res judicata* to the judgment in the first lawsuit.

The Plaintiffs argue that the Cabinet is barred by the doctrine of *res judicata* from re-litigating issues litigated in a case previously before this Court, styled Lexington H-L Services, Inc. and The Courier-Journal, Inc. vs. Cabinet for Health and Family Services, Franklin Circuit Court Case No. 09-CI-1742 (“the first lawsuit”). The Cabinet, in response, argues that *res judicata* does not apply because the determination of when disclosure of confidential information is permitted requires a case-by-case analysis of each set of records.

The doctrine of *res judicata* includes both issue preclusion and claim preclusion. Yeoman v. Commonwealth Health Policy Bd., 983 S.W.2d 459, 464-65 (Ky. 1998). Issue preclusion functions to bar parties from re-litigating the same issue when a final judgment has been rendered on the merits in a previous action. Id. In the first lawsuit, the parties litigated whether the Cabinet’s records are exempt from disclosure under the Open Records Act when child abuse or neglect results in a child fatality or near fatality. The Cabinet argued a number of exceptions prevented disclosure, including HIPPA, the personal privacy exception, and KRS 620.050(5). This Court rejected the Cabinet’s arguments and held that the Cabinet’s records in the case of child fatality or near fatality must be disclosed. Though in the first lawsuit the Cabinet appealed the decision on the issue of attorney’s fees, it did not appeal the decision on the merits. Thus, this Court’s decision on the merits is final.

In the present litigation, the Cabinet argues that *res judicata* does not apply because the requests for records are not identical to those at issue in the first lawsuit and the persons named in the records have unique privacy interests that must be considered

on a case-by-case basis. This Court disagrees. The Cabinet is attempting to raise exactly the same issues in the present case as it did in the first lawsuit. The issues the Cabinet now raises were fully litigated in the first lawsuit. There was a final decision on the merits in that case. The Cabinet did not appeal the decision. As such, the Cabinet is bound by this Court's final decision in the first lawsuit under the principles of *res judicata*.

b. The requested records are squarely within the exception to the general rule requiring confidentiality for public records involving child fatalities.

Beyond *res judicata*, the Cabinet's arguments fail for the same reasons they failed in the first lawsuit. In the present case, the Cabinet, when presented with a request for records pertaining to fatalities or near fatalities of children in its care, denied the request based on two sections of state law – KRS 620.050 and KRS 61.878(1)(k). Upon review, it is apparent that these statutes are inapplicable and have been misinterpreted by the Cabinet.

The Cabinet has gone to great lengths to explain privacy issues as they relate to the present case. See Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment. The Court acknowledges the significance of constitutionally-protected privacy rights and the rationale behind keeping juvenile court proceedings confidential. The Court is well aware of the general rule under state and federal law requiring strict confidentiality of state child abuse investigations. KRS 620.050; KRS 61.878(1)(k); 42 U.S.C. § 5106a(b)(2)(A)(viii). However, the Court also finds, and the Cabinet continues to flatly ignore, that there are explicit exceptions to this general rule.

First, federal law requires states receiving funding under The Child Abuse Prevention and Treatment Act (“CAPTA”) makes the receipt of federal funding contingent on maintaining confidentiality in child abuse investigations. 42 U.S.C. § 5106a(b)(2)(A)(viii). Nevertheless, a clear exception, which applies to the present litigation, permits “the public disclosure of findings or information about the case of child abuse or neglect which as resulted in a child fatality or near fatality.” 42 U.S.C. § 5106a(b)(2)(A)(x).

Second, the Kentucky statute to which the Cabinet points as mandating the confidentiality of child abuse and neglect reports contains a number of exceptions. One such exception, which squarely applies to the present litigation, provides that “[i]nformation may be publicly disclosed by the cabinet in a case where the child abuse or neglect has resulted in a child fatality or near fatality.” KRS 620.050(12)(a).

Moreover, in its response to the Plaintiffs’ request for records, the Cabinet posits that there is “sketchy guidance” from the U.S. Department of Health and Human Services regarding what records may be disclosed under CAPTA. In addition to the explicit language of the statute indicating that such records may be released in the case of a child fatality or near fatality, the intent of the legislature is clear. The U.S. Senate has reported that the CAPTA provision which mandates the “public disclosure of information about a case of child abuse or neglect which has resulted in a child fatality or near fatality *ensures improved accountability of protective services and can drive appropriate and effective systemic reform.*” Sen. Rep. No. 378 (2010) (emphasis supplied). Likewise, the committee report in the U.S. House of Representatives explained the purpose of this provision of law, finding “that in the case of a fatality or near-fatality resulting from child

abuse or neglect, that the factual information regarding how the case was handled may be disclosed to the public *in an effort to provide public accountability for the actions or inaction of public officials.*" H.R. Rep. No. 104-430 (1995) (emphasis supplied). The Cabinet simply cannot use the defense of privacy to shield itself from the explicit statutory mandate designed to allow public accountability for agency actions or omissions in the most egregious of cases that result in a child fatality or near fatality.

c. The public interest outweighs the requirement of confidentiality.

The Court must also consider the public importance of the records that the Cabinet seeks to protect. Where the records that a party seeks to keep confidential "involves issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality." Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3rd Cir. 1994). The public has a strong interest in having access to records concerning the activities of the government to ensure it is carrying out its function. See Doe v. Conway, 2009-CA-000641 (Ky. Ct. App. 2009).

In a case strikingly similar to the present case, a class of children who had been in the custody and care of the New Jersey Division of Youth and Family Services (DYFS) brought suit against DYFS for failing to provide needed services or to protect children from sexual, physical, and psychological abuses. Charlie & Nadine H. v. Whitman, 214 F.R.D. 240 (D.N.J. 2003). Two newspapers intervened and sought to overturn the existing Confidentiality Order. The court permitted discovery of murder and other child abuse investigation reports prepared by DYFS after redacting identifying information.

The court noted:

[T]his issue is of great public interest, impacting on the health and safety concerns of the children not only under the care of DYFS but others who may one day come into contact with DYFS. The only way for the public to know to know of the state of affairs of our child welfare system is to have reasonable access to case records... Furthermore, it is important that governmental entities be held accountable for their action not only to prevent further tragedies..., but to answer to its citizens, whose taxpaying dollar support DYFS.

Id. at 248.

This Court agrees with the District Court of New Jersey and finds that child fatalities or near fatalities occurring while the child is in the custody or care of the Cabinet are of great public concern. The release of these records will help to keep the Cabinet accountable to prevent future tragedies and to answer to taxpayers who fund the Cabinet.

d. The emergency regulation was improperly promulgated.

The Cabinet did not properly promulgate the Emergency Regulation under KRS 13A.190, which sets forth the procedure for enacting emergency regulations. KRS 13A.190 identifies the situations in which an emergency regulation can be promulgated, none of which are applicable here. The Cabinet argues that the promulgation of the Emergency Regulation was valid because the Cabinet was at risk of losing federal funding under CAPTA by disclosing the requested records. This Court disagrees. The loss of funding the Cabinet asserts is merely speculative. The federal government did not provide a directive to the Cabinet on the matter. The Court is unaware of a situation where the possibility of the loss of funding created injury sufficient for the enactment of an emergency regulation.

e. Release of records concerning intervening defendant Watkins will not violate the right to a fair and impartial jury.

Intervening Defendant Patrick Watkins argues that if the Cabinet's file on Michaela Watkins is released to the Plaintiffs, or to the media in general, information that may have been kept out of evidence in the first trial may enter the public domain, thereby making it more difficult to seat a fair and impartial jury on retrial. The Court finds this argument without merit.

Watkins has already been the subject of wide publicity in the community in the first trial, in which he was convicted of murdering his daughter Michaela. There has also already been media coverage about the pending retrial. That the Cabinet's records may contain information not revealed in the first trial and may result in pretrial publicity is not a sufficient basis to keep the records sealed.

Courts cannot censor the press in order to protect a criminal defendant's right to a fair trial because there are numerous other ways to protect fair trial rights that do not violate the First Amendment. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 601-04 (1977). A criminal defendant's right to a fair and impartial jury can be safeguarded by extensive voir dire and the exercise of challenges, a continuance, or even a change of venue. See Groppi v. Wisconsin, 400 U.S. 505, 510 (1971); Brewster v. Commonwealth, 568 S.W.2d 232 (Ky.1978). This Court does not make a recommendation regarding which of these methods is best suited for Mr. Watkins' retrial, but leaves such a decision to the sound discretion of the Clark County Circuit Court.


III. Conclusion

For the reasons stated above, the Plaintiffs' Joint Motion for Summary Judgment is GRANTED and the Cabinet's Cross-Motion for Partial Summary Judgment on the issue of the emergency regulation is DENIED. The Court RESERVES ruling on the

award of attorney's fees, costs, and penalties under KRS 61.882(5). The Court will defer ruling on motions for attorney's fees and costs until the entry of its final judgment and to give the Cabinet a full opportunity to brief and argue this issue.

The Court recognizes that the production of the records requested here, covering several years and numerous investigations, will impose a substantial administrative burden on the Cabinet. The Open Records Act provides that "the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection." KRS 61.872(5). Accordingly, the parties are directed to meet and confer in an effort to reach agreement on a procedure for the orderly and timely production of the records requested. The parties shall conduct this negotiation within ten (10) days of the entry of this Order and file a joint status report as to any agreement reached. If the parties are unable to reach an agreement, the parties shall jointly notify the Court, and the Court will set the matter for a further hearing and will issue injunctive relief specifying the time, place, and manner of production. The Court will enter a final and appealable judgment after ruling on any remaining issues involving injunctive relief and attorney's fees.

SO ORDERED this 3rd day of November, 2011.


PHILLIP J. SHEPHERD
JUDGE, FRANKLIN CIRCUIT COURT

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