

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 1
No. 06-CI-1373**

JUSTICE AND PUBLIC SAFETY CABINET

PLAINTIFF

v.

**STEPHEN MALMER and
GREGORY D. STUMBO, ATTORNEY GENERAL**

**DEFENDANT
INTERVENING DEFENDANT**

OPINION & ORDER

This action is before the Court on cross-motions for summary judgment on the merits of the appeal by the Justice and Public Safety Cabinet (“the Cabinet”) of an Open Records decision of the Office of the Attorney General (“OAG”). The Open Records decision held that the Cabinet was required to disclose electronic mail (“email”) messages requested by the Defendant Stephen Malmer. Mr. Malmer requested all “Personal non-work related emails between Bobbie Malmer and David Moss dated between 11-01-05 thru 6-01-06.” The Cabinet's General Counsel denied Mr. Malmer's request, on the grounds that the requested emails were within the statute's personal privacy and preliminary document exceptions to the rule of public disclosure. The emails in question were sent through the Commonwealth of Kentucky's email system, on state computers, during working hours, although it has been stipulated that the subject matter of the emails was entirely personal and non-work related. OAG then issued the decision under appeal, 06-ORD-184, finding that the “Justice and Public Safety Cabinet violated the Open Records Act by denying the request for non-work related emails exchanged by Cabinet employees on the basis of KRS 61.878(a), (i) and (j).”

In addition to the controversy over whether the Cabinet is required to produce the requested emails under the Open Records Act, the Cabinet has challenged the constitutionality of certain portions of the Open Records Act, specifically, KRS 81.880(3) and (5). These sections of the law provide that the Attorney General “shall not ... be named as a party in any Circuit Court actions regarding the

enforcement” of the Open Records Act¹, and that any unappealed decision of the Attorney General in Open Records cases “shall have the force and effect of law.”² The Court allowed the Attorney General to intervene for the limited purpose of defending the constitutionality of the statute and the OAG's administration and implementation of the Open Records Act.³ The Court has treated the Attorney General's Response as a cross-motion for summary judgment, and ordered that the Plaintiff's motion for summary judgment against the Attorney General be held in abeyance pending adjudication of the underlying Open Records issue.⁴ The Court now finds that these issues have been fully briefed, and are also ripe for decision.

I. The Attorney General's Open Records Decision #06-ORD-184 correctly held that the emails in question are subject to disclosure under the Open Records Act.

The legislature has carefully defined public records for purposes of compliance with the Open Records Act. The statutory definition includes all “documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency.” KRS 61.870(2). The issue presented here is narrow: are the non-work related emails conveyed between two public employees on the state email system subject to public disclosure under KRS 61.872?

OAG, in a thorough and well reasoned legal opinion, determined that such emails are subject to public disclosure. The Cabinet advances two grounds for exemption of the requested records from disclosure. First, the Cabinet argues that the requested emails are “public records containing information of a personal nature where public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy” under KRS 61.878(1)(a). Second, the Cabinet contends that the emails constitute preliminary drafts, notes, or correspondence with private individuals that are exempt from

1 KRS 61.880(3)
2 KRS 61.880(5)(b)
3 Order, 2/26/07
4 Order, 4/18/07

public disclosure under KRS 61.878(1)(i) and (j).

The Cabinet relies on the decision of the Court of Appeals in Baker v. Jones, 1999 S.W.3d 749 (Ky.App. 2006). There, the Court of Appeals upheld the denial of an Open Records request seeking emails between the mayor and city council regarding a “controversy involving alleged overbillings of the local Convention Center by its attorney and accountants for professional fees.” *Id.* at 751, n.1. The Court of Appeals held that the emails in question were preliminary in nature, and thus specifically exempt under KRS 61.878(1)(i) and (j). The Court further held that the “unauthorized disclosure of emails to a local newspaper reporter” did not constitute “a waiver of the disclosure exemption.” *Id.*

The emails at issue in Baker “were preliminary discussions involving what course of action should be taken in regard to a controversy pertaining to apparent irregularities in the finances of the local convention center.” *Id.* at 752. By contrast, the emails requested here are limited to non-work related communications made on state email, during working hours, by public employees. Such emails cannot divulge preliminary opinions or preliminary internal deliberations about a public policy decision. Accordingly, they are completely outside the scope of the exemption for “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” *Id.*

The Cabinet also relies on the decision of this Court in Gannett v. Governor Ernie Fletcher, No. 05-CI-1015, (Slip Op., May 17, 2006), in which the Franklin Circuit Court, Division 2, held that “conversational emails and non-policy fact based [emails] are not subject to public disclosure.” *Id.*, p. 6. The emails at issue in the *Gannett* case involved emails of a high level volunteer in the Governor's office who maintained a state email account. The Court agreed that such emails did not fall within the exemption for preliminary documents set forth at KRS 61.878(1)(i) and (j), but held that such personal emails “do not fit within the framework of the Open Records Act.” The Court went further, and explained that “[t]his category only includes emails that are purely personal and do not involve state

business. This method of electronic communication was not contemplated when the Open Records Act was passed and this type of message is simply not governmental. As such, the Court considers these emails private communications not subject to disclosure under KRS 61.878(1)(a).” *Id.*

The *Gannett* case can be distinguished from the instant action on the grounds that it involved a private citizen who served solely in a volunteer capacity in government, rather than a state employee. However, this Court does not agree that email is a form of communication that “was not contemplated when the Open Records Act was passed.” While that statement may be true of the original enactment of the Open Records Act in 1976, it is certainly not true of the amendments to the Act that were enacted in 1992⁵, 1994⁶, and 2005⁷. In fact, the definitions section of the Act makes specific reference to “tapes, diskettes, recordings, software or other documentation regardless of physical form or characteristics” that plainly include email and electronic data. KRS 61.870(2). *See also* KRS 61.870(3)(a) and (b) (statutory definition of “software”).

In *Gannett*, the trial court stated that it “considers these emails private communications not subject to disclosure under KRS 61.878(1)(a).” (Slip Op., p. 6). This Court disagrees, to the extent that the emails in question were sent, received, or maintained on the state email system.

Another factor which distinguishes this case from *Gannett* is the undisputed fact that in this case both the public employees signed waivers of their personal privacy rights with regard to electronic information generated on the job. Mrs. Malmer's waiver expressly acknowledged “I understand that the electronic resources are provided for the transaction of government business, only, and that no personal use is permitted. All information processed electronically through the state's computer resources is the property of the state, and is subject to inspection, recording, monitoring or removal by

5 1992 Ky. Acts, ch. 163, sec. 5

6 1994 Ky. Acts, ch. 262, sec. 5

7 2005 Ky. Acts, ch. 45, sec. 6.

management at any time.”⁸ Mr. Moss signed a waiver that also acknowledged that “All information processed electronically through the state's computer resources is the property of the state, and is subject to inspection, recording, monitoring or removal by management at any time.” The waiver signed by Moss also stated that “incidental personal use of Internet and E-mail are [sic] permissible, but not encouraged.”⁹

The Open Records Act is predicated on an explicit legislative policy “that free and open of examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.” KRS 61.871. (Emphasis supplied). The Court, accordingly, must construe the personal privacy exception to the rule of open public records as narrowly as possible. In this case, the communications are by definition non-work related, but that does not mean there is no public interest in the disclosure of such emails. The fact that state employees are using state resources to exchange non-work related messages during working hours is a matter of legitimate inquiry for the public. The use of state email resources for non-work related activities is directly relevant to the use of taxpayer resources and the efficiency of the operation of government.

The narrow exception for personal privacy enacted at KRS 61.878(1)(a) protects employees from the disclosure of personal matters when state employees are required to disclose such personal matters in a public record (such as their social security number, their home addresses, or matters related to a medical condition). There are many such items of private information that are required for legitimate public purposes. The privacy exception does not protect public employees from the disclosure of improper or embarrassing personal communications that were made during working hours through the use of the state electronic mail system. *See* KRS 61.871. It is not an “*unwarranted*

⁸ Cabinet's Motion for Summary Judgment, 1/31/07, Exhibit 4.

⁹ *Id.*, Exhibit 5.

invasion of personal privacy” to disclose such non-work related communications made during working hours on the state computer system. This principle applies with even greater force when the state employees have been informed that all information conveyed through the state email system is the property of the state, and is subject to public oversight and control. In these circumstances, no privacy interest can be legitimately claimed.

Moreover, the Court agrees with the observation of Justice Brandeis that “Sunlight is said to be the best of disinfectants.”¹⁰ The best deterrent for improper use of the state email system for non-work related activity is to apply the plain language of the Open Records Act to ensure the enforcement of the principle that public employees are accountable for their use of public time and public resources. The public has a right to know the contents of non-work related emails transmitted through the state email system by state employees being paid with tax dollars during working hours. If the subject matter of the email is truly private, it should not be communicated through the state email system.

II. The Open Records Act, as construed and implemented by the Attorney General is constitutional.

The Cabinet has also raised substantive challenges to the OAG's administration of its statutory duties under the Open Records Act, seeking declaratory and injunctive relief on those issues. The primary issues raised concern the constitutionality of the provisions of the Act that provide the Attorney General is not to be made a party to appeals of decisions of the OAG in Open Records cases, and the provisions of the Act that provide that the decisions of the OAG in Open Records cases are binding if an appeal to circuit court is not filed within 30 days. KRS 61.880. The Cabinet also takes issue with the practice of the OAG in publishing its Open Records decisions, representing them to be “legally binding,” and citing them as “precedent”, even when they are being challenged on judicial

¹⁰ Brandeis, Other People's Money (1933, p. 62).

review. The Cabinet argues that the prohibition against naming the Attorney General in actions appealing OAG decisions in Open Records cases results in situations in which the Attorney General unfairly continues to apply its own Open Records decisions notwithstanding an on-going judicial review.¹¹ The Cabinet has requested that the Court order the Attorney General to withhold formal publication of its decisions in Open Records cases that are under appeal, and to withhold application of those decisions until the completion of judicial review.

In response, the Attorney General has stated that “[b]ecause courts in different circuits and in different divisions within the same circuit may decide the same issue differently, we respectfully decline to remove open records decisions from our websites when those decisions are reversed by a circuit court. We acknowledge our obligation to adhere to published opinions of the Kentucky Court of Appeals and the Kentucky Supreme Court. Based on your concern we will, in the future, note the fact in our decision when the circuit court in the same jurisdiction from which an appeal to this office arises has previously rendered a decision different from ours, if that fact is brought to our attention by the agency.”¹²

The Cabinet originally filed this lawsuit as an action for judicial review of the final decision of the Attorney General in requiring disclosure of the emails in question. The Cabinet, however, sought relief challenging the OAG's implementation of the Open Records Act, and the constitutionality of parts of the Act. As a result of the declaratory and injunctive remedies sought by the Cabinet, the OAG sought and was granted permission to intervene. To the extent that the Cabinet seeks declaratory relief that is broader than reversal of the Attorney General's decision in 06-ORD-184, it is appropriate for the OAG to intervene to defend its practices and the constitutionality of the statute.

The Cabinet's brief criticizes “the arbitrary practice of considering its [OAG's] decisions to be

11 See Cabinet's Motion for Summary Judgment, 3/23/07, p. 2-3, summarizing the procedural and factual background supporting its attack on the constitutionality of KRS 61.880(3) and (5).

12 Letter from Assistant Attorney General Ryan Halloran to Counsel for Plaintiff, 11/2/06, attached as Exhibit 18 to Cabinet' Motion for Summary Judgment.

law and citing them as binding authority in other open records decisions, even in cases where appellate review of the original controversy has not been concluded."¹³ The Court understands the frustration of the Cabinet, which is required to respond to an avalanche of Open Records requests from both members of the public and from prisoners who are incarcerated. However, the OAG must also cope with a tremendous volume of Open Records requests and appeals, and the Court cannot second guess its policies in administration of the law, so long as those policies are within statutory and constitutional bounds. The Attorney General is a constitutional officer under Sections 91 and 92 of the Kentucky Constitution, and has been vested with the statutory authority as "chief law officer of the Commonwealth and all of its departments, commissions, agencies and political subdivisions, and the legal adviser of all state officers, departments commissions, and agencies..." KRS 15.020. The Attorney General has been vested with specific statutory authority to issue binding decisions on Open Records matters by KRS 61.880.

The Open Records Act's provision barring the naming of the Attorney General in actions for judicial review¹⁴ is a reasonable legislative determination that it would impose an excessive administrative burden on the OAG to be required to appear and defend all such actions. It further reflects the legislative scheme of the Open Records Act, in which the Attorney General is a neutral and disinterested stakeholder, to whom the legislature has delegated the authority to act as referee between state government (including all subsidiary public agencies) and members of the public seeking disclosure of public documents.

This legislative scheme in no way "hampers judicial action or interferes with the discharge of judicial function." Arvin v. Meade, 462 S.W.2d 940 (Ky. 1971). If circumstances warrant, a party aggrieved by the Attorney General's administration of the Open Records Act, may seek declaratory and injunctive relief under the Declaratory Judgment Act, KRS Chapter 418. Once a court has acquired

¹³ Cabinet's Brief, 3/23/07, p. 5 (emphasis in the original).

¹⁴ KRS 61.880(3)

jurisdiction, the judicial branch of government is constitutionally vested with the authority to issue any orders or injunctive relief necessary to enforce its constitutional duty. Smother v. Lewis, 672 S.W.2d 62, 64 (Ky. 1985). Nothing in the Open Records Act precludes such relief against the Attorney General in an independent legal action if the facts and the law justify such a remedy.

The Cabinet complains that the Open Records Act allows the Attorney General to “make law.” But in fact, the legislature has made the law. The General Assembly enacted the statute, and has merely vested the Attorney General with power to administer and enforce the requirements of the statute. This the kind of broad delegation of power to an administrative agency that has been upheld by Kentucky's highest court. *See* Butler v. United Cerebral Palsy of Norther Kentucky, 352 S.W.2d 203 (Ky. 1961).

The Attorney General is not authorized to “make law”, but rather to apply the law the legislature has enacted. It is inevitable that attorneys representing state agencies will often dispute the interpretation of this statute made by the Attorney General. But the legislature has vested the Attorney General with the final say, as the chief legal officer of the state under KRS 15.020, and as the arbitrator of disputes under the Open Records Act. KRS 61.880. To guard against arbitrary or erroneous application of the law by the Attorney General, the legislature has provided for judicial review of final decisions of the Attorney General. KRS 61.882. This scheme of administration of the Open Records Act does not violate the separation of powers, but rather carefully reflects the proper role for each branch of government: the legislature has established policy in enacting the Open Records Act; the executive branch enforces that policy through the Office of the Attorney General; and the judicial branch conducts judicial review of the decisions of the executive branch when a citizen or agency has been aggrieved. *See generally*, Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984).

The Court recognizes that it can be vexing and difficult for public agencies to deal with the

Open Records Act. This is especially true in cases in which an unpublished decision of the Court of Appeals or a circuit court may be contrary to the interpretation adopted by the Attorney General. But the Court is also mindful that circuit courts frequently disagree about the application of the law, and that unpublished Court of Appeals decisions have no binding effect as precedents. *See* CR 76.28(4)(c). In these circumstances, the Attorney General has an ethical obligation to follow the ruling of the courts in each individual case, but also to apply the law that he believes in good faith is correct until directed to do otherwise by a court of competent jurisdiction, or until that position has been rejected by a published opinion of an appellate court. Any agency or citizen that is aggrieved by a decision of the Attorney General in an Open Records case has an adequate remedy by challenging the Attorney General's determination in an action for judicial review.

Likewise, the Court can see no valid basis for imposing the substantial procedural and administrative safeguards of KRS Chapter 13B on the Attorney General's conduct of Open Records reviews of agency action. The Attorney General's role in Open Records cases does not fit the definition of administrative hearing set forth in KRS 13B.010, and the specific procedures enacted by the legislature would control over the general requirements of KRS Chapter 13B in any event. The Attorney General's role in Open Records cases is to give legal advice to public agencies, and the legislature has determined that in the field of Open Records, that legal advice is binding on the public agencies unless the courts determine it to be arbitrary or erroneous.

CONCLUSION

For the reasons stated above, IT IS ORDERED AND ADJUDGED:

1. The motion of defendant Stephen Malmer for summary judgment is GRANTED and the cross motion of the plaintiff Justice and Public Safety Cabinet is DENIED. The plaintiff Justice and Public Safety Cabinet is directed forthwith to provide Mr. Malmer the public records that are the subject of this appeal.

2. The motion of the Attorney General for summary judgment is GRANTED and the cross motion of the Justice and Public Safety Cabinet is DENIED.
3. The Court finds and declares, pursuant to KRS 418.040 and CR 57, that KRS 61.880(3) and (5) do not violate the requirements for open courts and separation of powers as set forth in Sections 14, 27, 28, and 29 of the Kentucky Constitution, and that those provisions of the Open Records Act are constitutional, both facially and as applied. The Court further finds that KRS Chapter 13B does not apply to the Attorney General's review of Open Records decisions of public agencies under KRS 61.880. The provisions for judicial review of the final action of the Attorney General set forth in KRS 61.882 and KRS 61.880(5)(a), provide an adequate remedy for any party who is aggrieved by a decision of the Attorney General in an Open Records case.
4. This is a final and appealable order and there is no just cause for delay.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

Dated: November 19, 2007

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