

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001829-MR

CITY OF OWENSBORO, KENTUCKY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE JAY A. WETHINGTON, JUDGE  
ACTION NO. 12-CI-00467

JAMES MAYSE AND  
THE KENTUCKY STATE LODGE  
FRATERNAL ORDER OF POLICE

APPELLEES

OPINION  
AFFIRMING AND REMANDING

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BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: The City of Owensboro, Kentucky (hereinafter “City”) appeals the August 13, 2012 order of the Daviess Circuit Court (Division II) granting summary judgment and awarding costs and reasonable attorney fees to James Mayse, as well as the September 24, 2012 order of the Daviess Circuit Court (Division I) making findings of fact, confirming the summary judgment, and awarding attorney fees.

The case arises under the Open Records Act and involves the withholding by the City of two documents, which are labeled “Professional Standards Complaint Forms” from James Mayse, a reporter for an Owensboro, Kentucky, newspaper. He submitted a series of Open Records Act requests to the Owensboro Police Department seeking documents related to a former Owensboro Police Department employee. His requests were denied because the City considered them to be exempt under Kentucky Revised Statutes (KRS) 61.878(1)(a), (i), and (j) and existing case law. After careful consideration, we affirm the orders of the circuit court. However, we remand for a determination as to a supplemental award of attorneys’ fees under KRS 61.882(5).

#### FACTS

The Owensboro Police Department is a division of the City. Officer Marian Cosgrove was the police department’s public information officer until her employment ceased in November 2011. Before Cosgrove resigned, personnel in the police department completed two Professional Standards Complaint Forms, which were the initiating documents for investigations of Cosgrove by the police department. On October 31, 2011, which was during the pendency of the investigations, Chief Glenn Skeens issued a personnel order placing Cosgrove on paid administrative leave until the final disposition of the investigations.

Cosgrove, however, resigned on November 12, 2011, while the investigations were still pending.

On November 21, 2011, Mayse submitted an open records request to the police department concerning Cosgrove. He sought copies of any documents related to any complaint about Cosgrove, as well as information about any “final action” taken against her or whether she was placed on suspension at any time between September 10 and November 12, 2011. On November 22, 2011, Chief Skeens responded in writing to Mayse’s request. He stated that with regards to a complaint about Cosgrove, “the City has no records responsive to your request, and with regards to whether Cosgrove was placed on suspension, I can advise you that the City has no record responsive to your request.” Chief Skeens enclosed with his response a copy of Cosgrove’s one-sentence letter of resignation.

On December 1, 2011, Mayse submitted another open records request to the police department asking for copies of all documents regarding the employment status of Cosgrove between August 1, 2011, and November 18, 2011, and for a copy of Cosgrove’s personnel file. Counsel for the City responded, on December 6, 2011, and provided a copy of Cosgrove’s letter of resignation. Further, Counsel for the City wrote that a redacted personnel file of Cosgrove would be made available for inspection, absent Cosgrove’s medical records, which are protected under KRS 61.878.

On December 8, 2011, Mayse submitted a third open records request. Basically, he asked for the same records as before but highlighted that he was requesting any documents related to any grievance or internal process that involved Cosgrove's employment and eventual resignation. Specifically, he asked for documents dealing with any complaint, inquiry, investigation, or review of Cosgrove by the Owensboro Police Department's Public Standards Unit (hereinafter "PSU") between September 1, 2011, and November 13, 2011.

Counsel for the City again denied Mayse's request. While noting the obvious, that is the City would produce public records which were not exempt, it would not provide records that were exempt. Furthermore, with regards to any "complaints" or "investigations," Counsel wrote in the letter that "there is no complaint responsive to your request." Furthermore, it claimed that any documents related to any internal investigation or review by the PSU involving Cosgrove between September 1 and November 13, 2011, were exempt under KRS 61.878(1)(i) and (j).

On December 19, 2011, Mayse appealed the City's denial of his open records request to the Kentucky Attorney General's Office (hereinafter "OAG") pursuant to KRS 61.880. The City responded to the appeal by asserting again that no complaint had ever been filed against Cosgrove. The OAG, in a letter dated January 17, 2012, concluded that the City had, for the most part, supplied Mayse

with the requested documents. Nonetheless, it observed that it was unclear whether certain records in the investigative file were subject to an open records request. Consequently, under the proviso of KRS 61.880(2)(c), the Attorney General requested that the City produce for an *in camera* review by the OAG the records the City claimed were exempt from disclosure. The City complied with the OAG request and on January 20, 2012, provided complete copies of two investigative files.

On February 3, 2012, the Attorney General asked the City's counsel for an explanation for the reason that certain forms could not properly be classified as "complaints" or for a methodology to distinguish them from a complaint. The City's counsel responded as follows:

The documents you reference are not "complaints" filed against an officer. In each instance the document is the initiating document of an internal investigation that was initiated by the police department. Each bears the notation "Internal" and is signed not by a complainant, but by the officer conducting the PSU internal investigation. There was no written complaint (document) about Officer Cosgrove received by the department.

The documents in question were the Professional Standards Complaint Forms, which initiated the investigations of Cosgrove.

The Attorney General, after an *in camera* review, rejected the City's argument that the records were not subject to the Open Records Act. Thereafter,

the OAG issued Open Records Decision, 12-ORD-055 on March 12, 2012. The decision stated:

This office finds that the OPD [Owensboro Police Department] violated the [Open Records] Act in withholding the complaint forms which prompted the investigation because the “initiating or charging document, or any other document that spawns an investigation must be made available for public inspection at the conclusion of an investigation and upon the imposition of final agency action, including the decision to take no action.” 05-ORD-005, p.9 (citations omitted).

Ky. Op. Atty. Gen. 12-ORD-55, p. 2.

On April 11, 2012, the City filed suit against Mayse in Daviess Circuit Court, pursuant to KRS 61.880(5). It appealed the section of 12-ORD-055, which determined that the City violated the Open Records Act. Both parties made motions for summary judgment. A hearing was held on August 13, 2012, at which the trial court judge ruled from the bench and entered an order affirming the Attorney General’s decision. The order also directed the City to provide Mayse with copies of the complaints, and awarded him costs and attorneys’ fees. Nevertheless, the trial court in its order did not find that the City had performed a “willful violation” as required under KRS 61.882(5).

Two days later, the trial judge recused himself and transferred the case to Division I of the Daviess Circuit Court. On that same day, the City filed a motion for reconsideration. Another hearing was held on September 14, 2012. On

September 24, 2012, the trial court entered findings of fact, an order confirming summary judgment, and awarding attorneys' fees.

In the order, the trial court agreed with the Attorney General's opinion and held that the City violated the Open Records Act by withholding the two Professional Standards Complaint Forms, which it had deemed were non-exempt public records. The trial court also ordered that these documents be made available for inspection and awarded attorneys' fees plus costs to Mayse under KRS 61.882(5). In awarding attorneys' fees, the trial court found that the City's denial of the existence of the documents was "willfully defiant" of the intent of the Open Records Act and done in "bad faith."

The City now appeals both the August 13, 2012 and the September 24, 2012 orders. Nonetheless, after filing its appeal, the City provided Mayse with the two disputed Professional Standards Complaint Forms. Thereafter, the City filed a motion with the Court of Appeals to strike the two documents since they were not a part of the record before the Daviess Circuit Court. Mayse had attached the documents to his civil prehearing form.

The parties disputed whether the content of these documents could be considered on appeal. Subsequently, our Court ruled that the contents of the two records could not be included in the appeal because they were not part of the circuit court record; however, the Court, for the purposes of this appeal, took

judicial notice of the uncontested fact that the City provided the disputed documents to Mayse after filing the notice of appeal.

## ISSUES

On appeal, the City proffers three issues for this Court's review. First, whether the two documents, which were prepared by a police officer rather than a third-party complainant, are exempt from public inspection under KRS 61.878(1)(i) and (j). Next, whether Cosgrove's resignation constituted final action under the Open Records Act since she voluntarily resigned, no third-party complaint had been filed, no charges under KRS 95.450 had been filed, and she was never officially disciplined or punished by the Owensboro Police Department or the City. Finally, whether the City acted in "bad faith" and willfully violated the Open Records Act's intent when it denied that any complaint existed and did not disclose the two Professional Standards Complaint Forms since they believed the forms to be exempt under the Act and existing case law.

To begin, Mayse now contends that since the City provided him with the two Professional Standards Complaint Forms after it filed its appeal, the first two issues – whether the forms were exempt and whether Cosgrove's resignation was a final action – are now moot. Accordingly, he argues that we should dismiss this portion of the appeal. And he contends that the only issue on appeal is



whether the trial court's award of costs and attorneys' fees, pursuant to KRS 61.882(5), was clearly erroneous.

In response to the City's other arguments, if this Court does not determine that the issues regarding exemption and final action are moot, Mayse asserts that the documents were not exempt from disclosure because complaints that initiate an investigation must be disclosed after final action is taken; that the distinction between third-party complaints and police-filed complaints is irrelevant; that the absence of statutory discipline charges is irrelevant; and that Cosgrove's resignation constituted "final action."

Lastly, in reference to the only issue that Mayse believes is before us on appeal, he argues that the trial court did not err when it found that the City's withholding of records was a willful violation of the Open Records Act and the award of attorneys' fees was proper.

#### ANALYSIS

The Kentucky Open Records Act, KRS 61.870 et seq., governs the public's right to inspect and to copy records held by agencies of the Commonwealth. In general, the Act encourages disclosure by requiring that "[a]ll public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884[.]" KRS 61.872(1). Further, the Act provides

that 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.

Because of the presumption favoring open disclosure, the agency opposing disclosure has the burden of establishing that a record sought is exempt from release. *Medley v. Board of Education, Shelby County*, 168 S.W.3d 398, 402 (Ky. App. 2004). Thus, the City has the burden to establish that the “complaints” withheld from Mayse were exempt from release.

*Are the exemption and final action issues now moot?*

In the trial court’s final order, it enjoined the City to provide Mayse with copies of the two Professional Standards Complaint Forms and awarded him costs and attorneys’ fees, which he had incurred in this case pursuant to KRS 61.882(5). The City, then, instituted this appeal. Shortly thereafter, the City provided the documents, which are the subject of this appeal, to Mayse. The question is whether by satisfying the injunctive portion of the trial court’s order, the City rendered the first two issues of their appeal moot.

The City acknowledged to the Court of Appeals in their civil prehearing statement that they had provided these documents to Mayse. Notwithstanding the disclosure of the documents, the City still maintained that it

has authority to pursue the portion of its appeal regarding whether the records are exempt from disclosure.

In addition, the City made a motion to the Court of Appeals to strike the two disclosed documents from the appellate record. The documents had been attached to Mayse's supplemental civil appeal prehearing statement. The City reasoned that because they had not been a part of the trial court's record, they could not be a part of the appellate record.

Our Court entered an order on January 14, 2013, which granted the City's motion to strike the two documents from the appellate record, holding that these documents were not part of the circuit court record prior to the filing of the appeal and, therefore, could not be part of the appellate record. In addition, Mayse was ordered to refrain from mentioning the contents of the documents during the remainder of the appeal. Nevertheless, the Court did note that, for purposes of the appeal, it would take judicial notice of the uncontested fact that the City did provide the disputed document to Mayse after filing the appeal. Hence, the parties may refer to and rely upon this fact in all further pleadings and briefs.

Returning to the issue of whether the issue of disclosure of the documents is moot, we observe that Kentucky appellate courts often consider circumstances that occur after an appeal is filed to determine whether the appeal has become moot, either in whole or in part. *See Windstream Kentucky West, LLC*

*v. Kentucky Public Service Comm'n*, 362 S.W.3d 357, 360 (Ky. App. 2012). In general, Kentucky courts have recognized that “unless there is an actual case involving a present, ongoing controversy, the issues surrounding it become moot.” *Commonwealth of Kentucky, Department of Corrections v. Engle*, 302 S.W.3d 60, 63 (Ky. 2010). Indeed, “[o]ur courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy.” *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992).

There has emerged, however, an exception to the mootness doctrine, which is, “when a dispute is capable of repetition, yet evading review.” *Com., Dept. of Corrections*, 302 S.W.3d 60 at 63. *Philpot* described the exception and applied a two-prong test to determine whether the exception would apply in a particular case:

In *Lexington Herald–Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983), we addressed the merits of a controversy that was moot, under “the standard, ‘capable of repetition, yet evading review.’” *Id.* at 661. We did so because the case involved “important questions ... related to public access, and more particularly news media access, to criminal trials,” more specifically, voir dire examination .... The decision whether to apply the exception to the mootness doctrine basically involves two questions: whether (1) the “challenged action is too short in duration to be fully litigated prior to its cessation or expiration and [2] there is a reasonable expectation that the same complaining party would be subject to the same

action again.” *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir.1988).

*Philpot*, 837 S.W.2d at 493.

The aforementioned two-part test governs the application of this exception. In the instant case, while the issue is certainly capable of repetition, it will not evade future review. With regards to the first part of the test, the issue here would permit the necessary litigation if it arose again. Undoubtedly, any public agency in Kentucky has a meaningful opportunity to challenge an open records request.

Here, regarding the second prong, whether there is a reasonable expectation that the same complaining party would be subject to the same action again, in general it is reasonable to assume that police departments in Kentucky will be subjected to the requests for complaints by media and other citizens in similar situations. But in particular, this case is completed and, consequently, the City will not be subject to a request for these same documents by Mayse again. Therefore, no exception to the mootness doctrine is implicated in this case.

In response to Mayse’s claim that a portion of its appeal is moot, the City asserts that these issues are not moot because the appellate court could not determine whether the fees and costs were properly awarded without deciding if the records were exempt. However, by handing over the two documents to Mayse, the City has impliedly allowed the documents to be labeled non-exempt.

Therefore, whether the attorneys' fees were properly ordered by the trial court under KRS 61.882(5) may be reviewed by our Court.

Hence, the first two issues on appeal – whether the documents were exempt under the Open Records Act and whether Cosgrove's resignation was a final action – are moot, and we dismiss this part of the appeal. In doing so, we point out that, in the case at hand, it was the City that disclosed the documents prior to the resolution of the appeal, thus eliminating the case in controversy.

*Award of attorneys' fees*

A circuit court has the discretion to award a prevailing party reasonable attorneys' fees and costs upon a finding that a public agency "willfully withheld" records in violation of the Open Records Act. KRS 61.882(5). The statute provides, in relevant part, that "[a]ny person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action." KRS 61.882(5).

The key inquiry in determining whether an award of attorneys' fees and costs is warranted under the Open Records Act is whether the records were "willfully withheld" in violation of the Act. The circuit court's "decision on the issue of willfulness is a finding of fact and, as such, will not be disturbed unless

clearly erroneous.” *Bowling v. Lexington–Fayette Urban County Government*, 172 S.W.3d 333, 343–44 (Ky. 2005); Kentucky Rules of Civil Procedure (“CR”) 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). And “[s]ubstantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person.” *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003).

With this standard of review in mind, we address the issue of whether the trial court erred in its decision to award Mayse attorneys’ fees. He must show bad faith on the City’s part. The Supreme Court has provided guidance in ascertaining whether bad faith has occurred:

A public agency's mere refusal to furnish records based on a good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Act.... In other words, a technical violation of the Act is not enough; the existence of bad faith is required.

*Bowling*, 172 S.W.3d at 343 (internal citations omitted). So, besides demonstrating a violation of the Open Records Act, Mayse must make an additional showing that the agency refused to provide the records in bad faith. *Com., Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875, 882 (Ky. App. 2012).

Here, the circuit court found that the City acted in bad faith. Our analysis is focused on the question of whether the court's finding of bad faith was supported by substantial evidence and, hence, not clearly erroneous. As noted above, the Kentucky Open Records Act governs the public's right to inspect and to copy records held by agencies of the Commonwealth. The Act further provides that its "basic policy" is that "free and open 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. The presumption favors open disclosure.

In light of these principles, the City's response, on three separate occasions, that no record responsive to Mayse's requests for complaints is problematic given the egis of the Open Records Act. In fact, there were two documents labeled "Professional Standards Complaint Forms" in Cosgrove's file from the inception of Mayse's requests. When the Attorney General asked repeatedly about the existence of "any other document," the City also denied the existence of such documents to the OAG. The circuit court found the City's explanation that the information was incorrectly put on a complaint form and labeled "internal" was not persuasive and defied the statutory intent of the Open



Records Act. In essence, the City repeatedly made false denials of the existence of any complaints regarding Cosgrove. This action exemplifies “willfulness.”

The City had other options. As provided in the Open Records Act, if the City wished to withhold the documents, it should have followed this statutory protocol:

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. The response shall be issued by the official custodian or under his authority, and it shall constitute final agency action.

KRS 61.880(1).

But, based on the actions of the City toward both Mayse and the OAG, the circuit court concluded that these denials were willfully defiant and done in bad faith. We ascertain no grounds to disagree with that conclusion since substantial evidence existed to support it. Accordingly, the circuit court’s decision was not clearly erroneous, and we concur with the award of attorneys’ fees and costs to Mayse.

In light of our decision, and per Mayse’s request, we remand this matter to the circuit court for determination as to a supplemental award of attorneys’ fees and costs incurred on appeal. KRS 61.882(5) allows, upon a showing of a willful withholding, that aggrieved parties are entitled to any fees and

costs “incurred in connection with the legal action,” which would necessarily include fees and costs incurred in defending the judgment on appeal. Since Mayse has requested a determination on this issue, remand is appropriate. *See Moorhead v. Dodd*, 265 S.W.3d 201, 205 (Ky. 2008).

### CONCLUSION

For the foregoing reasons, the decision of the Daviess Circuit Court is affirmed, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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