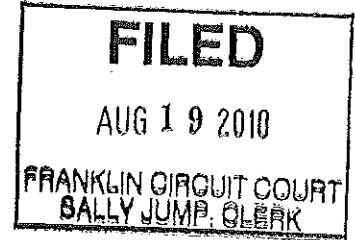


COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II  
NO. 10-CI-1325



THE COUNCIL ON DEVELOPMENTAL DISABILITIES, INC.

PLAINTIFF

v. **COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF**

CABINET FOR HEALTH AND FAMILY SERVICES,  
275 E. Main St., 5W-B  
Frankfort, KY 40621

DEFENDANT

Serve: Attorney General Jack Conway, Esq.  
118 State Capitol  
700 Capitol Ave.  
Frankfort, KY 40601

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**I. PARTIES AND JURISDICTION**

1. This action is brought pursuant to KRS 418.040 and KRS 61.882 for declaratory relief and an award of costs and attorneys' fees challenging the willful withholding by defendant of documents properly requested pursuant to the Open Records Act.

2. The plaintiff, The Council on Developmental Disabilities, Inc., is a Kentucky non-profit corporation in good standing whose principal office is located at 1151 S. Fourth St., Louisville, KY 40203. The Council was organized on June 23, 1952, and was previously known as the Council for Retarded Citizens of Jefferson County, Kentucky, and subsequently as the Council on Mental Retardation, until a name change effective January 1, 2010.

3. The defendant, the Cabinet for Health and Family Services ("CHFS"), is an agency of the Commonwealth of Kentucky. Pursuant to CR 4.04(6) and KRS 61.880(3), service of this action and notice are being provided to the Attorney General.

4. Jurisdiction and venue are proper in this Court pursuant to KRS 61.882 because the CHFS has its principal place of business in Franklin County and because the records which are the subject of this action are maintained, in whole or in part, in Franklin County.

## II. FACTUAL AND PROCEDURAL HISTORY

5. The Council is a member agency of the Metro United Way in Louisville, which has provided funding to the Council for several decades. Metro United Way explains on its website that the Council “Provides information, support and advocacy services to children and adults with mental retardation and their families and other interested persons in the community.” ([http://www.metrounitedway.org/index.cfm?fuseaction=home.viewPage&page\\_ID=5E4E8F39-0188-38FA-482EB541F33B3B71#c](http://www.metrounitedway.org/index.cfm?fuseaction=home.viewPage&page_ID=5E4E8F39-0188-38FA-482EB541F33B3B71#c)) As the Council itself explains on its website, “It is the mission of The Council to initiate positive change on behalf of individuals with developmental disabilities by voicing their needs to the community; creating new choices for living, learning and participating; and ensuring the highest quality of life possible.”

6. The Council’s activities are also funded in part by the Louisville-Jefferson County Metro Government, including activities involving reviewing and disseminating information, and participating in government policy formation, concerning the safety and welfare of adults with developmental disabilities who reside in state-operated institutions and state-supported community housing placements. The Council’s activities are thus expressly aligned with and in furtherance of the statutory policies adopted by the Kentucky General Assembly and expressed in KRS Chapter 209 (“Protection of Adults”). *See, e.g.*, KRS 209.010(1):

The purpose of this chapter is:

- (a) To provide for the protection of adults who may be suffering from abuse, neglect, or exploitation, and to bring said cases under the purview of the Circuit or District Court;

- (b) To provide that any person who becomes aware of such cases shall report them to a representative of the cabinet, thereby causing the protective services of the state to be brought to bear in an effort to protect the health and welfare of these adults in need of protective services and to prevent abuse, neglect, or exploitation; and
- (c) To promote coordination and efficiency among agencies and entities that have a responsibility to respond to the abuse, neglect, or exploitation of adults.

7. Kentucky law actually places an affirmative legal duty on anyone “having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation” to “report or cause reports to be made in accordance with the provisions of this chapter.” *See, e.g.*, KRS 209.030(2):

(2) Any person, including but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made in accordance with the provisions of this chapter. Death of the adult does not relieve one of the responsibility for reporting the circumstances surrounding the death.

8. On January 27, 2010, the Council’s Executive Director, April DuVal, made a request pursuant to Kentucky’s Open Records Act, KRS 61.670 *et seq.*, for documents maintained by CHFS concerning “all investigations and follow-up activities completed on behalf of Richard Tardy.” *See Exhibit 1.* Mr. Tardy was an adult with developmental disabilities who had been moved by CHFS representatives in late 2009 from a state-operated facility in Louisville, Central State Hospital, to another residential placement in southeastern Kentucky, pursuant to a government-funded program called “Supports for Community Living” or “SCL.” Mr. Tardy had died shortly after moving into the SCL placement.

9. By letter dated February 9, 2010, CHFS refused to produce the documents concerning Mr. Tardy that Ms. DuVal had requested. *See Exhibit 2.* The denial of the Council's request did not cite any provision of the Open Records Act, and specifically did not address the expression of legislative intent in KRS 61.871 ("The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 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."). Instead, the full explanation for the refusal to produce the requested documents was: "It has been determined that you are not entitled to the requested information as defined by (KRS 209.140) which delineates who is entitled to specific information."

10. The denial of the Council's request also did not address the stated purposes of KRS Chapter 209, including as stated in KRS 209.010(1): "To provide that any person who becomes aware of such cases shall report them to a representative of the cabinet, thereby causing the protective services of the state to be brought to bear in an effort to protect the health and welfare of these adults in need of protective services and to prevent abuse, neglect, or exploitation." Instead, CHFS relied on a provision of KRS Chapter 209 entitled "Confidentiality of Information." It provides:

All information obtained by the department staff or its delegated representative, as a result of an investigation made pursuant to this chapter, shall not be divulged to anyone except:

- (1) Persons suspected of abuse or neglect or exploitation, provided that in such cases names of informants may be withheld, unless ordered by the court;
- (2) Persons within the department or cabinet with a legitimate interest or responsibility related to the case;

- (3) Other medical, psychological, or social service agencies, or law enforcement agencies that have a legitimate interest in the case;
- (4) Cases where a court orders release of such information; and
- (5) The alleged abused or neglected or exploited person.

This statute, KRS 209.140, does not define the term “social service agencies ... with a legitimate interest or responsibility related to the case.”

11. By letter dated March 8, 2010, Ms. DuVal and an attorney who served as a Board member for the Council appealed the denial of Ms. DuVal’s Open Records Act request to the Attorney General’s Office. *See Exhibit 3.* Again, Ms. DuVal explained the historical background of the Council and the reasons for the Council’s concerns about Mr. Tardy’s death “in a state supported residential program for adults with mental retardation.” Ms. DuVal also challenged the conclusion that the Council was not entitled to receive the requested documents as a “social service agenc[y with] ... a legitimate interest in the case.” Ms. DuVal explained that “The Council, established in 1952, has operated services and programs throughout our history. We are a social service agency, funded locally by Metro United Way and other groups. The attached program sheet clearly outlines our social service and advocacy roles within our community and throughout the state of Kentucky.”

12. On April 21, 2010, the Attorney General issued an Order, 10-ORD-080, denying the Council’s appeal of the refusal by CHFS to provide documents pursuant to the Open Records Act. The Order explained: “Even assuming, for the sake of argument, that the Council is a “social service agenc[y]” within the meaning of KRS 209.140(3), it did not provide services to Mr. Tardy prior to his death nor has it otherwise demonstrated a ‘legitimate interest in the case’ within the meaning of KRS 209.140(3).” *See Exhibit 4*, at 1. The Attorney General apparently

ignored the attachment to the Council's appeal, which set forth in detail the Council's programs including "intervention and/or assistance with the legal system, medical care, protective services, residential services, guardianship, and other services that are needed to stabilize individual circumstances." See **Exhibit 3**, at 3. Likewise, just as CHFS had earlier done, the Attorney General failed to consider the expression of legislative intent in KRS 61.871 ("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"), and the purposes of KRS Chapter 209 ("thereby causing the protective services of the state to be brought to bear in an effort to protect the health and welfare of these adults in need of protective services and to prevent abuse, neglect, or exploitation").

13. Instead, the Attorney General's Order credited the "persuasive analysis" by CHFS in which it defended its decision by arguing that "for an interest to be legitimate, it must be more than personal or self-serving." *Id.*, at 3. The Attorney General quoted at length from CHFS's legal defense of its decision, including the following smart-alecky dismissal of the Council's oversight activities, *id.*, at 6:

The Council already has all of the information it needs in order to provide information and resources to Kentuckians. As they stated above, the Council already knows that the investigation did not warrant closure of the home. Unfortunately for the Council, there is also no "closure for companions" exception in KRS 209.140.

In the remaining paragraphs of the Council's letter, they claim eligibility to receive the requested information on the grounds that they are a social service agency. They restate how old the Council is, assert that they are funded by the Metro United Way and other groups, and that they offer many services throughout Kentucky. However, there is no allegation that the Council was providing services to Mr. Tardy at the time of his death.

At no point does the letter offer any kind of legitimate interest that the Council has in Mr. Tardy's records other than as friends who want to

know about the details of Mr. Tardy's death. These are simply insufficient grounds under KRS 209.140.

14. In conclusion, the Attorney General stated, *id.*, at 9:

[A]s a rule of general application, this office has consistently deferred to agencies' reasonable interpretations of their own confidentiality provisions in a variety of contexts absent binding legal authority to the contrary. [Citations omitted.] ... Because the Council did not provide services directly to Mr. Tardy or advocate specifically on his behalf while he was living, and the Council does not otherwise have a "legitimate interest in the case" based upon the agency's reasonable interpretation of this language, the Attorney General has no basis to find that a violation occurred when the CHFS denied its request on the basis of KRS 209.140.

15. For various reasons, including the limited focus of the Council's request to documents concerning Mr. Tardy's death, the Council did not appeal the Attorney General's Order dated April 21, 2010.

16. On May 3, 2010, this Court issued a decision in a case with remarkable similarities, *Lexington H-L Services, Inc. v. Cabinet for Health and Family Services*, No. 09-CI-1742 (Div. I) (*see Exhibit 5*), overruling an Attorney General's Order that had upheld a refusal by CHFS to produce documents concerning an infant who died after being "placed by the Cabinet in its publicly funded foster care program for abused and neglected children." Relying on the strong expression of legislative intent in KRS 61.871 as recently reaffirmed in *Central Kentucky News-Journal v. George*, 306 S.W.3d 41, 45 & n.4 (Ky. 2010), this Court vigorously rejected the Cabinet's defense of its decision to withhold the requested documents. *See Exhibit 5*, at 11-12:

These children have been abused and neglected and, through no fault of their own, are dependent on the Commonwealth of Kentucky to protect their welfare. A foster care system that operates in secret, without public scrutiny or accountability, even in this extreme case where a child in foster care has lost his life, is a system that is operating outside the scope of the legislative mandate for public accountability that is codified in KRS 61.872 and KRS 620.050(12)(a). This reflects a systemic failure that will

inevitably lead to covering up, rather than fixing, the problems in the state foster care system, to the detriment of the children who are dependent on the state for their protection and welfare. The interests of these children also must be weighed in the balance.

17. Upon becoming aware of this Court's ruling in *Lexington H-L Services, Inc. v. Cabinet for Health and Family Services*, by letter dated July 28, 2010 (actually sent July 29, 2010), the Council's Executive Director April DuVal made another request for "copies of all investigations, coroner's report(s), and Mortality Review Committee findings related to" the death of another adult with developmental disabilities, Gary Farris, who had also died after being transferred by CFHS from a state facility to an SCL community placement. See **Exhibit 6**, at 1. In addition, Ms. DuVal requested the same documents concerning "the deaths of any other individuals who were transferred by the Cabinet for Health and Family Services from ICF/MR placements and died in community placements after January 1, 2008 through the date of your response." *Id.* Ms. DuVal explained her request as follows:

As you may know, the Council (formerly known as the Council on Mental Retardation) is a non-profit Metro United Way member agency formed in 1952. As stated on our website, "It is the mission of The Council to initiate positive change on behalf of individuals with developmental disabilities by voicing their needs to the community; creating new choices for living, learning and participating; and ensuring the highest quality of life possible." Pursuant to this statement, we have a "legitimate interest in," and indeed have a responsibility to those public and private donors who support and fund our operations, to monitor the Commonwealth's discharge of its statutory duties to vulnerable and dependent adults with intellectual disabilities, and to try to identify, address and publicize any problems in the Cabinet's performance of those duties.

18. By letter dated August 5, 2010, CHFS again refused to produce the documents concerning Mr. Tardy that Ms. DuVal had requested. See **Exhibit 7**. Again, CHFS failed to address the expression of legislative intent in KRS 61.871, and for that matter, failed to acknowledge or distinguish this Court's analysis in *Lexington H-L Services, Inc. v. Cabinet for*

*Health and Family Services*. Instead, CHFS exaggerated the previous Attorney General's Order relating solely to information concerning Richard Tardy's death ("In light of the Attorney General's resolution of your previous request for similar information on similar grounds, *the Cabinet is statutorily prohibited from releasing that information to you*"). See **Exhibit 7**, at 2 (emphasis added). More broadly, CHFS appeared to invent a statutory restriction limiting access to information only to social services agencies who could demonstrate they "provided services to or advocated on behalf of the person whose records were sought." *See id.*:

In the previous decision, the Attorney General found that you did not have a legitimate interest in the records you sought because there was no evidence that the Council provided services to or advocated on behalf of the person whose records were sought. 10-ORD-080, p. 9. Likewise, there are no allegations that the Council provided services to or advocated on behalf of the persons whose records are sought in this request. The request is therefore denied.

### **III. CLAIMS FOR RELIEF**

19. An actual controversy has arisen and currently exists concerning the obligation of defendant CHFS to produce documents requested by April DuVal, acting as Executive Director of the plaintiff, The Council on Developmental Disabilities, Inc. The defendant's denial of Ms. DuVal's request for documents dated July 28, 2010 constitutes a willful violation of and subversion of the intent of the Kentucky Open Records Act, KRS 61.870 *et seq.*

### **IV. PRAYER FOR RELIEF**

WHEREFORE, pursuant to KRS 418.040 and KRS 61.882, plaintiff demands as follows:

1. Entry of appropriate Orders pursuant to KRS 61.882(4) so that, except as otherwise provided by law or rule of court, this matter may be given precedence on the docket over all other causes and assigned for hearing and decision at the earliest practicable date;

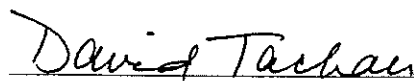
2. Entry of declaratory relief holding that defendant's denial of Ms. DuVal's request for documents dated July 28, 2010 violated the Kentucky Open Records Act, KRS 61.870 *et seq.*, and remanding for production of all documents requested by Ms. DuVal;

3. Entry of further relief awarding the plaintiff all of its costs and attorneys' fees in this action by reason of the defendant's willful withholding of the documents requested by Ms. DuVal, as demonstrated by defendant's failure to consider and implement the legislative purposes of KRS Chapter 209, as clearly expressed in KRS 209.010(1); failure to consider and implement the legislative purposes of KRS 61.870 *et seq.*, as clearly expressed in KRS 61.871; failure to adhere to the multiple judicial pronouncements concerning the purposes of the Open Records Act, *see Central Kentucky News-Journal v. George*, 306 S.W.3d 41, 45 & n.4 (Ky. 2010); and specific failure to conform to the recent admonitions concerning the purposes of the Open Records Act in *Lexington H-L Services, Inc. v. Cabinet for Health and Family Services*, No. 09-CI-1742 (Franklin Cir. Ct. May 3, 2010) (Div. I).

4. Award of all other relief in law or equity to which plaintiff may be entitled.

Respectfully submitted,

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