21-CI-00680

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 21-CI-00680

KENTUCKY OPEN GOVERNMENT COALITION, INC. **PLAINTIFF**

vs.

KENTUCKY DEPARTMENT OF FISH AND WILDLIFE COMMISSION **DEFENDANT**

OPINION AND ORDER

This matter is before the Court on Plaintiff, the Kentucky Open Government Coalition, Inc's *Motion for Summary Judgment* and Defendant, the Kentucky Department of Fish and Wildlife Commission's *Motion for Summary Judgment*. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS**, in part, and **DENIES**, in part, Plaintiff, the Kentucky Open Government Coalition, Inc's *Motion for Summary Judgment*, **GRANTS**, in part, and **DENIES**, in part, Defendant, the Kentucky Department of Fish and Wildlife Commission's *Motion for Summary Judgment*, and **REMANDS**, in part, this matter to the Kentucky Department of Fish and Wildlife.

STATEMENT OF FACTS

This is an action brought under the Kentucky Open Records Act by the Kentucky Open Government Coalition, Inc. ("the KOGC") with respect to the Kentucky Department of Fish and Wildlife Commission's ("the Commission") response to the KOGC's August 10, 2021, open records request. On August 10, 2021, the KOGC submitted an open records request to the Commission seeking:

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> All emails and text message that were sent from 1 June 2020 to present time, between any 2 or more of the following individuals listed: Rich Storm (former Commissioner KDFWR), Brian Clark (deputy commission/acting commissioner KDFWR), KDFWR Commission Chairman—Karl Clinard, Jeff Eaton (past 6th district commissioner), KDFWR Commission members, Representative C. Ed Massey and Representative Matthew Koch.

The request further stated:

> Please note that this request is not limited to communications that took place on government-owned email accounts and cell phones. The scope of the Coalition's request should additionally include all responsive public records which were generated on private cell phones, on private email services, or through other private communication channels.

On August 17, 2021, the Commission responded to the request and provided a link for the KOGC to review the initial portion of the responsive records. In its August 17, 2021, response, the Commission indicated that due to the nature of the request, the Commission was in the process of manually identifying non-responsive records and estimated that a final response with the remaining records would be available on August 24, 2021.

On August 24, 2021, the Commission provided the KOGC with a second portion of the requested records. In its August 24, 2021, response, the Commission indicated that it was still identifying any non-responsive records and needed until August 27, 2021, to produce its final response. On August 25, 2021, the KOGC responded to the Commission, by email, seeking clarification of whether its search for responsive records included emails sent or received from private electronic devices and/or email addresses. The KOGC noted that all records produced by the Commission included at least one (1) government-owned email address.

On August 27, 2021, the Commission provided the KOGC with its final batch of responsive records. In its August 27, 2021, response, the Commission stated:

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> In response to your email of August 25, 2021, *In re: Brian Mackey/Department of Fish and Wildlife*, 21-ORD-127 (2021) provides that documents solely in the possession of individuals on their personal devices are not owned by the Commonwealth and therefore are not "public records" within the scope of the open records act. See also KRS 61.870 et seq. Commission members were provided with a copy of your open records request, and were asked to produce any responsive documents which may be contained in their personal email. No such privately owned communications have been provided for the Department's review or release. Further, members of the Fish and Wildlife Resources Commission can only conduct business when in a public meeting with a quorum. By definition there can be no "action taken" by individual commission members to make a final policy decision for the Department on their own, or otherwise conduct the business of the department outside of a public meeting. See KRS 61.805 and 61.810. Therefore, the personal emails/texts of Commission members are not considered public records to be retained by the Department.

On September 3, 2021, the KOGC filed the underlying action, pursuant to KRS 61.882, specifically challenging that the Commission violated the Open Records Act by failing to produce records related to the Commission's business that were sent or received on privately owned devices and/or email accounts. The parties filed cross-motions for summary judgment. The Court held oral argument on December 6, 2021. On December 27, 2021, the Court granted the Commission's request for leave to file a belated reply and granted the KOGC the opportunity to file a reply. The KOGC later decided not to file a reply. The matter stands submitted to the Court.

STANDARD OF REVIEW

Summary judgment is appropriate when the Court concludes that no genuine issue of material fact for which the law provides relief exists. CR 56.03. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is

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no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.01.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show the absence of a genuine issue of material fact. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. Ct. App. 2011). The movant will only succeed by showing "with such clarity that there is no room left for controversy." *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W. 2d 476, 482 (Ky. 1991). "The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor. The Court will only grant summary judgment when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest*, 807 S.W. 2d at 480.

The Court recognizes that the summary judgment is a device that should be used with caution and is not a substitute for trial. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Jones v. Abner*, 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

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ANALYSIS

I. The Open Records Act

Pursuant to KRS 61.882, the Franklin Circuit Court has jurisdiction to hear this action. The Kentucky Open Records Act allows Kentucky citizens to request government records from a state agency. The agency must, in five (5) days time,[1] notify the person in writing whether it will disclose the requested documents. KRS § 61.880(1). An agency that denies an open records request must provide information to the requestor including: if the responsive record exists, and if so which records the agency is not disclosing; the specific exemption allowing withholding of the records; and an explanation outlining how the exemption applies to each withheld record. KRS § 61.880; 15-ORD-151.

The Kentucky Open Records Act secures the citizens of the Commonwealth's ability to access public records in an effort to make the operations of state agencies transparent. *Lawson v. Office of the Attorney General*, 415 S.W.3d 59 (Ky. 2013). "Rigid adherence to this stark principle is the lifeblood of a law which rightly favors disclosure, fosters transparency, and secures the public trust." *Cabinet for Health and Family Serv. v. The Courier-Journal, Inc.*, 493 S.W.3d 375, 389 (Ky. 2016). The General Assembly crafted the Open Records Act to lend itself towards disclosure. However, exceptions do exist for agencies to withhold documents. The Open Records Act places the burden of proof on the public agency seeking to withhold a record from disclosure under the Open Records Act, and the government agency bears the burden of proving the exempt status of the record. KRS § 61.882(3); *Valentine v. Personnel Cabinet, Commonwealth*, 322 S.W.3d

[1] As of June 29, 2021, KRS 61.880(1) was amended to allow five (5) days to respond to an open records request.

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505, 507 (Ky. Ct. App. 2010) (citing *Lexington H-L Services, Inc. v. Lexington-Fayette Urban County Government*, 297 S.W.3d 579, 583 (Ky. Ct. App. 2009)).

II. Arguments

a. The KOGC

The KOGC contends that all communications sent or received by the Commissioners with respect to agency business are public records within the meaning of KRS 61.870(2) regardless of the device or account from which the communications were sent or received. The KOGC argues that these communications fit the definition of "public record" because they are "prepared," "owned," and/or "used" by the Commission. The KOGC reasons that the Commissioners must communicate on private devices and accounts because they are not provided state-funded cell phones or email accounts. Accordingly, the KOGC claims that the Open Records Act plainly rejects the possession-only approach that the Commission and the present Attorney General promote. The majority of the KOGC's argument rests on an unpublished decision from the Kentucky Court of Appeals, *City of Louisville v. Cullinan*, 1998-CA-001237-MR and 1998-CA-001305-MR (Ky. Ct. App. Aug. 13, 1999),[2] and various Attorney General Opinions issued prior to the current administration. The KOGC distinguishes opinions issued by the present Attorney General and classifies the present administration's and the Commission's stance as alarming and a serious blow to government transparency. The KOGC warns the Court against adopting

[2] The Court declines to further address the holding in *Cullinin*. *Cullinin* was an easy call as there was no dispute that public funds were spent on the legal services—the bills of which were the records at issue. Public funds are not involved in the underlying action, therefore, making the holding in *Cullinin* not dispositive.

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such a profound change to the Open Records Act based on non-binding Attorney General Opinions.

Further, the KOGC states that the legislative history of the Open Records Act supports its position because in 2018, the General Assembly declined to amend the definition of "public record" to exclude "any electronic communications, including without limitation, calls, text messages, or electronic mail contained in, sent or received using a private cell phone or other private electronic device that is paid for with private funds or contained in, sent, or received using a nongovernment electronic mail account." 2018 HB 302, SCS 1. Instead, the KOGC notes that the General Assembly adopted a narrower exception to exempt "[c]ommunications of a purely personal nature unrelated to any governmental function." KRS § 61.878(1)(r).

Finally, the KOGC asks the Court, pursuant to KRS 61.882(5), to find that the Commission willfully violated the Open Records Act by refusing to produce the requested records and ignoring what the KOGC classifies as controlling precedent. The KOGC requests costs and attorneys' fees associated with this action.

b. The Commission

The Commission argues that it is entitled to summary judgment because records contained on private devices are not within the scope of the Open Records Act. The Commission states that it cannot produce records that it does not possess, and various Attorney General Opinions support its position that an agency must possess a record to produce it. Similarly, the Commission reasons that records on private devices are not prepared by an agency, and thus are exempt under the Open Records Act. The Commission notes that the Commissioners do not receive public funds for their private cell phones and

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distinguishes this fact from public officials who receive publicly funded cell phones. The Commission asks the Court to consider the ramifications of the KOGC's far-reaching and disastrous interpretation of the Open Records Act. Likewise, the Commission reasons that the Court should balance the public's right to know what their government is doing with the inherent interest in personal privacy.

Moreover, the Commission contends that pursuant to KRS 61.878(1)(r), records created and stored on a privately-owned device are exempt from inspection. The Commission also believes that under KRS 61.878(1)(j) communications within the Commissioners' personal lives that occur outside of public meetings are exempt. Similarly, the Commission offers that pursuant to KRS 150.022(9) a majority of members are needed to constitute a quorum, thus, individual members do not have the authority to make policy or conduct agency business outside of noticed meetings and without a quorum.

Finally, the Commission asserts that the KOGC's request imposes an extreme burden on state agencies and their voluntary boards. *See* KRS 61.872(6). The Commission claims the KOGC's position will likely result in unfettered requests and fishing expeditions into the private emails, text messages, and other private communications of state employees and volunteers, thus placing an undue burden on public agencies. The Commission provides that such requests are so extensive and cannot realistically be complied with.

III. Public Records

The KOGC contends that under the Open Records Act any communications sent or received with respect to state business constitute public records regardless of whether the communications were sent or received on privately-owned devices or accounts. This action

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specifically involves emails sent and received on private email accounts and text messages and other forms of communication sent and received on privately-owned cell phones. The Open Records Act defines "public record," in relevant part, as:

> all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other 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).

Although the General Assembly has defined "public record," its application to private email accounts, text messages, and other channels of communication contained on privately-owned devices is a matter of first impression before the Court. The present Attorney General, and a handful of former Attorney Generals have touched on the subject, although inconsistently. Yet, no previous Attorney General Opinion has sufficiently addressed this delicate, controversial, and invasive issue. Nevertheless, Attorney General Opinions are not binding on the Court, but the Court gives "great weight to the reasoning and the opinion expressed" by the Attorney General in an Open Records case. *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. Ct. App. 1991). Again, it bears repeating that the current administration and previous administrations have issued conflicting opinions, sometimes even conflicting with an opinion issued by its own administration. The Court is confident its brethren at the Kentucky Supreme Court will ultimately resolve this decisive issue.

In 15-ORD-226, then Attorney General Jack Conway opined that cell phone records, including phone calls and text messages, stored on privately-owned devices are not subject to the Open Records Act because the records were paid for with private funds and thus cannot be considered *prepared* by or in the *possession* of an agency. In 17-ORD-

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050 and 17-ORD-273, former Attorney General Andy Beshear determined that records "used" by a public agency are subject to the Open Records Act regardless of where the records are located or whose "personal property" the records are considered. Attorney General Beshear noted that agencies have an obligation to retrieve public records from employees to ensure public access to the records. In 18-ORD-032 and 19-ORD-011, Attorney General Beshear reaffirmed that emails generated in the discharge of a person's public function are "used" by an agency and thus are "public records" subject to the Open Records Act. In 20-ORD-109, Attorney General Daniel Cameron explained how an ordinary email, sent between a prisoner and his mother, could transform into a "public record" if the email is "used" by a correctional facility for administrative purposes, such as a disciplinary action. However, in 21-ORD-127, 21-ORD-146, and 21-ORD-151, Attorney General Cameron adopted Attorney General Conway's reasoning in 15-ORD-226 with respect to privately-owned cell phones. Thus, Attorney General Cameron has taken the position that records, such as emails, phone calls, text messages, and other forms of communications sent or received on privately-owned devices, for which no public funds have been spent, are not "public records" and thus are not subject to the Open Records Act.

The Court appreciates the efforts of all Kentucky Attorney Generals to ensure government transparency and review disputed open records requests. However, the issue really turns to the plain language of KRS 61.870(2). As written, the statute includes records "which are prepared, owned, used, in the possession of *or* retained by a public agency." KRS § 61.870(2) (emphasis added). The use of "or" clearly indicates that the statute does not take a *possession* only approach. Rather, as written, the statute encompasses records that are either: prepared, owned, used, in the possession of, *or* retained by an agency. Thus,

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as the KOGC offers, records used or prepared by an agency fall within the scope of the Open Records Act regardless of where the record is stored. A possession only approach does not comport with the plain language of KRS 61.870(2) or the general purpose of the Open Records Act. Nevertheless, the Court's analysis does not end there. The Court believes this matter requires a separate fact-sensitive analysis for the application of the statute to (1) emails sent or received from a private email account and (2) text messages and other forms of communication contained on a privately-owned devices.

a. Emails

On the outset, it seems incredibly invasive and truly an act of government overreach to subject emails sent or received from private accounts to the Open Records Act. Nonetheless, state employees, officials, volunteers, etc. should not be allowed to circumvent the Open Records Act by using a private email account to conduct state business. However, this matter is particularly unique because the Commissioners, and presumably members of other boards, are not provided with state email accounts, and thus, have no option but to communicate via their personal email accounts.

The KOGC notes that the Commission advertises the private email accounts of the Commissioners on its website as their point of contact.[3] The Court finds that this invites state business to be conducted through the Commissioners' personal email accounts. The KOGC also cites to a training session for the Commissioners conducted by attorneys for the Tourism, Arts & Heritage Cabinet in which the Commissioners were advised to send

[3] After review of the Commissioners' listed email addresses, it does appear that two (2) commissioners, Robin Floyd and Brian Mackey, have wisely created specific email accounts to conduct Commission business. District Commission Members—Kentucky Department of Fish and Wildlife. Available at: https://fw.ky.gov/More/Pages/District-Commission-Members.aspx (last visited January 25, 2022).

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any correspondence to a Commission staff member who would then disseminate the information to all other commissioners.[4] Presumably, the Commissioners were given this directive to ensure a state email account is always involved in correspondence for record retention purposes.

Nevertheless, the Court is amazed that the Commissioners, and presumably all other members of boards in the Commonwealth, are not provided a state email account. In fact, the Court believes this entire issue can simply be eliminated by providing the Commissioners, and those similarly situated, with state email accounts. It is truly a failure on the part of the Commonwealth not to provide the Commissioners, and others similarly situated, with state email accounts to conduct business. Had the Commissioners been provided a state email account, there would be no need for personal email accounts to be used. Like the training provided to the Commissioners, it is the responsibility of the state agencies to direct employees, officials, volunteers, etc. to only use their provided state email accounts for state business. Otherwise, it becomes the responsibility of the state agencies to fulfill the impossible task of retaining all emails pertaining to state business, sent or received, from private email accounts.

Hence, as stated above, because the Commissioners lack state email accounts and their personal email accounts are listed on the Commission's official website as the point of contact, it seems logical that emails sent or received via the Commissioners' personal email accounts concerning state business are "prepared" and "used" by the Commission, therefore placing the emails at issue within the purview of the Open Records Act, absent an exception applying.

[4] Available at https://www.youtube.com/watch?v=zQ9QeE1evjQ

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However, the Court's analysis does not stop there. In the August 27, 2021, letter, the Commission stated:

> Commission members were provided with a copy of your open records request and were asked to produce any responsive documents which may be contained in their personal email. No such privately owned communications have been provided for the Department's review or release.

The language used by the Commission to deny producing the requested emails is confusing and leads the Court to two (2) separate conclusions. First, if by the language used in the August 27, 2021, letter, the Commission means that the Commissioners were provided a copy of the KOGC's open records request and the Commissioners searched their personal email accounts, which they use for state business, and *no* responsive records were found, then the Commission has acted in accordance with the Open Records Act. An agency cannot provide records which do not exist, and an agency is not required to prove a negative when affirmatively stating that records do not exist.

But, if by the language used in the August 27, 2021, letter, the Commission means that the Commissioners were provided a copy of the KOGC's open records request and the Commissioners declined to search for responsive records or turn over any emails from their personal email accounts, which they admittedly use for state business, then the Commission has violated the Open Records Act. Accordingly, the Court **REMANDS** this matter to the Commission and the Commission is **ORDERED** to obtain any emails from the Commissioners' personal email accounts that relate to the KOGC's open records request.[5] The Commission shall then analyze whether any records are subject to being

[5] This Opinion and Order does not confer authority onto state agencies to force state employees, officials, or volunteers to turn over access to their personal email accounts. In

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withheld under a specific exemption and outline how the exemption applies to each withheld record.

Finally, the Court must return to the significant issue the Commonwealth has created in failing to provide state email accounts for the Commissioners. The Commonwealth has given the Commissioners no other option but to communicate via their personal email accounts. This makes it impossible for sufficient record retention and a serious issue for the Department for Libraries and Archives. All state agencies should heed the warning that the Court is forced to issue with this Opinion and Order and consider the costless task of issuing state email accounts for the Commissioners and all others similarly situated. The Court emphasizes that this portion of its Opinion and Order shall be narrowly construed. This is a fact-specific decision and shall not be read to explicitly subject the personal email accounts of other state employees, officials, and volunteers to the Open Records Act.

b. Text Messages and Other Private Communication Channels

Despite the Court's holding with respect to emails on a private email account, the Court finds that text messages and other forms of communication sent or received on private devices are exempt from disclosure under the Open Records Act pursuant to KRS 61.872(6) and general personal privacy concerns. "'Although the general policy of the Open Records Act favors broad availability of public records, that availability is not unlimited.' 'Perhaps the main exception to the general presumption that public records are subject to public inspection is contained in KRS 61.872(6), which provides that an

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this case, the Commission shall ask the Commissioners to search their private email accounts and provide any responsive records to the Commission.

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otherwise valid open records request may be denied if complying with it would cause 'an unreasonable burden[.]'" *Department Of Kentucky State Police v. Courier Journal*, 601 S.W.3d 501, 505 (Ky. Ct. App. 2020) (quoting *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008)). Whether an open records request falls within this exception is a highly fact-specific determination and requires clear and convincing evidence. *Courier Journal*, 601 S.W.3d at 505-06; KRS § 61.872(6).

First, the Court cannot in good faith adopt the KOGC's desired ruling. Doing so would lead to permitted fishing expeditions into the private cell phones and private lives of state employees, officials, volunteers, etc. There is no question that publicly funded cell phones are subject to the Open Records Act because the purpose of publicly funded cell phones is to conduct state business. However, it is unfathomable for the government to force state employees, officials, and volunteers to hand over their privately-owned devices for inspection of possible records.

Realistically, it is impractical to subject private cell phones to the Open Records Act. As noted, doing so will likely lead to fishing expeditions and subject state agencies, the Attorney General's Office, and any reviewing court to invasively review private data to determine if any text messages or other private forms of communication constitute a public record subject to disclosure. This would create an unreasonable burden. The substantial volume of records involved exacerbates the difficulty of separating personal data from non-personal data. Additionally, when considering the sheer number of state employees, officials, volunteers, etc. whose privately-owned cell phones would be subject to open records requests, it would make responding to any such open records request unmanageable for state agencies.

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Moreover, the Court must state that requiring state employees, officials, volunteers, etc. to hand over a personal cell phone, for which no public funds were spent, and thus is not traditionally used, nor should be used, for official business, is highly invasive. State employees, officials, and volunteers still possess a right to privacy and the right to maintain personal lives free from government overreach. Thus, the Court's holding goes to more than just the burden that sorting through private cell phones would cause state agencies, the Attorney General's Office, and reviewing courts. The Court is highly concerned about the government overreach in forcing state employees, officials, and volunteers to hand over their privately-owned devices for the government to browse. State employees, officials, volunteers, etc. are entitled to privacy and broadly subjecting their privately-owned devices, which arguably would then include their private social media accounts and any other channels of communication, would absolutely discourage any person from state employment, running for public office, or accepting the honor of serving on a state board.

In the end, emails sent or received from a private email account and text messages and other private forms of communication are fundamentally different. Text messages and other private forms of communication are generally not accepted forms of communication for government business. Subjecting text messages and messages contained on other private channels of communication to disclosure would serve no valid public interest and would instead invade individuals' privacy interests. Further, text messages and other private forms of communication are contained on cell phones, which here are privately-owned. The ultimate responsibility in curbing the use of private devices for public business rests with state agencies. State agencies shall instruct employees, officials, and volunteers

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not to conduct state business on privately-owned devices.[6] State agencies also have the power to issue publicly funded cell phones for employees, officials, and volunteers to conduct state business. Again, the Court admonishes state employees, officials, volunteers, etc. from using privately-owned devices to conduct state business, but the Court firmly holds that subjecting text messages and other forms of communication contained on privately-owned devices to the Open Records Act would create an unreasonable burden on state agencies in producing records and would grossly encroach on the private lives of state employees, officials, and volunteers.

IV. The Commission did not willfully violate the Open Records Act.

Finally, the KOGC asks the Court to find that the Commission willfully violated the Open Records Act. The Open Records Act states, "[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).

In this Opinion and Order, the Court held that in this unique situation, where the Commissioners are not provided state email accounts and because the Commission advertises the Commissioners' private email accounts as their point of contact, emails related to state business contained on the Commissioners' private email accounts are subject to the Open Records Act. The Court found that the Commission properly requested the Commissioners to provide it with any emails sent or received from private email

[6] Obviously, this excludes using a privately-owned device to send or receive emails from a state email account as the state retains access to any email sent or received from a state email account regardless of the device from which the email was sent or received.

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addresses, however, none were provided. This led the Court to two (2) separate conclusions. Either the Commissioners' personal email accounts did not have any responsive records or the Commissioners failed to search their private email accounts to determine if any responsive records exist. Because the Commission's response to the KOGC's open records request did not make either of the above conclusions clear, the Court remanded this issue to the Commission and ordered the Commission to notify the Commissioners of the Court's holding and have them search their private email accounts and turn over any responsive records to the Commission.

Again, the Court admonishes state employees, officials, volunteers, etc. against using private email accounts to conduct state business. The Commonwealth has created this issue in failing to provide the Commissioners, and presumably those similarly situated, with government email accounts to conduct state business. The Court reasons the Commonwealth should immediately create state email accounts for the Commissioners and those similarly situated, but still it is ultimately the responsibility of state agencies to instruct all employees, officials, volunteers, etc. to only use state email accounts to conduct state business.

However, the Court holds that the Commission did not willfully violate the Open Records Act because it did request the Commissioners to provide any emails sent or received on privately-owned email addresses. Although the Commissioners provided no emails, the Commission at least made a good faith effort in requesting responsive records from the Commissioners. Accordingly, the Commission did not willfully violate the Open Records Act with respect to the emails on privately-owned email accounts because it acted

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in good faith by requesting the Commissioners to produce any responsive records related to the KOGC's open records request.

Next, the Court determined that text messages and other forms of communication, sent or received on a privately-owned device, for which no government funds were spent, are exempt from disclosure. It bears repeating that it is the responsibility of state agencies to instruct all employees, officials, volunteers, etc. not to use their privately-owned devices to conduct state business and/or to provide state funded cell phones for this purpose. Nevertheless, the Court affirms that subjecting text messages and other forms of communication, sent or received on a privately-owned device, for which no government funds were spent, would be a severe invasion of personal privacy and create such an insurmountable task for agencies, the Attorney General, and reviewing courts, that its application is impractical. Therefore, the Commission did not willfully violate the Open Records Act by refusing to provide text messages and other forms of communication sent or received on privately-owned devices, for which no government funds were spent.

CONCLUSION

The Open Records Act fails to take into account the rapid changes in technology or the fact that the Commonwealth is navigating an unprecedented global pandemic, which has many employees working hybrid schedules. Despite these challenges, the Commonwealth has a duty to maintain records. The Court understands the magnitude behind the present Opinion and Order and has thoroughly researched the issues and considered the potential ramifications of all positions presented. For a final time, the Court admonishes state employees, officials, and volunteers from using privately-owned devices

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and accounts to conduct state business. However, the ultimate responsibility with enforcement rests with state agencies.

In sum, this matter presents two (2) separate requests. The first, for records contained on private email accounts, which were advertised on the Commission's website as the point of contact for the Commissioners, as the Commissioners are not provided state email accounts.[7] The second, for records contained on privately-owned devices, specifically, text messages and other forms of communication. Ultimately, the Court concludes that the first issue is unique because the Commissioners are not provided state email accounts and the Commission advertises the Commissioners' private email accounts as their points of contact. Thus, the Court finds that this subjects the Commissioners' private email accounts to the Open Records Act. However, the Court firmly holds that subjecting text messages and other forms of communication contained on privately-owned devices to the Open Records Act would create an unreasonable burden on state agencies in producing records and would grossly encroach on the private lives of state employees, officials, and volunteers.

WHEREFORE, Plaintiff, Kentucky Open Government Coalition, Inc.'s *Motion for Summary Judgment* is **GRANTED**, in part, and **DENIED**, in part, and Defendant, the Kentucky Department of Fish and Wildlife Commission's *Motion for Summary Judgment* is **GRANTED**, in part, and **DENIED**, in part. This matter is **REMANDED**, in part, to the Kentucky Department of Fish and Wildlife.

[7] The Court acknowledges that the Commission's website also lists phone numbers at which to contact the Commissioners, however, as previously stated, text messages and other forms of private communication are not acceptable forms of contact within state government.

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This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 25th day of January, 2022.

Hon. Thomas Dawson Wingate
/s/ HON. THOMAS DAWSON WINGATE
electronically signed
1/25/2022 3:38:13 PM ET

THOMAS D. WINGATE
Judge, Franklin Circuit Court

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this _____ day of January, 2022, to the following:

Hon. Jon L. Fleischaker
Hon. Michael P. Abate
Hon. William R. Adams
Kaplan Johnson Abate & Bird, LLP
710 West Main Street, Fourth Floor
Louisville, Kentucky 40202

Hon. Johnathan D. Goldberg
Hon. Charles H. Cassis
Hon. Jan M. West
Hon. Anthony R. Johnson
Goldberg Simpson, LLC
Norton Commons
9301 Dayflower Street
Prospect, Kentucky 40059

_____
Amy Feldman, Franklin County Circuit Court Clerk

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