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**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT DIVISION I**

CIVIL ACTION NO. 16-CI-974

CONCERNED CITIZENS OF ESTILL COUNTY, INC.

and

TOM BONNY

and

ROBERT W. SHAFFER

PLAINTIFFS

v.

****NO JURY DEMAND****

CABINET FOR HEALTH AND FAMILY SERVICES

Serve: Hon. Andy Beshear, Attorney General
Office of the Attorney General
Capitol Suite 118
700 Capitol Avenue
Frankfort, Kentucky 40601-3449

and

VICKIE YATES BROWN GLISSON, in her official capacity as
SECRETARY FOR THE CABINET FOR HEALTH AND FAMILY SERVICES

Serve: Vickie Yates Brown Glisson, Secretary
Cabinet for Health and Family Services
Office of the Secretary
275 E. Main St., 5W-A
Frankfort, KY 40621

and

ENERGY AND ENVIRONMENT CABINET

Serve: Hon. Andy Beshear, Attorney General
Office of the Attorney General
Capitol Suite 118
700 Capitol Avenue
Frankfort, Kentucky 40601-3449

and

CHARLES G. SNAVELY in his official capacity as
Secretary, Energy and Environment Cabinet

Serve: Charles G. Snavely, Secretary
Energy and Environment Cabinet
300 Sower Boulevard, 3rd Floor
Frankfort, Kentucky 40601

and

OFFICE OF THE KENTUCKY ATTORNEY GENERAL

Serve: Hon. Andy Beshear, Attorney General
Office of the Attorney General
Capitol Suite 118
700 Capitol Avenue
Frankfort, Kentucky 40601-3449

and

ANDY BESHEAR, in his official capacity as the Kentucky Attorney General

Serve: Hon. Andy Beshear, Attorney General
Office of the Attorney General
Capitol Suite 118
700 Capitol Avenue
Frankfort, Kentucky 40601-3449

FIRST AMENDED COMPLAINT

Plaintiffs, Concerned Citizens of Estill County, Inc. (“CCEC”), Tom Bonny, and Robert W. Shaffer, by counsel and for their First Amended Complaint against Defendants Cabinet for Health and Family Services (“CHFS”), Vickie Yates Brown Glisson in her official capacity as Secretary for the CHFS, Energy and Environment Cabinet (“EEC”), Charles G. Snavely in his official capacity as Secretary for EEC, Office of the Kentucky Attorney General (“OAG”), and Andy Beshear in his official capacity as the Kentucky Attorney General state as follows:

Parties

1. CCEC is a non-profit Kentucky membership corporation incorporated under the laws of the Commonwealth of Kentucky and organized on June 13, 2016 with its principal office at 1548 Wisemantown Road, Irvine, Kentucky.
2. Tom Bonny, a resident of Irvine, Kentucky, is a founding and current member of the Board of Directors of CCEC.
3. Robert W. Shaffer, a resident of Berea, Kentucky, is a founding and current member of CCEC.
4. CHFS is an executive branch agency of the Commonwealth of Kentucky created by KRS Chapter 194A. CHFS's principal office is in Franklin County, Kentucky.
5. Vickie Yates Brown Glisson ("Secretary Glisson") currently serves as Kentucky's Secretary for CHFS, a position established by KRS 194A.025. Secretary Glisson's principal office is located in Franklin County, Kentucky.
6. EEC is an executive branch agency of the Commonwealth of Kentucky created by KRS Chapter 224.
7. Charles G. Snavelly ("Secretary Snavelly") currently serves as Kentucky's Secretary for EEC, a position established by KRS 224.10-022. Secretary Snavelly's principal office is located in Franklin County, Kentucky.
8. OAG is a constitutional state office created by Ky. Const. §91.
9. Andy Beshear ("Attorney General Beshear") currently serves as the Kentucky Attorney General. Attorney General Beshear's principal office is located in Franklin County, Kentucky.

JURISDICTION AND VENUE

10. This action is brought pursuant to KRS 61.882 to appeal the denials of Open Records Requests submitted by the undersigned, Mary Varson Cromer, on behalf of founding members of CCEC and on behalf of CCEC itself, when requests were filed after the group formally organized on June 13, 2016, and for injunctive and declaratory relief relating to the Defendants' refusals to disclose public records in violation of the Open Records Act.

11. Jurisdiction and venue are proper in this Court because the principal places of business for all Defendants are in Franklin County, Kentucky.

FACTUAL ALLEGATIONS

12. This action relates to the unlawful dumping of out-of-state radioactive waste from hydraulic fracturing operations ("fracking") at the Blue Ridge Landfill in Irvine, Kentucky and the files relevant to that activity that are in the possession of one or more of the three Defendant agencies.

13. On March 8, 2016, EEC's Division of Waste Management ("DWM") issued a notice of violation ("NOV") to Advanced Disposal Services Blue Ridge Landfill, Inc. related to the dumping of fracking waste at the landfill.

14. The NOV cited the landfill for, *inter alia*, accepting and disposing of 47 loads of waste containing technologically enhanced naturally occurring radioactive materials ("TENORM") from July through November 2015.

15. During the first and second week of March 2016, OAG attorney Barbara Whaley contacted both EEC and CHFS and requested that documents collected or generated by

the Cabinets concerning the disposal of TENORM or other radioactive waste into any Kentucky landfills be exempted from Open Records pursuant to KRS 61.878(1)(h), (i), and (j).

16. On March 16, 2016, the OAG announced that it had launched an investigation into allegations that radioactive waste was transported and illegally dumped in Boyd and Estill counties.
17. On April 13, 2016, the undersigned attorney, on behalf of CCEC founding members Tom Bonny and Robert Shaffer, sent EEC's DWM and Division of Enforcement an open records request for "[a]ll agency documents, including correspondence, testing results, compliance plans, and RSSI results, related to NOV's issued to Advanced Disposal Services in early March 2016" and "all correspondence between DEP [EEC's Department of Environmental Protection] and US EPA regarding the same."
18. On April 18, 2016, an EEC representative responded saying, "there is an investigation being conducted and any records related thereto are exempt by KRS 61.878(1)(h), KRS 61.878(1)(i), and KRS 61.878(1)(j)."
19. On May 9, 2016, Tom Bonny and Robert Shaffer initiated an appeal to the OAG pursuant to KRS 61.880(2)(a) of EEC's denial of access to records.
20. On May 16, 2016, the undersigned attorney, on behalf of CCEC founding members Tom Bonny and Robert Shaffer, sent CHFS an Open Records Request for "all agency records from July 16, 2015 to the present relating to the disposal of fracking sludge sent to Kentucky from Fairmont Brine Processing of Fairmont, West Virginia. ...Please consider this request to encompass all agency records, including but not limited to, all records of communication between Kentucky Cabinet for Health and Family Services ("CHFS")

and West Virginia Department of Health and Human Resources and between CHFS and West Virginia Department of Environmental Protection, as well as any monitoring, sampling, or site characterization reports.”

21. On June 3, 2016, CHFS denied the request in part, stating that “on March 9, 2016 Barbara Maines Whaley, Assistant Attorney General advised [CHFS] that the Attorney General ... has opened a criminal investigation into the disposal of fracking sludge waste at the Blue Ridge Landfill in Estill County,” and that “the Attorney General made a request to [CHFS] that all documentation collected or generated by [CHFS] concerning the disposal of NORM, TENORM, or other potentially radioactive waste into any landfill in Kentucky” be withheld pursuant to KRS 61.878(1)(h), (i), and (j).
22. Along with the letter explaining the denial, CHFS provided five responsive documents.
23. On June 3, 2016, Tom Bonny and Robert Shaffer initiated an appeal of CHFS’s denial with OAG pursuant to KRS 61.880(2)(a).
24. On July 15, 2016, OAG announced that it concluded its investigation and had determined there was insufficient evidence to seek criminal charges in the disposal of radioactive waste at the Blue Ridge Landfill in Estill County. The OAG further announced that while it had offered to pursue civil penalties, CHFS had indicated that it instead would pursue such penalties and did not need the assistance offered by OAG.
25. Specifically, Attorney General Beshear stated in a press release on that day: “Because of these flagrant violations and reckless disregard for the safety of the community, my office sought the necessary statutory consent from the Cabinet for Health and Family Services to pursue damages and penalties to the fullest extent of the law. The cabinet declined our request, but has stated it plans to pursue such penalties on its own.”

26. On July 18, 2016, OAG attorney Barbara Maines Whaley advised the Cabinets that the request that open records be exempted due to the pendency of the OAG investigation was rescinded.
27. After the OAG's request that records be withheld was rescinded, CHFS and EEC provided records responsive to the two requests.
28. Both Cabinets continued to withhold other records, claiming that they were exempt under KRS 61.878(h), (i), and (j).
29. As requested by OAG, both Cabinets submitted withheld records for *in camera* review pursuant to KRS 61.880(2)(c).
30. On July 25, 2016 and August 1, 2016, the undersigned attorney requested from counsel for EEC a log of documents being withheld.
31. On August 4, 2016, counsel for EEC responded to the request stating, "I don't have a document by document log to produce for what KEEC is claiming an exemption."
32. On August 16, 2016, OAG issued 16-ORD-167, finding that the EEC's withholding of documents were proper under the preliminary records exemptions, KRS 61.878(1)(i) and (j).
33. On August 19, 2016, the undersigned counsel requested a log of materials withheld by electronic mail from counsel for CHFS.
34. On August 23, 2016, CCEC submitted an Open Records Request to the OAG, requesting, "all records in your office related to the investigation of the disposal of radioactive waste at the Blue Ridge Landfill in Estill County, Kentucky, including but not limited to all interviews or communications with Dr. George Partridge of the Energy and Environment Cabinet."

35. On August 29, 2016, OAG issued 16-ORD-180, finding that CHFS's withholding of documents were likewise proper under the preliminary records exemptions, KRS 61.878(1)(i) and (j).
36. On August 30, 2016, OAG responded to CCEC's Open Records Request to OAG stating, "[t]here is an investigative file that contains documents or other filings that would potentially 'relate to' the requested documents; however, this office must respectfully decline to produce that file. It is the contention of this office that these documents are exempt from disclosure pursuant to KRS 61.878(1)(h), because the matter is under investigation and premature disclosure of this information would be detrimental to the satisfactory conclusion of the investigation." (Emphasis added.)
37. On August 31, 2016, CHFS provided Plaintiffs with a log of documents withheld as exempt. The log contains only one- to three-word descriptions of each document.

COUNT I

38. Plaintiffs incorporate by reference paragraphs 1 through 37 of this Complaint.
39. Defendants willfully violated the Open Records Act by refusing to disclose records responsive to the April 13, 2016, May 16, 2016, and August 23, 2016 Open Records Requests.
40. Based on information and belief, EEC failed to submit all responsive records to the OAG for *in camera* review.
41. Based on information and belief, both Cabinets failed to disclose responsive records to the Plaintiffs of communications with non-agency entities.

42. OAG did not meet its burden of establishing that the records are exempt under KRS 61.878(1)(h) because it has not demonstrated that there was an ongoing investigation and that the disclosure of the records would harm that investigation.
43. Based on information and belief, Defendants failed to separate exempt material that is commingled with non-exempt material and redact where necessary as is required by KRS 61.878(4).
44. Pursuant to KRS 61.880(5) in the two instances where an OAG appeal was filed, Plaintiffs are entitled to *de novo* review by this Court.
45. Pursuant to KRS 61.882(1) Plaintiffs are entitled to injunctive relief and other relief from the Defendants' actions with respect to their Open Records Requests.
46. Pursuant to KRS 61.882(4), this action should take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.
47. Pursuant to KRS 61.882(5), Plaintiffs are entitled to recover their costs and reasonable attorney's fees from this lawsuit because Defendants have willfully withheld records in violation of the Open Records Act.

COUNT II

48. Plaintiffs incorporate by reference paragraphs 1 through 48 of this Complaint
49. EEC, Secretary Snavelly, OAG, and Attorney General Beshear violated KRS 61.871, et seq. by failing to provide a list of the records withheld, an adequate description of the records, and the asserted basis for each exemption.
50. CHFS and Secretary Glisson violated KRS 61.871, et seq. by failing to provide a description of each record withheld that was adequate to allow the Plaintiffs to determine the propriety of the asserted exemption.

51. Without such a log, Plaintiffs cannot fully determine whether the ORA is being complied with, which frustrates the goal of the Act to allow “free and open examination of public records.” KRS 61.871.
52. Pursuant to KRS 61.882(1) Plaintiffs are entitled to injunctive relief and other relief from the Defendants’ actions with respect to the violation alleged in this Count.
53. Pursuant to KRS 61.882(4), this action should take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.
54. Pursuant to KRS 61.882(5), Plaintiffs are entitled to recover their costs and reasonable attorney’s fees from this lawsuit.

WHEREFORE, Tom Bonny, Robert W. Shaffer, and CCEC respectfully request the following relief:

- A. An expedited briefing schedule and hearing on this matter at the earliest practicable date;
- B. A declaration that Defendants willfully violated the Open Records Act by failing to provide public records responsive to the requests;
- C. A declaration that both Cabinets failed to submit all responsive records to the OAG for *in camera* review;
- D. A determination that the Office of Attorney General acted arbitrarily and in a manner inconsistent with law in claiming entitlement to withholding of records based on the pendency of an investigation, when in fact such investigation had been concluded;
- E. An injunction compelling Defendants to provide the requested records;

- F. A declaration that the Defendants' failure to provide a log that lists and describes each record withheld and asserts a basis for each withholding and that describes the material in sufficient detail to allow the requesting party to be able to determine the propriety of the asserted exemption is a violation of Kentucky's Open Records Act;
- G. An award of reasonable attorneys' fees and costs pursuant to KRS 61.882(5);
- H. An award of statutory penalties pursuant to KRS 61.882(5); and
- I. All other relief to which the Plaintiffs may be entitled.

Respectfully Submitted

/s/ Mary Varson Cromer

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