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| NO. 23-CI-00052 | CALLOWAY CIRCUIT COURT DIVISION 1 SPECIAL JUDGE JOHN ATKINS |

**WPSD-TV, LLC PLAINTIFF**

**v.**

**MURRAY STATE UNIVERSITY DEFENDANTS**

WPSD-TV, LLC’s Reply in support of

motion for summary judgment

Murray State University’s (“MSU”) response begins from the false premise that the willfulness of its violations of the Open Records Act is still up for debate. That is wrong; this Court already granted WPSD’s motion for summary judgment—which included a request for a finding of willfulness—in full. And it invited WPSD to submit its motion for fees and penalties. All that is left is for this Court to decide how much those should be.

Unfortunately, the facts of this case show that a substantial fee and penalty award are necessary to deter MSU, and agencies like it, from ever again adopting “a near categorical redaction scheme at odds with existing law.” Summary Judgment Order (“SJ Order”), p. 1. MSU ignored its obligations under the Act from the beginning, going so far as to invoke the First Amendment to hide *from journalists* records that documented the University’s attempt to silence its own public radio station; failed to faithfully comply with the basic requirements of the Act following the adverse Attorney General Opinion; dragged this case out for months, only giving up additional information as WPSD and its counsel demanded it; and continued to invoke invalid exemptions even as the records in dispute winnowed down to a final few. And as if that weren’t enough, after this Court granted WPSD summary judgment and invited this fee motion, MSU officials issued statements portraying itself as the victim and accusing WPSD (and, by implication, this Court) of unfairly suggesting it did something wrong. *See* Ex. 1, MSU Statement (“The University has taken no actions in willful disregard of the law with respect to WPSD’s requests. As such, WPSD is not entitle to fees and penalties under the Act.”).

This consistent course of conduct evinces a “‘culture of secrecy’” that continues to this day within MSU—*i.e.*, “an obvious and misguided belief that the Open Records Act is merely an ideal—a suggestion to be taken when it is convenient and flagrantly disregarded when it is not.” *Cabinet for Health & Fam. Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 389 (Ky. Ct. App. 2016). Even being mindful that any award will ultimately be born by the taxpayers, this Court should reaffirm that “the nominal punishment of an egregious harm to the public’s right to know would come at an even greater price.” *Id.* at 388.

1. MSU’s Conduct Merits an Award of Fees and Penalties Under the Open Records Act.

In its summary judgment ruling, this Court held that MSU violated the Act when it “misused or misapplied the attorney client privilege, the personal privacy privilege, the preliminary records exemption” and implemented “a near categorical redaction scheme at odds with existing law.” SJ Order, p. 1. The Court “adopted plaintiff’s arguments” from its summary judgment motion which, as discussed at the prior hearing, included arguments regarding the willfulness of MSU’s conduct. *Id.* Indeed, this Court approvingly cited to page 20 of WPSD’s motion in finding that MSU adopted “a near categorical redaction scheme ‘at odds with existing law’”; that section of WPSD’s brief was the portion arguing that MSU had willfully violated the Open Records Act. *See* WPSD Summary Judgment Motion, pp. 19-22. And, this Court then invited WPSD to file a motion for fees and penalties. SJ Order, p. 1.

Despite these numerous indications that the Court agreed with WPSD, including on the question of willfulness, MSU pretends that that question remains unresolved. WPSD submits that is not the proper way to read this Court’s Summary Judgment Order. But regardless of what this Court intended to hold in its prior order, it should now hold that MSU acted willfully—that is, “without plausible justification and with conscious disregard of the requester’s rights,’” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013)—from the beginning of the case through to the present day.

MSU cannot sweep its long pattern of obfuscation under the rug by characterizing this case as a narrow disagreement about a few discreet redactions. MSU Response, p. 2. While that may have been all that was left at the end of the dispute, the parties only got there because WPSD retained experienced Open Records counsel who doggedly pursued the matter through the Attorney General appeal stage and litigation process, repeatedly forcing WPSD to abandon ORA exemption claims that never had any support in the law. This case was nothing more—or less—than a slow-moving coverup meant to deter and/or delay any coverage of MSU’s attempts to censor WKMS.

Indeed, MSU’s “categorical scheme” to withhold what we now know are hundreds of responsive records began as soon as it received WPSD’s first request. Instead of releasing the responsive records to WPSD within 5 days (KRS 61.872(5)) MSU speciously invoked the First Amendment and accused *WPSD* of interfering with WKMS’ news-gathering process by seeking public records capable of confirming whether MSU had indeed pressured WKMS reporters to kill negative reporting about Judge Jameson. MSU refused to even *search* for responsive records and, instead, attempted to withhold hundreds of responsive documents with broad “speculation” that the records could be privileged or somehow exempt from production. 23-ORD-024 at 2 (MSJ, Exhibit 11).

After WPSD prevailed at the OAG, MSU willfully violated the Act again by refusing to undertake the required steps to properly invoke the Act’s preliminary records and personal privacy exemptions. Instead, MSU continued its “categorical redaction scheme” that is prohibited by the Act. *See, e.g., City of Fort Thomas*, 406 S.W.3d at 855 (rejecting blanket denial of police investigatory file); *Com., Cabinet for Health & Fam.* *Servs. v. Lexington H-L Servs., Inc*., 382 S.W.3d 875 (Ky. App. 2012) (rejecting blanket denial of child abuse records); *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013) (“the Act forbids blanket denials of ORA requests”).

To be sure, MSU slowly abandoned most of these improper redactions over the course of fourteen months while the case made its way through this Court, but that does not mitigate its past (or present) willful conduct. For one thing, MSU only produced additional records as WPSD’s counsel continued to challenge its improper redactions and they became untenable. Moreover, the forfeited redactions only revealed the extent of MSU’s willfulness in initially denying WPSD’s request. It is now readily apparent (and confirmed by this Court’s Judgment) that MSU never had any plausible justification for most of its redactions. Instead, it used barebones “boilerplate, multiple grounds exemptions…for every single document” it redacted. *Univ. of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 55 (Ky. 2021). That forced WPSD to assert its rights in the Attorney General Appeal process and in this Court, incurring significant costs to obtain public records that should have been released at the outset. And those costs only continue to increase as this litigation continues.

But the harms in this case are not merely monetary. MSU’s “categorical redaction scheme” delayed reporting of critical public information about a serious matter of public concern. This matter began when Judge Jamie Jameson was removed from the bench, in part, because the Judicial Conduct Commission found that he improperly used his position to pressure MSU leadership to kill an unflattering story about him that was being investigated by WKMS reporters. WPSD’s open records request sought the only public records capable of confirming those serious findings by the JCC.

MSU’s acquiescence in that effort was revealed slowly over the course of this litigation as MSU reluctantly un-redacted some (but not all) of these public records. We now know that MSU’s pressure campaign caused WKMS station manager Chad Lampe to leave WKMS and Murray State. Jack Kane & Mason Watkins, *Murray State President Bob Jackson stays silent on involvement to stop a news story from airing*, WPSD Local 6, Nov. 17, 2022, updated April 20, 2023.[[1]](#footnote-1) Lampe testified under oath: “If we're talking about this situation and whether or not I felt as though I was attempted, that someone was attempting to influence me or exercise some leverage over me because of the power they hold — yes.” Todd Faulkner & Perry Boxx, *Murray State administrators and WKMS clash over station’s mission and values*, WPSD Local 6, April 20, 2023, updated April 20, 2023.[[2]](#footnote-2)

Moreover, MSU’s belatedly unredacted documents revelated President Jackson’s contempt for investigative reporting at WKMS. Dean David Eaton wrote Mr. Lampe on March 17, 2021 describing President Jackson’s attitude towards investigative journalism:

Dr. Jackson gets complaints in regard to the ‘investigative’ nature of some of the news...his line was along the lines of ‘We’re not the New York Times.’ And this seems to be the nature of the complaints that are coming to him… I think this may be tied to a perception of FOIA requests that ‘reporters stir up trouble.’ Or inconvenience. Or maybe shed light in places people don't want it...which is a legit function of journalism…Clearly, WKMS is not simply a publicity arm of Murray State. National news/events get covered by NPR. Ryland Barton and others do a great job of covering Frankfort. The issue seems to be what in-house reporters cover in this area.

*Id*.

Other emails show that this was not an isolated incident at MSU. In April 2021, MSU Dean David Eaton emailed Lampe regarding complaints from the subject of WKMS reporting about a sexual harassment lawsuit against Easter Seals, whose CEO is State Senator Danny Carroll. *Id*. Yet another email from former WKMS reporter Liam Niemeyer indicated that his job was threatened by MSU leadership due to his reporting on a different State Senator, Jason Howell, “liking” Tweets depicting pornographic images from his public Twitter account. *Id*. MSU initially attempted to redact critical information from these emails and improperly asserted the attorney-client privilege over materials that were obviously not privileged or otherwise exempt from production under the Act. *Id*.

 WPSD’s reporting has also revealed that, after WKMS’s investigations caused elected officials and members of the Board of Regents to complain to President Jackson, MSU retaliated with a 20% budget cut for WKMS at the same time President Jackson refused to accept a federal grant to fund a reporter’s salary on WKMS’s behalf. Todd Faulkner, Perry Boxx, & Justin Jones, *Murray State leadership questions WKMS mission, reporter positions*, WPSD Local 6, April 27, 2023, updated May 1, 2023.[[3]](#footnote-3) The University’s Board of Regents also agreed that they must reign in WKMS’s successful reporting and “set the fences for what an MSU radio station does.” *Id*. When Lampe and Dean Eaton raised their concerns, they were told by MSU leadership to stop pressing the issue or suffer the consequences: “Buddy the decision is done. Anger will occur if you and Chad keep pushing this. I’m watching out for you both.” *Id*.

 It’s not hard to see why MSU never wanted this information to see the light of day; it shows that an institution supposedly dedicated to higher learning was in fact stifling free speech and investigative journalism to favor powerful, local interests. What *is* difficult to understand, by contrast, is how the University, even today, can argue that its behavior was fine. This Court should grant WPSD’s request for fees and penalties to send a clear message to MSU that this kind of willful stonewalling is not acceptable from an educational institution in this Commonwealth. *See, e.g.*, *Courier-Journal*, 493 S.W.3d at 388 (The Act’s purposes are served “by liberal reading of those provisions aimed at the meaningful punishment of those who willfully obfuscate the public’s ability to examine non-exempt records”).

1. The Amount of Fees Sought by WPSD is Reasonable.

MSU also takes aim at the amount of attorneys’ fees that WPSD requests. Its arguments are completely without merit.

A $40,000 fee request for over fourteen months of work is more than reasonable. Courts that have granted far higher fee awards in similar litigation without hesitation. *See e.g.*, *Courier-Journal, Inc*., 493 S.W.3d at 381 (affirming $228,887.06 in fees for Courier Journal, and $72,896.50 in fees for the Herald-Leader, in ORA dispute); *Cabinet for Econ. Dev. v. Courier-Journal, Inc*., No. 2018-CA-001131-ME, 2019 WL 2147510, at \*12 (Ky. App. May 17, 2019) (affirming $30,693.20 ORA fee award for approximately six months of work in trial court and remanding for additional appellate fees); *American Oversight v. Office of Attorney General*, No. 20-CI-00758 (Franklin Cir. Ct.) (settlement agreeing to pay $99,750 in attorneys’ fees to resolve ORA dispute) (attached as Ex. \_); *Commonwealth v. Suetholz*, No. 18-CI-229 (June 24, 2019) (granting $71,237.50 in attorney’s fees, including a rate of $400 for lead partner handling the matter, in ORA dispute) (attached as Ex. \_).

Moreover, the rates sought by undersigned counsel in this case are more than reasonable for an Open Records dispute. Indeed, over the last decade, undersigned counsel has repeatedly won fee and penalty awards for their clients in Open Records cases without a single court ever reducing their rates or otherwise suggesting their fee requests were unreasonable. *See, e.g.*, *See, e.g., Cabinet for Econ. Development v. Courier-Journal, Inc*., No. 2018-CA-001131-ME, 2019 WL 2147510, at \*14 (Ky. App. May 17, 2019); *Cabinet for Health & Fam. Servs. v. Courier-Journal, Inc*., 493 S.W.3d 375, 388 (Ky. App. 2016); *Cabinet for Health & Fam. Servs. v. Todd County Standard, Inc*., 488 S.W.3d 1, 8 (Ky. App. 2015). Often, state agencies simply elected to pay the fee amounts because they saw little point in disputing them. *See, e.g.*, *Courier Journal v. University of Louisville*, No. 21-CI-0678 (Jefferson Cir. Ct. Nov. 16, 2022); *Kentucky Labor Cabinet v. Kentucky Public Radio*, No. 18-CI-422 (Franklin Cir. Ct. Apr. 9, 2019); *Kentucky Finance and Administration Cabinet v. Kentucky Public Radio*, No. 18-CI-335 (Franklin Cir. Ct. May 10, 2019).

MSU’s suggestion that counsel’s rates are not reasonable is completely without merit. WPSD seeks $425/hour for the time of Michael Abate, a partner with nearly 20 years’ extensive trial and appellate litigation experience (including more than a decade of litigating cases under the Open Records Act for individuals, organizations, and media clients across the Commonwealth), and $290/hour for Rick Adams, a litigation associate with six years’ experience, much of which has been dedicated to litigating Open Records Act disputes. Mr. Abate and Mr. Adams are the attorneys with primary responsibility for the Kentucky Press Association’s member “hotline,” meaning they handle Open Records and Open Meetings issues for clients across the Commonwealth on a near daily basis. That allowed them to handle this case far more efficiently than in many of the cases cited above, where attorneys billed far more hours getting up to speed on the relevant legal issues involved. *See, e.g.*, American *Oversight* ($99,750 in attorneys’ fees); *Suetholz*, ($71,237.50 in attorney’s fees).

Moreover, the Franklin Circuit Court upheld rates higher than this *more than a decade ago*—$436/hour for partners in an Open Records case where Mr. Abate was counsel of record (albeit while still employed by the firm MSU has now retained). *See* *Courier-Journal*, 493 S.W.3d at 388. Market rates for attorneys have significantly increased in that time, rendering that rate even more reasonable now. A case in point is the recent decision in *Courier Journal v. University of Louisville*, where the Jefferson Circuit Court found that a different public university (represented by the same firm and some of the same attorneys as MSU here) willfully violated the Open Records Act. There, the Court approved partner rates of $545 (for Jon Fleischaker) and $400 (for Michael Abate) as reasonable for their work on that case. *See* Nov. 16, 2022 Memorandum and Order at 2, No. 21-CI-0678 (attached as Ex. \_\_).

But more to the point, just last year the Franklin Circuit Court approved a fee request filed by MSU’s own counsel in a case it litigated against the Kentucky State University Foundation (where, WPSD notes, MSU’s counsel advanced arguments very similar to those in WPSD’s brief). *See* *Kentucky State University Foundation v. Frankfort Newsmedia, LLC,* No. 21-CI-0798 (Franklin Cir. Ct. Feb. 21, 2023), *affirmed*, No. 2023-CA-0320-MR, 2024 WL 875009 (Ky. App. Mar. 1, 2024). In that case, most of the work was performed by Suzanne Marino, who is also counsel of record here. Ms. Marino sought—and was awarded—a billable rate of $300/hour even though she had only been admitted to practice for just over two years at that point. Mr. Adams’ rate easily passes muster under this measuring stick, given that he has more years of experience—and more Open Records experience—that Ms. Marino did when she sought and obtained those reasonable rates.[[4]](#footnote-4)

Simply put, these are not “top market” rates, as MSU claims. Rather, and as noted in WPSD’s fee motion, the requested rates represent significant discounts off standard hourly rates, particularly for Mr. Abate’s time. Fee Affidavit, ¶ 3.

Finally, the suggestion that WPSD’s bills are littered with irrelevant work is plain false. MSU takes issue with counsel reviewing MSU’s many inadequate productions to determine which of MSU’s redactions were improper. This is not a “bizarre cyclical framework.” MSU Response, p. 7. Rather, Counsel’s review of MSU’s ever-changing redactions was an integral part of this litigation process, and the repeated back-and-forth proved necessary to slowly whittle away at MSU’s improper redactions. Is MSU seriously suggesting that counsel should not have checked to see whether MSU really did what the law required? This argument should be seen for what it is: more willful behavior from a public agency that refuses to take its open records obligations seriously.

MSU has identified one time entry that it believes should not have been included in undersigned counsel’s fee report. On August 8, 2023, Mr. Adams billed .2 hours of his time to “Research Title IX Due Process Bill and Vote History.” That matter was in fact related, as it pertained to research attempting to establish whether there might be a connection between the University pressuring WKMS to kill stories unflattering to powerful politicians at the same time that many public universities were working to kill (or change) a bill designed to give more rights to students during misconduct investigations. Nevertheless, WPSD is willing to voluntarily reduce its original fee request by $58 dollars to remove that entry.

*However*, that reduction is easily offset by the new amount of fees that have been necessitated in dealing with MSU’s opposition. WPSD respectfully requests that this Court allow it to submit a supplemental fee affidavit capturing all time spent on this matter since its original fee motion. *See, e.g.*, *KSU Foundation*, 2024 WL 875009, at \*6 (remanding for a supplemental award of costs and fees); *City of Taylorsville Ethics Comm'n v. Trageser*, 604 S.W.3d 305, 314 (Ky. App. 2020) (same); *Courier-Journal*, 493 S.W.3d at 388 (same).

1. A Substantial Penalty Award Is Appropriate.

The law clearly permits this Court to award statutory penalties on a per-record/per-day basis. *See* *Courier-Journal*, 493 S.W.3d at 388. Here, WPSD seeks to apply only the same formula used by the Court there: $10/day for each improperly withheld record. Counsel will not belabor the arguments in favor of willfulness set forth above, but it is clear that MSU remains defiantly committed to its culture of secrecy and coverup. Unfortunately, only a serious monetary sanction will signal to the University and its leadership—including the Board of Regents—that something must change.

Conclusion

 For the reasons stated herein and in WPSD’s motion for attorney’s fees and statutory penalties, WPSD should be awarded $40,370.45 in attorney’s fees and costs (plus an award of supplemental fees), and an additional $374,850 in statutory penalties.

Respectfully submitted,

*/s/ Michael P. Abate*

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 26, 2024 I filed a copy of this Motion with the Court’s electronic filing service which caused a copy to be served on all counsel of record.

 */s/ William R. Adams*

1. <https://www.wpsdlocal6.com/newsletter_stories/murray-state-president-bob-jackson-stays-silent-on-involvement-to-stop-a-news-story-from/article_8efeff4a-6669-11ed-badf-f7b12637a625.html> [↑](#footnote-ref-1)
2. <https://www.wpsdlocal6.com/news/murray-state-administrators-and-wkms-clash-over-stations-mission-and-value/article_0bbd83e6-dfe4-11ed-a071-8781640f2ae4.html> [↑](#footnote-ref-2)
3. <https://www.wpsdlocal6.com/local_6_investigates_murray_state_university/murray-state-leadership-questions-wkms-mission-reporter-positions/article_8e33a352-e532-11ed-99b8-6fcd81cbced6.html> [↑](#footnote-ref-3)
4. Notably, Dinsmore sought $230/hour in that case for its *paralegals’* time. The Court deemed that a bridge too far and reduced the rate for non-attorney staff. [↑](#footnote-ref-4)