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**COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
DIVISION 1
CASE NO. 23-C1-00978**

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CHRISTINE McLAUGHLIN

PLAINTIFF

vs.

**BOONE COUNTY CLERK
JUSTIN CRIGLER**

DEFENDANT

**PLAINTIFF’S RESPONSE TO COUNTY CLERKS’ AMICUS BRIEF,
AND RESPONSE TO DEFENDANT’S DEPUTY-CLERK AFFIDAVIT
(Filed Electronically)**

Comes now the Plaintiff

Comes now the Plaintiff, Christine McLaughlin, by and through the undersigned counsel, to ask the Honorable Court to:

- (a) grant Plaintiff’s Summary Judgment Motion,
- (b) deny Defendant’s Cross-Motion for Summary Judgment,
- (c) award fees, costs, and penalties to Plaintiff under KRS 61.882(5) 61.882, and
- (d) take appropriate action to address Defendant’s false accusation that the

Plaintiff is a vigilante;

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1. INTRODUCTION.

a. For the first time in this litigation, an explanation has been proffered to explain how the personal privacy exception of KRS 61.878(1)(a), allegedly applies to the ballots requested by Plaintiff’s Open Records Request. The explanation comes from the Amicus Brief of the Kentucky County Clerks’ Association (“KCCA”), and it is reinforced by the new Affidavit in the Defendant’s Reply in Support of Motion for Summary Judgment, (hereinafter, “Defendant’s 18 December Reply”).

b. The theory correctly asserts, that in a small turn-out situation, when all the voters vote the same way, the identity of those voters can be obtained from the information in the Poll Book. Unfortunately for the KCCA and the Defendant, the explanation applies to less than one percent (1%) of the Requested Ballots, and all of the alleged “personal information” gleaned from the “reverse engineered ballots,” has already been released on the World Wide Web, by the Kentucky State Board of Elections

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(SBE) more than seven months ago, on May 16, 2023. In other words, anyone who wanted to gather information on “identical vote scenarios” would not need to look at the ballots, because they could get the same information (voting results, and poll book information) from the SBE website. Thus, Defendant’s “reverse-engineering” theory, does not provide a reason to deny Plaintiff’s ORR.

2. DEFENDANT HAS FAILED TO FULFILL ANY OF HIS BURDENS, AND AN EVIDENTIARY HEARING IS NOT NECESSARY.

a. On December 19, 2023, the morning after the Defendant filed his 18 December Reply, the Plaintiff told the Court that an evidentiary hearing would probably be necessary, given Defendant’s unexplained, but steadfast insistence that the Requested Ballots contained personal information. Plaintiff believed that no discovery device, short of judicial intervention, could properly review the ballots that allegedly, contained personal information.

b. However, Plaintiff has now had ample time to examine the details of the “reverse-engineered ballot” theory, proffered by both the KCCA and Defendant. That theory rests on information already available to the public, and it does *not assert* that the name or personal information of the voter can be determined from the ballot itself. Thus, Plaintiff is now convinced that the requested ballots do not contain personal information, so no evidentiary hearing, on that topic, is necessary.

3. PLAINTIFF’S ORR STRENGTHENS, RATHER THAN WEAKENS, BALLOT SECRECY IN KENTUCKY.

a. The KCCA claims on the first page of its Amicus Brief, that “The secret ballot in Kentucky is threatened by Plaintiff’s Open Record Request.” Nothing could be further from the truth, and the KCCA has gotten it exactly backward. It is the efforts by KCCA

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and the Defendant to prevent Citizens from ensuring the integrity of the ballot box, that threaten the Commonwealth of Kentucky. Removing the Citizens' ability to ensure and confirm – *for themselves* – the integrity of the ballot box, invites tyranny; which might eventually destroy the Constitutional Republic of the United States of America.

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b. Citizen involvement in elections, to include inspecting public records like cast ballots (after the lock down period), strengthens the security of the secret ballot, and the public's trust in the entire election process. The KCCA and the Defendant, seem content to say, "Trust us, we work for the government, so there is no need for you to check our work." But neither of those parties would claim that every single government employee involved in the election process, always performs flawlessly and infallibly. And even if everything was done perfectly, the Open Records Act (ORA) exists so Citizens can "trust but verify," rather than blindly believing civil servants whose personal interests might, or might not, be contrary to the interests of the Citizens. Or as the Kentucky Supreme Court put it, Citizens have the right to determine for themselves "whether the public servants are indeed serving the public." *Kentucky Bd. of Examiners of Psychologists v. Courier Journal & Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky.1992). The KCCA and the Defendant should enthusiastically embrace the opportunity to grant Plaintiff's ORR! The ORR provides them the opportunity to have a civic-minded Citizen, confirm that the public servants in the Clerk's Office "are indeed serving the public." *Id.* The inspection and approval of operations in the Clerk's Office by civic-minded citizens, would enhance the credibility of the Office. The apparent disinterest by KCCA and Defendant, to gain that approval and credibility, is troubling. Description

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4. **THE KCCA BRIEF & DEFENDANT'S CROSS MOTION BOTH HAVE THE SAME INACCURATE DESCRIPTION OF THE SECRET BALLOT.**

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a. The first three pages of the Clerks' Amicus Brief, regarding the claim that the Plaintiff's ORR will threaten the secrecy of those ballots, contain the same errors that were made in Defendant's Combined Memorandum in Support of His Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, *hereinafter*, "Defendant's Cross-Motion." So again, here are the Three Rules of Secret Ballots, that were discussed in Paragraph V of Plaintiff's Response to the Cross Motion, and summarized on page 23.

(1) Secret ballots have no secrets, or confidential information on them.

(2) Secrecy and personal information cannot co-exist on the same ballot.

So if any of the Requested Ballots really have any personal information on them, in the barcodes or otherwise, then somebody probably violated the Kentucky Constitution, and at least one statute.

(3) The secrecy that makes the secret ballot secret, is *not the ballot*, but the anonymity process, which ensures the voter's name, date of birth, and home address, that are recorded in the Precinct Signature Register (aka Poll Book), are not present on the ballot.

b. The information necessary to determine how voters voted – in a low turnout scenario where all the voters voted the same – relies heavily on the public information in the poll book. The security/anonymity of the ballot is still secure, because nobody could pick out a ballot cast by someone in that small group, and determine *the name of the voter* who cast that ballot, just by looking at the ballot and the Poll Book. The only conclusion one could make is, if John Doe was one of the eight voters, in an identical vote scenario,

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then he voted for the same candidate that was also selected by the other seven voters.

And again, that information has already been published by the SBE, so it cannot be a

reason to deny the ORR.

5. KCCA & DEFENDANT’S PRIVACY CLAIM ATTEMPTS TO PROTECT INFORMATION PUBLISHED ON INTERNET BY SBE IN MAY 2023.

a. Page four of the KCCA Brief discusses the “low-turnout” scenario and how the scenario makes it “possible to *reverse engineer* how a particular voter voted.” The Defendant, on page seven of his 18 December Reply, uses the same term after citing the Affidavit of Deputy Clerk Stacy Adkins: “The potential for *reverse engineering* underscores the necessity to prevent a clearly unwarranted invasion of privacy”

b. The KCCA Brief mentions the low turnout of 24 ballots in Precinct C126 (Florence Elementary - Ralph Rush Center) in the May 2023 Primary Election on pages four and five. The Defendant’s Affidavit from Deputy Clerk Adkins, in paragraph 12, discusses the same facts regarding Precinct C126 as an “example,” without mentioning the designation/name of the Precinct. It is clear that both the KCCA and the Defendant are discussing the same low-turnout scenario, with the same concerns.

c. On page four of their brief, the KCCA states “a close inspection of *the cast ballot itself*, and cross-referencing that, with already-available turnout information [i.e., Precinct Signature Roster] makes it possible to derive *how a particular voter voted*.” In her Affidavit, Deputy Clerk Stacy Adkins similarly states a person could “identify *how particular individuals voted* in an election if one has access to the Precinct Signature Roster [aka, Poll Book], *coupled with the actual ballot by an individual*.” These similar statements are both misleading for three reasons.

(1) First, both parties fail to mention that their statement *is* limited to *only*

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“low turnout” scenarios – where all the voters vote the same. Based on the election results published by the SBE, the *“particular individuals / voters”* mentioned by the

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KCCA and Ms. Adkins are, in this case, just 79 voters out of 1,513 voters, which is one half of one percent of the ballots included in Plaintiff’s ORR. See paragraph 6 below.

(a) Both parties claim that determining how a voter voted is easier “in elections with low turnout.” In paragraph 11 of her Affidavit Ms. Adkins states, “the ability to determine how an individual voted *is more likely in those precincts where there is a low voter turnout.*” Page four of the KCCA states “it is possible to reverse engineer how a particular voter voted, *particularly in elections with low turnout.*” This language might lead the reader to believe that it is possible to use the “reverse engineered ballot” process to *figure out how voters voted in large turnout scenarios*, but that’s not the case.

(b) The trick to determining how “particular voters” voted, works only when the voters – in a particular precinct, or other defined population – *all vote exactly the same way* (for a candidate, or anything else on a ballot). In short, it’s not the size of the population that matters, *but the homogeneity of the votes.*

(2) Second, the KCCA and Ms. Adkins identify two items that are needed to determine how a voter voted: (1) the Precinct Signature Roster (aka Poll Book), and (2) *the actual ballot by an individual.* But again, neither Ms. Adkins, nor anyone else, can pick out a cast ballot, from the ballots requested by the Plaintiff, *and determine the name of the voter* who cast that ballot.

(3) Third, like the KCCA, Ms. Adkins focuses on *the ballot*, as the second item which is needed to determine how an individual voted. However, after May 16, 2023, *there was/is no need to look at ballots* to determine how a voter voted – in a low-

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turnout / identical-vote scenario. That information was published – to the world – by the Kentucky State Board of Elections (SBE) on May 16, 2023. The KCCA and Deputy Clerk Adkins both admit the Precinct Signature Rosters are “available for public review,” (Adkins’ Affidavit at ¶ #6, and KCCA page 4 (“already-available turnout information)). However, neither Party mentions that all the information they attribute to the ballots is already in the public domain, and could be more easily obtained from the SBE’s website, rather than the ballots.

6. THE DETAILS IN PRECINCT C126, PROVE DEFENDANT NEVER HAD A GOOD FAITH CLAIM FOR THE PRIVACY EXCEPTION.

a. The “low-turnout/identical-vote” scenario did occur in this case, in the ballots Plaintiff requested from Precinct C126. The KCCA mentions the scenario on page four of their brief. Ms. Adkins discusses that scenario in more depth, in paragraph #12 of her Affidavit (without mentioning the Precinct number). In Precinct C126, as Ms. Adkins correctly explains, “only 24 voters . . . voted in the [May Primary] election 16 of those voters [were] Republican and 8 [were] Democrat.” Ms. Adkins then declares, “If ballot access were allowed it is a guarantee that one could determine how *some* of those individuals voted, *especially if all voted for the same candidate in [a] particular race.*” Emphasis added. That statement is inaccurate, but only because Ms. Adkins used the word “*especially*” rather than the phrase “*but only*” to describe races where voters identities can be identified. The “reverse-engineered ballot” (aka, identical-vote) scenario works *only* when the voters – in a particular precinct, or other defined population – *all vote the exactly the same way* (for a candidate, or anything else on a ballot).

b. While Ms. Adkins’ declaration is mostly true, it’s also true that:

(1) Nobody needs the ballots to determine “how some individuals voted”

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because that same “ballot” information has been on-line at the SBE’s website, for the last seven months.

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(2) The only reason someone can determine “how some individuals voted” in the Governor’s race, in Precinct C126 is because *all eight voters voted for the same candidate*. **Plaintiff’s Exhibit (PX) #7**, at page 1. However, no amount of scrutiny of the Precinct Signature Roster and the ballots (or election results) would reveal which of the eight ballots was cast by a particular voter.

(3) The eight Democrat voters in C126, who voted for a candidate for Governor, also voted for a candidate for the Commissioner-of-Agriculture (on the same ballot). Among the eight votes in that race, Candidate Malone got one vote, and Candidate Enlow got the other seven. Thus, it is not possible to determine – by name – *how any of those eight voters voted* in the Commissioner-of-Agriculture race by simply looking at a pollbook, a ballot, the election results, or any combination of them.

c. The first page of **PX #7**, contains the election results, published by the Kentucky State Board of Elections on May 16, 2023, for Precinct C126. Pages two thru eight of **PX #7** provides the Poll Book / Precinct Signature Roster which provides the names, birthdates, and home addresses of the eight Democrat voters who voted in the May 2023 primary election.

(1) **Note**, in accordance with CR 7.03, and an abundance of caution, the last names of the eight voters, and their birthdates, and home addresses have been redacted. In addition, for all the voters listed in the Poll Book, who did not vote in Precinct C126, the complete name has been redacted. These same redactions were also

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applied to **PX #8, Precinct B115 Election Results**, and **PX #9, Precinct A112, Election Results**.

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(2) Because all eight Democrat voters in Precinct C126 voted for the same candidate for Governor, Ms. Adkins – *and everybody else in the world who visits the SBE website* – can determine how those eight Democrat voters voted in the Governor’s race. Additional “identical-vote” scenarios – among the ballots requested by the Plaintiff – occurred in Precincts B115 and A112.

d. Among the three Precincts, a total of 79 (8 + 35 + 36) voters, or one half of one percent (0.5%) of the 1,513 ballots requested by the Plaintiff, were involved in identical-vote scenarios. Precinct C126 had eight such voters (PX #7), while Precinct B115 had 35 (PX #8), and Precinct A112 had 36 (PX #9). Thus, from the 1,513 ballots requested by the Plaintiff, the *reverse-engineered scenario* – *which was used to deny 100% of Plaintiff’s ORR* – *did not apply to 99.5% of those ballots*.

7. IF THE SBE HAD NOT PUBLISHED THE “PRIVATE INFORMATION” THE KRS 61.878(1)(a) EXCEPTION WOULD STILL NOT APPLY.

a. Even if the SBE *had not* already provided all the “personal information” that the KCCA and Defendant want to conceal, the information would not qualify for the KRS 61.878(1)(a) exception. The amount of information published by the State Board of Elections, *is the minimum amount of information necessary for Citizens to have any faith in the integrity of the election results*. The SBE documents are open records, subject to the Open Records Act, and could be obtained by an ORR, even if the SBE had not already published that information.

b. Publishing the name and address of a voter, provides no more information than a traditional telephone book, and the SBE does not publish the Social Security Number or

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the Driver's License Number of the voter. The most invasive information published by the SBE, is the voter's birthdate. But that date is necessary because voters don't all have a unique names and unique addresses. For example a father and an adult son could have the same name and live in the same three-bedroom house. Unlike the public's low interest in the name of a victim who was sexually assaulted by her doctor, the public rightfully, has an enormous interest in the integrity of their elections.

8. THE CLAIM THAT THE REQUESTED BALLOTS CONTAIN PERSONAL INFORMATION NEVER HAD ANY MERIT.

a. If the Defendant had believed, in good faith, that certain ballots – where a voter's vote could be discerned with the help of a poll book – constituted a breach of that voter's personal privacy, he would have provided a detailed explanation of his theory to the Plaintiff on June 22, 2023, when he denied the ORR. If the Defendant believed in good-faith that the 79 "reverse-engineered ballots" qualified for some sort of different treatment (despite the fact that the information was already in the public domain) then he would have immediately made the other 1,434 ballots ready for Plaintiff's inspection. Defendant did not act in faith, and with or without the release of information by the SBE, Defendant was obligated to provide at least 99.5% of the Plaintiff's ORR in June 2023.

b. The KCCA Amicus Brief, and the Defendant's Affidavit make it clear that the Defendant never had a legitimate personal-privacy exemption to deny the Plaintiff's ORR. Prior to December 18, 2023, Defendant did not "provide the requesting party and the court with sufficient information about the nature of the withheld record . . . and the harm that would result from its release to permit the requester to dispute the claim and the court to assess it." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, at 852 (Ky. 2013). At long last, the KCCA and the Defendant have now provided an

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explanation that can be assessed and disputed, and that explanation boils down to this:

Defendant denied the request to inspect all 1,513 ballots, because 79 of those ballots allegedly contained “personal information” which the Kentucky SBE published to the world, 30 days *before* the Plaintiff submitted her ORR.

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c. Defendant’s recent explanation, like all of his six other reasons to deny the Plaintiff’s ORR, was not made in good faith. The Supreme Court of Kentucky stated, “A public agency’s mere refusal to furnish records based on a good faith claim of a statutory exemption, *which is later determined to be incorrect*, is insufficient to establish a willful violation of the Act.” *Bowling v. Lexington-Fayette Urban Cnty. Government*, 172 S.W.3d 333-334 (Ky. 2005). From the date of the June 22, ORR Denial, to the present, the Defendant *who has always retained the burden of prove in this case, has never, provided a good faith reason* to deny the ORR. Thus, the Defendant has no *initial* “good-faith claim for a statutory exception,” so he cannot benefit from the safe harbor set forth in *Bowling v. Lexington-Fayette*.

d. “To be entitled to attorneys’ fees, costs, and penalties under KRS 61.882, the circuit court must find that the public agency acted ‘willfully’ in denying a ‘person’ access to requested records under the Open Records Act. *Cabinet for Health and Family Services v. Courier-Journal, Inc.*, 493 S.W.3d 375, at 384 (Ky. App. 2016). Given Defendant’s willful, and bad faith actions, attorneys’ fees, costs, and penalties under KRS 61.882(5) are warranted.

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WHEREFORE, the Petitioner respectfully requests as follows:

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1. That the Court grant Summary Judgment to the Plaintiff on all issues and, if deemed necessary by the court, set this matter for expedited hearing and disposition;
2. That the Court deny Defendant's Summary Judgment Motion on all issues;
3. That the Court order the Defendant to grant Plaintiff McLaughlin's ORR;
4. That the Court order the Defendant to notify the Plaintiff of the place, time, and date for inspection of the requested records;
5. That the Court award attorneys' fees, costs, and penalties to Plaintiff McLaughlin under KRS 61.882(5);
6. That the Court award Plaintiff McLaughlin \$25 per day under KRS 61.882(5) starting from June 16, 2023, when Plaintiff McLaughlin was first denied her right to inspect the ballots, during business hours;
7. That the Court take appropriate action to address Defendant's false accusation that the Plaintiff is a vigilante;
8. And for all other relief to which she may be entitled.

Respectfully submitted,

/s/ Brian Corneilson
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CERTIFICATE OF SERVICE

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This is to certify that on the 5th day of January, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Courtnet system. A copy was also e-mailed to:

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