2014 WL 3706669 (Ky.) (Appellate Brief)
Supreme Court of Kentucky.

THE COUNCIL ON DEVELOPMENTAL DISABILITIES, INC., Appellant,

v.

CABINET FOR HEALTH AND FAMILY SERVICES, Appellee.

No. 2013-SC-000357.
May 9, 2014.

On Appeal from Court of Appeals Case No. 2011-CA-000396
Franklin Circuit Court Case No. 10-CI-01325

Reply Brief for Appellant, the Council On Developmental Disabilities, Inc.

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I. INTRODUCTION

In urging the Court to affirm the judgment below, the Cabinet for Health and Family Services completely abandons the stated reason it provided for why it denied the Council's Open Records Act – because KRS 209.140(3) supposedly prevented the Cabinet from producing records where "there are no allegations that the Council provided services to or advocated on behalf of the persons whose records are sought in this request." R: 48-49 (Appendix Tab 4 to the Council's initial Brief).

Instead, the Cabinet devotes the bulk of its Brief (pages 18-38) to entirely new arguments about alleged constitutional and statutory rights of "privacy" and "confidentiality" purportedly supported by a lengthy description of the "history and the goals" for the enactment of the Adult Protection Act, KRS Chapter 209. These arguments were never presented to the courts below. Indeed, they were not even mentioned in the Cabinet's Response to Motion for Discretionary Review.

After this lengthy discussion, the Cabinet devotes the remainder of its Brief to alleged justifications for denying the Council's request contained in "The Open Records Privacy Exemption," Cabinet Brief at 38-40, "Other Privacy Limitations in the Adult Protection Act," *id.* at 40, and "The HIPAA Regulations," *id.* at 40-43. Again, these arguments were not mentioned in the Cabinet's Response to Motion for Discretionary Review and were barely, if at all, presented to the courts below. They were not, for example, identified in the Cabinet's "Civil Appeal Supplemental Prehearing Statement" filed with the Court of Appeals. They also have no support in Kentucky law.

Four years into this litigation, the Cabinet has finally acknowledged "the legitimacy of [the Council's] advocacy for intellectually disabled adults, children or their ***2** families." Cabinet Brief at 3-4. But the Cabinet continues to act as if this is just a golf outing and it can play an endless number of mulligans. Neither the restrictions on appellate review in Kentucky law nor the Open Records Act allows the Cabinet to keep adding new justifications until the requesting party or the courts are simply worn down. The Cabinet's basis for withholding documents here was legally unsound, and thus the judgment below should be reversed with directions to enter judgment for the Council. [a]

II. ARGUMENT

A. The Cabinet's New "Informational Privacy" and Confidentiality Arguments Are Procedurally Improper and Should Be Rejected.

As a threshold matter of appellate procedure, there are two related reasons why the Cabinet's new arguments concerning alleged constitutional and statutory prohibitions on the release of the requested documents should be rejected.

First, the Cabinet's new "informational privacy" arguments were never presented to the courts below. The Cabinet has simply ignored the restrictions on new appellate arguments and made no attempt to comply with CR 76.12(4)(e) (requiring an appellee to identify where an issue has appeared in the record). *See Giddings & Lewis, Inc. v. Industrial Risk Insurers,* 348 S.W.3d 729, 744 (Ky. 2011) ("Specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal."), quoting *Fischer v. Fischer,* 348 F.3d 582, 588 (Ky. 2011).

***3** Second, the Cabinet's entire discussion of the origins and even motivations for the enactment of the Adult Protection Act - including "Why Kentucky and Other States Enacted Adult Protection Laws" (pages 4-10) and "Legislative History of the

Kentucky Adult Protection Act" (pages 10-17) - is unsupported by any evidence in the record or even citations to specific sources for most of the Cabinet's sweeping generalizations about what "the obvious legislative intent is" (and even "Our General Assembly also had constructive knowledge about" - whatever that means). On the contrary, virtually the only source for much of the Cabinet's essay-like discussion is a single Legislative Research Commission report authored 24 years *after* KRS 209.140 was enacted, and thus irrelevant to most of the points for which it is cited. Indeed, nearly all of the Cabinet's discussion focuses on problems with reporting and remedying "**elder** **abuse**," not **abuse** of individuals with intellectual disabilities who have different vulnerabilities and live in different community settings with different regulatory schemes.

The Cabinet blithely asserts that the Court can take judicial notice of all of these matters, *id.* at 19 n.28. The Cabinet wholly ignores the limitations on use of that doctrine in Kentucky law, especially in appellate arguments. In fact, the Cabinet appears to concede that the alleged facts are not "[g]enerally known within ... the county in which the venue of the action is fixed" (*see id.* at 3: "Lacking awareness of the history and goals of the APA, the dissenting judge disagreed with the majority"). Ky. R. Evid. 201(b)(1). Nor can it be said that the sweeping generalizations in the Cabinet's discussion are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ky. R. Evid. 201(b)(2). *See Rogers v. Commonwealth,* 366 S.W.3d 446, 450-52 (Ky. 2012); ***4** *Commonwealth v. Howlett,* 328 S.W.3d 191, 193-94 (Ky. 2010); Robert G. Lawson, *The Kentucky Evidence Law Handbook,* § 1.00[2][c] (5th ed. 2013). For these reasons alone, the Cabinet's new arguments should be rejected and only the validity of its initial reason for withholding documents from the Council should be subject to this Court's review.

B. The Cabinet's New Privacy and Confidentiality Arguments Also Should Be Rejected Because They Are Legally Erroneous.

The Cabinet's new constitutional and statutory privacy arguments also should be rejected because they are legally flawed for multiple reasons. To begin with, the arguments are surely exaggerated. If it were true that the federal or Kentucky constitutions actually prohibited the kind of disclosures covered by the Council's request, there would be no need for a federal Privacy Act, 5 U.S.C. § 552(a), much less for the Open Records Act exception in KRS 61.878(1)(a).

Nor can the Cabinet's alleged "informational privacy" rights apply to records of people who have died, such as the records requested here. Under Kentucky law, decedents have no cognizable privacy interests - and thus have no need for the Cabinet's "protection." *See Mineer v. Williams,* 82 F. Supp. 2d 702, 704 (E.D. Ky. 2000) (dismissing a false light privacy claim because "The Supreme Court of Kentucky adopted the principles for invasion of privacy as enunciated in the Restatement (Second) Of Torts (1976) in *McCall v. Courier-Journal and Louisville Times Co.,* 623 S.W.2d 882, 887 (Ky. 1981)" and under those principles, "a privacy claim must be brought by a living person. This is specifically required by Restatement (Second) Of Torts § 6521 [(1977) ("Personal Character of Right of Privacy")]").

The Cabinet fails to bring this legal authority to the Court's attention. Instead, the Cabinet relies on a readily distinguishable century-old Kentucky decision, *Douglas v.* ***5** *Stokes,* 149 Ky. 506, 149 S.W. 849 (1912), *see Mineer,* 82 F. Supp. 2d at 706, and a U.S. Supreme Court decision which the Cabinet misrepresents as "reject[ing] the argument made by a FOIA requestor that privacy ceases to exist at death." Cabinet Brief, at 25, citing *National Archives and Records Admin. v. Favish,* 541 U.S. 157, 171 (2004). In fact, the *Favish* court expressly noted that its decision was not based on the decedent's possible "posthumous reputation or some other interest personal to him," but instead on rights asserted *by his relatives* who sought "to be shielded by the [FOIA] exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, *not for the sake of the deceased" Id.* at 166 (emphasis added).

Finally, even if the Cabinet's new arguments did apply to people who have died, the great preponderance of the documents covered by the Council's request did not "constitute a clearly unwarranted invasion" of anyone's "personal privacy," KRS 61.878(1)(a), nor could they be properly withheld because of purported law enforcement concerns, KRS 61.878(1)(h). Thus they should have been produced, or if redacted or withheld, the Cabinet should have "provide[d] the requesting party and the court with sufficient information about the nature of the withheld record (or the categories of withheld records) and the harm

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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, 852 (Ky. 2013).

In particular, the Council sought "copies of all investigations, coroner's report(s), and Mortality Review Committee findings related to" the death of a man named Gary Farris who died after the Cabinet transferred him from a state facility to a community placement, plus all documents concerning "the deaths of any other individuals who were ***6** transferred by the Cabinet for Health and Family Services from ICF/MR placements and died in community placements after January 1, 2008 through the date of your response." R: 45-46 (Appendix Tab 3 to the Council's initial Brief). Thus, for example, the Cabinet should have produced all investigatory and reporting records about such things as how many people died at community placements monitored by the Cabinet? In what locations? How many investigations were actually performed? By whom? What were the circumstances of the deaths? Were any medical examinations or autopsies performed? What were the results? Were the deaths preventable or from natural causes? Were there indications of **abuse** or neglect? Was any corrective action taken? Were any of contractual arrangements with the residential providers altered? Why or why not? Were any Cabinet employees who were supposedly monitoring the residential services given extra training? Were any disciplined? Were any referrals made to law enforcement officials? How many? Were any reports prepared to the Governor and the Legislative Research Commission as provided by KRS 209.030(12)(b)?

The Cabinet produced none of these documents. In other words, the Cabinet made no effort to segregate or redact documents which might implicate alleged constitutional or statutory privacy concerns - or which might contain "private health information" purportedly shielded by HIPAA (the Health Insurance Portability and Accountability Act of 1996) - and then produce the remaining investigatory materials and reports to the Council. This was unlawful: even if the Cabinet had timely raised its privacy concerns or the purported law enforcement concerns, the Cabinet still should have reviewed its documents and produced everything not clearly satisfying the exceptions in KRS 61.878(1)(a) or KRS 61.878(1)(h). *See* KRS 61.878(4) ("If any ***7** public record contains material which is not excepted under this section [61.878], the public agency shall separate the excepted and make the unexcepted material available for examination."). And as to any documents the Cabinet withheld, "the court must hold the agency to its burden of proof by insisting that the agency make a sufficient factual showing - by affidavit; by oral testimony; or, if necessary to preserve the exemption, by *in camera* production - to justify the exemption." *City of Fort Thomas,* 406 S.W.3d at 852. The Cabinet failed to meet this requirement as well.

C. The Cabinet's Other New Arguments Are Also Procedurally Improper and Legally Flawed.

The Cabinet concludes with three final justifications for its refusal to produce documents to the Council, none of which were mentioned when the Cabinet denied the Council's Open Records Act request and none of which has merit.

First, at pages 38-39 of its Brief, the Cabinet gives a breathtaking interpretation of "this Court's recent *Kentucky New Era* opinion" and asserts that it "would mean this agency could categorically redact all the medical records and law enforcement type information as that would be the only practical way to comply with the type of request the Council has made to the Cabinet." According to the Cabinet, "Almost everything the Council asks for from the Cabinet would be private under KRS 61.878(1)(a) for the same reason this Court upheld the government's categorical redactions in that recent opinions."

In fact, the Council's request in this matter was remarkably different from the request in *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76 (Ky. 2013). There, the requesting newspaper was a newspaper which already had obtained "440 pages of arrest and incident records" from the government agency, and had already succeeded in obtaining additional demographic data that was initially redacted. ***8** However, the newspaper still sought personal identification data for juveniles and for adults whose names had already been provided (and could be located through other investigative means). This Court expressly recognized that "where the disclosure of certain information about private citizens sheds significant light on an agency's conduct, we have held that the citizen's privacy interest must yield." *Id.* at 86 (citation omitted). Yet in the circumstances of that case, the Court held that the disclosures by the agency were sufficient for the public interest purposes, and no further disclosures were required.

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By contrast, in the present case, the Cabinet made precisely the "blanket denials" condemned in *Kentucky New Era. Id.* at 88. The Cabinet made no careful redactions based on sensitive personal information. The Cabinet produced no records of any investigation (or even whether any investigations ever occurred), no incident reports (even if redacted to protect the personal identification data of witnesses), and no records of employee training or disciplinary actions or remedial plans as a result of individual deaths. The Cabinet even failed to produce the annual reports that should have been provided under KRS 209.030(12)(b) ("The cabinet shall make the report available to community human services organizations and others upon request."). To put it mildly, the Cabinet's insistence on the identity of *Kentucky New Era* and the present case is a disagreeable reminder of why further guidance to government agencies is still needed.

Second, at page 40 of its Brief, the Cabinet introduces yet another new argument not presented to the courts below, arguing that because of parallel restrictions on the disclosure of "records" as defined in KRS 209.020(15) and 209.030(7), the Cabinet could not share extensive records with the Council "even if it was an 'agency' with a 'legitimate need' as it has argued to the Court." But the Cabinet brazenly misquotes the ***9** two statutory sections. Both of them include the modifying phrase "of the adult" which the Cabinet has simply deleted in quoting KRS 209.020(15) in its Brief. In other words, even assuming that records of the decedents are still protected, the limitations in KRS 209.020(15) and 209.030(7) are nowhere near as expansive as the Cabinet asserts, and do not justify Cabinet's refusal to withhold documents and reports from the Council.

Finally, at pages 40-43 of its Brief, the Cabinet argues that disclosure of the records requested by the Council is limited or prohibited by HIPAA, which prohibits "covered entities" from using or disclosing "protected health information" except as permitted by national privacy standards. 45 CFR §§ 164.502(a). But the vast majority of the requested records would never constitute "protected health information," and the Cabinet cannot even establish that it is a "covered entity" under HIPAA. On the contrary, in 08-ORD-166, the Attorney General's Office concluded that the Cabinet had violated the Open Records Act by citing HIPAA as an obstacle to producing information in a separate request for investigations of facilities charged with the care of people with intellectual disabilities, and chastised the Cabinet for an overly zealous redaction policy under which "the public is effectively foreclosed from monitoring the agency's conduct in discharging its statutory duty to investigate **abuse** and neglect at this state owned and operated facility for individuals with developmental disabilities." 08-ORD-166, at 9. The Attorney General's Office reaffirmed its analysis that HIPAA does not shield documents discoverable under the Open Records Act in 10-ORD-161, and again in 10-ORD-176, where the Office also rejected the Cabinet's argument here that the requested documents were shielded by "personal privacy" exception in KRS 61.878(1)(a) because Kentucky law generally does not recognize personal privacy interests after death.

*10 III. CONCLUSION

As discussed in the Council's initial Brief, the perverse tragedy of the rulings below is that men like Mr. Tardy and Mr. Farris, who are vulnerable wards of the Commonwealth and likely have no family members or guardians to act as advocates, are exactly the adults with the greatest need for advocacy and protection by independent entities like the Council. Yet once again in its Brief, the Cabinet has completely failed to reconcile its interpretation of KRS 209.140(3) with the "basic policy" of the Open Records Act "that free and open examination of public records is in the public interest," KRS 61.871, and the further statutory mandate that "the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed." *See City of Fort Thomas,* 406 S.W.3d at 849.

The Circuit Court's dismissal of this action should be reversed and remanded, with instructions to the Circuit Court to enter judgment for the Council declaring that it is entitled to receive all responsive documents from the Cabinet without further delay.

Footnotes

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a The Cabinet does continue to insist (as the concurring judge argued below) that the Council cannot qualify for disclosure of documents to "Other medical, psychological, or social service agencies, or law enforcement agencies that have a legitimate interest in the case," as provided in KRS 209.140(3), because "the word 'agency' should be interpreted to mean 'government agency.'" Cabinet Brief at 31. As the Council has argued before, this interpretation violates the mandate in KRS 61.871 that the Cabinet "strictly" construe "the exceptions provided for by KRS 61.878 *or otherwise provided by law.*" The Cabinet's interpretation is also flawed because "medical" and "psychological" agencies are plainly non-governmental, and so too "social service agencies" can be.

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