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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001131-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR ECONOMIC DEVELOPMENT — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 17-CI-01137

THE COURIER-JOURNAL, INC. — APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

KRAMER, JUDGE: The Commonwealth of Kentucky, Cabinet for Economic Development (Cabinet) appeals a decision of the Franklin Circuit Court in favor of The Courier-Journal, Inc., in a dispute relating to Kentucky's Open Records Act (ORA). For the reasons set forth below, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL HISTORY

The relevant facts of this case are undisputed. During the 2017 legislative session, the General Assembly passed HB 482, as altered by a Senate Committee Substitute. HB 482 reopened the Executive Branch budget to allow for either (a) $15 million in bond funding for the Kentucky Economic Development Finance Authority ("KEDFA") Loan Pool, or (b) $15 million from the General Fund Surplus Account or Budget Reserve Trust Fund. HB 482 required the funds to be used "for the sole purpose of facilitating a private sector investment of no less than $1,000,000,000 in one or more locations in the Commonwealth." The bill also required the funds to be used on "programs administered by" KEDFA.

On April 26, 2017, Governor Matt Bevin and entrepreneur Craig T. Bouchard announced that a company recently formed and incorporated in Delaware, Braidy Industries, Inc., would build a $1.3 billion aluminum plant in Greenup County. The official press release from the Cabinet for Economic Development ("Cabinet") stated that the decision appeared to have been made after KEDFA held a special meeting on the same day to approve $10 million in tax incentives through the Kentucky Business Investment Program.

A day after the announcement, at its regular meeting on April 27, 2017, KEDFA authorized the transfer of the $15 million in bond funds from the High-Tech Investment Pool to the Kentucky Economic Development Partnership

("KEDP"). KEDP serves as the governing body of the Cabinet pursuant to KRS[1] 154.10-030(1)[2] and approves "economic development programs and projects" pursuant to KRS 154.10-030(4).

On the same date, KEDP authorized a $15 million capital contribution into Commonwealth Seed Capital, LLC ("CSC"). The contribution came with the requirement that it be used to facilitate an investment in Kentucky of at least $1 billion. CSC approved the investment of the $15 million to purchase direct equity in Braidy, which resulted in the issuance of stock in Braidy to CSC. This investment resulted in CSC's 20% ownership of Braidy.

In short, $15 million in public funds were used to purchase a 20% ownership stake in a private company.

On June 30, 2017, a reporter for the Courier-Journal, Tom Loftus, submitted an ORA request to the Cabinet. As an aside, much of the difficulty in this case arises from the Cabinet's understanding of *what* Loftus was requesting; throughout the litigation below and its appellate brief, the Cabinet has referred to it in vague, general terms as "Braidy's shareholder *information*," "*documents containing* shareholder information," or "*all* documents submitted to the Cabinet

[1] Kentucky Revised Statute.

[2] The Cabinet is authorized, on certain conditions, "to contract for the provision of any economic development function or service with private firms or public institutions[.]" KRS 154.12-050.

by Braidy Industries *and* containing information about the shareholders of Braidy Industries." To be clear, however, the information Loftus sought on behalf of the Courier-Journal was extremely specific. In the relevant part of his June 30, 2017 email to the Cabinet, he requested:

> [C]opies of any and all documents that list the stockholders or investors in Braidy Industries, Inc., a corporation organized in Kentucky on June 1, 2017 and with its principal office at 1544 Winchester Ave., Ashland, Ky., 42202.
>
> This request seeks all documents the cabinet has received that show the names of stockholders/investors in Braidy Industries, Inc., including any original list plus any subsequent lists that may reflect additions or changes in the names of those investors.

In other words, the Courier-Journal, through Loftus, only requested documents in the Cabinet's possession that indicated the names of Braidy's stockholders or investors. If the documentation included other information, the Courier-Journal left the door open for the Cabinet to redact it.

In response to the request, the Cabinet produced two KEDFA board reports, which identified Bouchard and CSC as possessing a "20% or more" ownership in Braidy. But, the Cabinet refused to produce anything more than that, explaining in relevant part as follows:

> The attached board reports are made available for your inspection as the contents of those reports were presented during publicly held meetings of [KEDFA]. The identity of other stockholders or investors in Braidy Industries,

Inc. are not subject to inspection under the Open Records Act for the reasons discussed below.

KRS 61.878(1)(a) exempts from inspection records containing "information of a personal nature where the public disclosure [would] constitute a clearly unwarranted invasion of privacy [sic]." The privacy right of a private stockholder or investor not to be publicly identified as having an ownership interest in a private enterprise is substantial and disclosure of the stockholder or investor would constitute a clearly unwarranted invasion of privacy.

KRS 61.878(1)(i) exempts from disclosure records including "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency" and (1)(j) exempts inspection of "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]" The names of prospective stockholders or investors in Braidy Industries, Inc. were made known during the course of the Partnerships' [sic] evaluation, analysis and determination whether to commit the above referenced public funds to facilitate economic development. Because the identity of the prospective stockholders or investors are contained in preliminary materials relevant to the Partnerships' [sic] determination as to a particular course of action, the materials containing the names of the prospective stockholders or investors are exempt from disclosure. See also: *Baker v. Jones*, 199 S.W.3d 749 (Ky. App. 2006).

KRS 61.878(1)(c)1. exempts from inspection records confidentially disclosed to the cabinet, which are considered confidential or proprietary if disclosure would permit an unfair commercial advantage to the competitors of the parties subjected to the disclosure. As private investors in a private business enterprise, the identities of the stockholders and investors in Braidy

> Industries, Inc. are confidential and disclosure of their names would permit an unfair advantage to their competitors. The manner in which competitors might gain an unfair advantage are too varied and multiplicitous to describe. However, it might include for example, allowing the competitor to acquire an understanding to some degree of the potential financial and resource commitment of the prospective stockholders or investors which might expose their vulnerabilities elsewhere; or, it may allow the competitor to develop a perspective of the stockholders[’] or investors[’] potential future investments or business strategies bearing on related endeavors.
>
> Braidy Industries, Inc.’s application for economic development incentives, including supporting documentation, correspondence, records or writings, is not included. These records are exempt from inspection pursuant to KRS 61.878(1)(c)2.b., which expressly exempts applications for incentive programs and tax credits contained in KRS Chapter 154. *See also Hoy v. Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. [1995]).

Dissatisfied with the Cabinet’s refusal to identify *all* of Braidy’s shareholders, the Courier-Journal then appealed to the Attorney General for a determination of whether the exemptions asserted by the Cabinet applied. Upon review, the Attorney General found they did not apply and that the Cabinet had consequently violated the ORA. *See* Ky. Op. Atty. Gen. 17-ORD-198, 2017 WL 4585280. The Attorney General’s reasoning is set forth below in the context of our analysis.

Subsequently, the Cabinet filed an original action in Franklin Circuit Court contesting the Attorney General's decision, reasserting the same arguments it had previously raised before the Attorney General. Additionally, Braidy was given leave as *amicus curiae* to file a brief in support of the Cabinet's position.

Shortly thereafter, on or about December 25, 2017, Braidy authorized a press release purporting to disclose all of its shareholders' identities. Notwithstanding, the Cabinet did not abandon its position that the identities of Braidy's shareholders remained confidential and outside the scope of the ORA.

The parties filed cross-motions for summary judgment. And, in a March 29, 2018 order, the circuit court likewise determined the Cabinet had violated the ORA, ultimately rejecting the Cabinet's arguments for largely the same reasons given by the Attorney General and directing the Cabinet to produce any documentation responsive to the Courier-Journal's request for *in camera* review.

In response to the circuit court's directive, the Cabinet produced a total of sixteen unredacted documents, but with a caveat; in its "notice of production," it stated:

> In order to comply with the Order of this Court, these documents have been produced for in camera review in their entirety and have not been redacted. However, as the [Courier-Journal] has contested only the exempting of the identities of shareholders from disclosure, there is no disagreement before this Court as to the propriety of the

> exemption of other information contained in these documents from disclosure pursuant to the Open Records Act. Accordingly, should this Court find that these documents must be disclosed to [the Courier-Journal] to the extent that these documents contain the identities of shareholders, the [Cabinet] respectfully requests that the Court allow the [Cabinet] to produce properly redacted documents and that these documents, produced without redaction for the purpose of allowing review by the Court, remain under seal.

After reviewing what the Cabinet produced, the circuit court concluded in a July 5, 2018 order that the breadth of the Cabinet's documentation reflected Braidy's press release had, in fact, divulged all of its shareholders' identities. Nevertheless, it appears the circuit court determined that the Courier-Journal was entitled to four of the documents in *unredacted* form unless the Cabinet sought injunctive relief – in which case the documents would remain under seal. The documents in question consisted of: (1) a May 4, 2017 Voting Agreement; (2) a May 4, 2017 Stock Purchase Agreement; (3) a May 4, 2017 Investor's Rights Agreement; and (4) an April 13, 2017 Letter of Intent Regarding Investment of $15 Million Dollars (addressed to several of Braidy's shareholders). As to why the Courier-Journal was entitled to these documents, the circuit court explained in relevant part:

> [T]he Court finds that the four (4) corporate documents at issue contain information required to be made public by virtue of the Commonwealth's investment of $15 million tax dollars in the operation of this business. Under the Open Records Act, the public has a right to know the

> terms and conditions of the agreements which govern the investment and use of tax dollars.
>
> In addition, . . . the Court is required to balance the equities and to consider the public interest. *See Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978). Here, the documents at issue do not appear to implicate substantial privacy interests of these or other investors. On the other hand, the investment of public funds is clearly a matter of importance to the public. The documents at issue (primarily the various operating agreements) provide important information on the operation of Braidy, a company that received $15 million dollars in taxpayer funds from Commonwealth Seed Capital, LLC in exchange for direct equity in the corporation. Under the controlling authority of *Lawson v. Office of Attorney General*, 415 S.W.3d 59 (Ky. 2013), "the possibility of a limited amount of purely personal information does not justify the blanket non-disclosure of a record with substantial public import." *Id*. at 71.

In other words, the circuit court appears to have determined *sua sponte* that the Courier-Journal was entitled to documents in the Cabinet's possession which, in their current unredacted form, indicated "the terms and conditions of the agreements which govern the investment and use of tax dollars" relative to Braidy, and "important information on the operation of Braidy" – *more* than just the names of Braidy's shareholders. The circuit court also assessed the Cabinet with statutory penalties for willfully violating the ORA and required it to pay the Courier-Journal's attorney's fees.

This appeal followed. Contemporaneously, the Cabinet moved for emergency relief to stay enforcement of the circuit court's orders of March 29,

2018, and July 5, 2018; and its motion was ultimately granted pending final disposition of this matter.

STANDARD OF REVIEW

In *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Kentucky Supreme Court set out the process for review of an Open Records Act request.

> To begin, it is helpful to observe that when an agency denies an ORA request, the requester has two ways to challenge the denial. He or she may, under KRS 61.882, file an original action in the Circuit Court seeking injunctive and/or other appropriate relief. Alternatively, under KRS 61.880, he or she may, as was done in this case, ask the Attorney General to review the matter. Once the Attorney General renders a decision either party then has thirty days within which to bring an action pursuant to KRS 61.882(3) in the Circuit Court. Although the statutes refer to this second type of Circuit Court proceeding as an "appeal" of the Attorney General's decision, it is an "appeal" only in the sense that if a Circuit Court action is not filed within the thirty-day limitations period, the Attorney General's decision becomes binding on the parties and enforceable in court. Otherwise, this second sort of Circuit Court proceeding is an original action just like the first sort. The Circuit Court does not review and is not in any sense bound by the Attorney General's decision, nor is it limited to the "record" offered to the Attorney General. The agency, rather, bears the burden of proof, and what it must prove is that any decision to withhold responsive records was justified under the Act. Its proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld. The trial court may also hold a hearing if

> necessary, and the parties may request or the court on its own motion may require the *in camera* inspection of any withheld records. We review the trial court's factual findings for clear error, and issues concerning the construction of the ORA we review *de novo*.

Id. at 848-49 (internal quotation marks, alterations, ellipses, and citations omitted).

ANALYSIS

Two overarching issues are before this Court: (1) the propriety of the circuit court's decision relative to the Courier-Journal's ORA request; and (2) the propriety of its decision relative to the Courier-Journal's request for statutory penalties and attorneys' fees. Each is addressed in turn.

1. THE COURIER-JOURNAL'S ORA REQUEST

The primary issue raised in this appeal is whether the Cabinet violated the ORA by denying the Courier-Journal's June 30, 2017 request for records identifying shareholders and investors in Braidy Industries, Inc. Upon review, we agree with the Attorney General and circuit court that the Cabinet did violate the ORA in that respect. The Attorney General's opinion on this matter correctly and thoroughly resolves this issue, along with the Cabinet's and Courier-Journal's arguments relating to it; and, like the circuit court, we find it "highly persuasive." *See York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991) (citation omitted). Accordingly, we adopt the Attorney General's opinion as follows:

> In analyzing the arguments made by the parties, we take into account the public agency's burden of proof in

sustaining its action under KRS 61.880(2)(c). We are further mindful of the admonition in KRS 61.871 that "free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 . . . shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." Ultimately, as set forth below, we rule that that the Commonwealth cannot have "secret partners" in this situation.

Personal privacy under KRS 61.878(1)(a)

KRS 61.878(1)(a) authorizes public agencies to withhold:

> Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

In 1992, the Kentucky Supreme Court established a standard by which we judge the propriety of a public agency's reliance on KRS 61.878(1)(a) as a basis for denying access to public records. At pages 327 and 328 of *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992), the Court articulated the following standard:

> [G]iven the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. The statute contemplates a case specific approach by providing for de novo judicial review of agency actions, and by requiring that the agency sustain its action by proof.

> Moreover, the question of whether an invasion of privacy is "clearly unwarranted" is intrinsically situational, and can only be determined within a specific context.

The Court admonished that "the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity . . . ." *Id*.

In a subsequent analysis of the privacy exemption, the Court of Appeals refined this standard. *Zink v. Com., Dept. of Workers' Claims*, 902 S.W.2d 825 (Ky. App. 1994). At page 828 of that opinion, the court discussed its "mode of decision":

> [O]ur analysis begins with a determination of whether the subject information is of a 'personal nature.' If we find that it is, we must then determine whether public disclosure 'would constitute a clearly unwarranted invasion of personal privacy.' This latter determination entails a 'comparative weighing of antagonistic interests' in which the privacy interest in nondisclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good. [*Board of Examiners*] at 327. As the Supreme Court noted, the circumstances of a given case will affect the balance. *Id*. at 328.

The public interest to be considered is the purpose of the Open Records Act in general, which "is meant to open the state's public agencies to meaningful public oversight, to enable Kentuckians to know 'what their government is up to.' It is not meant to turn the state's agencies into a clearing house of personal information about private citizens readily available to anyone upon request." *Kentucky New Era, Inc. v. City of Hopkinsville,*

415 S.W.3d 76, 89 (Ky. 2013). *See also Zink, supra*, 902 S.W.2d at 829 ("the purpose of disclosure . . . is not fostered however by disclosure of information about private citizens . . . that reveals little or nothing about an agency's own conduct").

The *Courier-Journal* argues that because the Commonwealth has invested state money in Braidy for economic development purposes, "[t]he public is entitled to examine whether any of the other shareholders has other business dealings or personal relationships with the public officials responsible for investing" the money, to ensure "that the expenditure of funds was not the result of improper influence peddling, graft, or the like." Thus, it argues that the identities of individual shareholders of Braidy must be disclosed just as the names of anonymous donors of "substantial gifts" to a state university foundation raised a suspicion of improper influence or benefits in *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818, 823 (Ky. 2008).

The Cabinet responds that the Open Records Act is "premised upon the public's right to expect its agencies properly to execute their statutory functions," *Lawson v. Office of Att'y General*, 415 S.W.3d 59, 70 (Ky. 2013), and that "disclosing the names of the other Braidy Industries' shareholders offers nothing to show whether the Cabinet is executing its statutory obligations." Furthermore, the Cabinet argues that the personal assets and investment behavior of private individuals are "matters of personal finance [which] are intensely private and closely guarded," *Cape Publications, supra*, 260 S.W.3d at 822, and thus analogous to personal income, the "intimate nature" of which was recognized in *Zink, supra*, 902 S.W.2d at 829.

The question, therefore, is whether individual stockholders in Braidy have a substantial enough privacy interest in the singular fact they have invested in the

company to outweigh the public interest in disclosure of that information. We conclude that they do not.

The identities of the shareholders in Braidy are unquestionably a matter of public interest. As we have previously stated, the Open Records Act is premised on the idea that "[g]overnment action should be open and subject to review in order to foster confidence and trust as well as to ensure that public funds are properly spent." OAG 96-43. Moreover, we have recognized that "wherever public funds go, the public interest follows." OAG 76-648.

Here, the Cabinet, through CSC, made an extraordinary investment of public funds in Braidy. In doing so, the Commonwealth has conferred a direct benefit on the Braidy shareholders in the form of a capital injection into Braidy. Moreover, the Commonwealth is now in business with those shareholders. This creates a heightened public interest in disclosure.

As the Supreme Court has held, "[t]he public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions." *Zink*, 902 S.W.2d at 828 (quoting *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774-75 (1989)). We believe that revealing the identities of the shareholders of Braidy serves the purposes of the Open Records Act because it will allow the public to evaluate the Cabinet's decision to invest substantial resources in that company. *See also Courier-Journal & Louisville Times Co. v. Peers*, 747 S.W.2d 125, 130 (Ky. 1988) (disclosure of requested documents was required primarily because the information concerned "the expenditure of public funds").

Moreover, the Braidy shareholders' privacy interests do not outweigh the public interest in disclosure. The *Courier-Journal* seeks only the names of the

shareholders, and not additional financial information, such as the number or value of their holdings. The initial question in this inquiry is "whether the subject information is of a 'personal nature.'" *Zink*, 902 S.W.2d at 828. As we have repeatedly held, "a person's name is personal but it is the least private thing about him." OAG 82-234. Here, the only information that will be publicly revealed is the fact that the shareholders own equity in Braidy. *Cf. Cape Publications*, 260 S.W.3d at 822 (requiring disclosure of donors and the amounts of their gifts, and observing that while such information is private, it is "not as intimate as one's income").

We are mindful that the identities of shareholders in private companies are not generally public information. But the identity of a shareholder is not absolutely secret, either. Under both Kentucky and Delaware law, a shareholder may learn the identity of the other shareholders in a company. *See* KRS 271B.16-020(2)(c); Delaware General Corporation Law Section 220(b). Accordingly, Braidy's shareholders cannot have reasonably expected that their identities would remain secret from other shareholders. While the immediate owner of the equity in Braidy is CSC, and not the Cabinet, the citizens of the Commonwealth are, ultimately, the investors in Braidy, and the Braidy shareholders could not reasonably expect that their identities would be kept secret from their co-investors. Thus, any invasion of privacy that would result from disclosing their names is minimal. We therefore find that the balance weighs in favor of disclosure under KRS 61.878(1)(a).

Confidential disclosures under KRS 61.878(1)(c)1.

We next consider the application of KRS 61.878(1)(c)1. That subsection exempts from disclosure:

> records confidentially disclosed to an agency or required by an agency to be

> disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.

We have construed this as a three-prong test, such that in order to qualify for exclusion under KRS 61.878(1)(c)1., a public record must be:

> (1) confidentially disclosed to an agency or required by an agency to be disclosed to it;
>
> (2) generally recognized as confidential or proprietary; and
>
> (3) of such a character that open disclosure would permit an unfair commercial advantage to competitors of the disclosing entity.

(*See* 05-ORD-155 and authorities cited therein.)

The Cabinet asserts, and the *Courier-Journal* does not appear to dispute, that the "names of the other Braidy Industries' shareholders were disclosed confidentially to the Cabinet" as part of KEDP's review prior to authorizing the transfer of funds as a capital contribution to CSC. We therefore assume for present purposes that the first prong of the test has been met, and proceed to examine whether the names of shareholders are "generally recognized as confidential or proprietary."

We note once again that KRS 271B.16-020(2)(c) permits shareholders in a corporation to access a list of the other shareholders for certain purposes. Furthermore, there is nothing in the record to indicate a general custom or usage regarding such information as confidential; nor has any argument been made specifically as to why the names of shareholders should be regarded as

"proprietary" information of Braidy. Accordingly, we do not find this information confidential or proprietary.

We turn, lastly, to the question of whether disclosure of the listing of Braidy's stockholders "would permit an unfair commercial advantage" to Braidy's competitors. We conclude that it would not.

The Cabinet has already asserted that disclosure would permit industry competitors an understanding of "the potential financial and resource commitment of the prospective stockholders or investors which might expose their vulnerabilities elsewhere" or "allow the competitor to develop a perspective of the stockholders[']or investors['] potential future investments or business strategies bearing on related endeavors." On appeal, the Cabinet further argues:

> As discussed, names of the other Braidy shareholders were disclosed confidentially to the Cabinet. Releasing the names of these shareholders would give their competitors an unfair commercial advantage, as it would allow their competitors access to confidential nonpublic information about the company the competitors could use to profile Braidy Industries or to obtain insight into its financial status and business resources.
>
> . . . [I]t is routine for business organizations to set about in an effort to gain information about their competitors. . . . Confidential information about a company, (*i.e.*, information about a company that is not publically available), that would permit its competitors any ability or enhanced ability to profile the company or to obtain insight into the company's financial status, access to management services, areas of expertise,

> business patterns, strategies, affiliates, etc., constitutes unfair commercial advantage.

Thus, the Cabinet maintains that public disclosure of Braidy's shareholder records would unfairly permit competitors access to significant private financial information.

We do not find that the Cabinet has met its burden of proof on this point, in light of the fact that we do not regard the names of corporate shareholders, in isolation, as confidential or proprietary information.

Our decisions have "recognized that records relating to private financial affairs can be exempted under the Kentucky Open Records Act." 01-ORD-143 (citation form modified to current practice); *see also* 10-ORD-191. We do not, however, believe that the identities of the shareholders reveal anything of substance about the economic status of either Braidy or its shareholders. Specifically, the fact that an individual is an equity holder does not reveal how well-capitalized the company is, and it says nothing about how much money the investor has. This is not a case in which a requester seeks detailed personal financial information that could provide an advantage to competitors. *See, e.g., Marina Mgmt. Serv., Inc. v. Com., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995) (permitting agency to withhold records that reflected "asset values, notes payable, rental amounts on houseboats, related party transactions, profit margins, net earnings, and capital income").

Furthermore, the relevant "competitive" interest in this case is not in the nature of trade secrets, investment strategies, economic status, or business structures, but rather the competition for funding that has already concluded, which resulted in the investment of $15 million of the Commonwealth's resources (along with the approval by KEDFA of $10 million in tax incentives for

Braidy Industries). Since no unfair commercial disadvantage to Braidy or its investors has been shown, we find that the Cabinet has not met its burden of proof with respect to KRS 61.878(1)(c)1.

Confidential disclosures under 61.878(1)(c)2.b.[3]

As to KRS 61.878(1)(c)2.b., also invoked by the Cabinet, that subsection applies to:

> records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained . . . [i]n conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154.

Citing *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995), the Cabinet argues that certain e-mails containing shareholder names "involve Braidy Industries' application for economic incentives which are exempt from disclosure pursuant to KRS 61.878(1)(c) 2.b."

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[3] While the Cabinet makes no issue of it before this Court, the Cabinet later argued (before the circuit court) that Braidy's shareholder names were exempt from the ORA by virtue of the exception set forth in KRS 61.878(1)(c)2.a., which provides:

> records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained . . . [i]n conjunction with an application for or the administration of a loan or grant[.]

The circuit court rejected this additional argument, pointing out that even if a direct purchase of equity in Braidy could qualify as a "loan" or "grant" within the meaning of this exception, there is nothing in the record indicating a general custom or usage regarding shareholder names as confidential; nor has any argument been made specifically as to why the names of shareholders should be regarded as "proprietary" information of Braidy.

The *Hoy* case recognized certain information as confidential or proprietary, but that information "included a financial history of the corporation, projected cost of the project, the specific amount and timing of capital investment, copies of financial statements and a detailed description of the company's productivity, efficiency and financial stability." 907 S.W.2d at 768. Here, only the names of the Braidy shareholders are at issue. As we have already found in regard to KRS 61.878(1)(c)1., there has not been an adequate showing that this specific information is "generally recognized as confidential or proprietary."[4]

KRS 61.878(4) provides: "If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." Since only the list of shareholder names has been requested, any confidential and proprietary information that may appear in the records disputed under KRS 61.878(1)(c) 2.b. can be redacted, so long as the shareholder names are disclosed.

Preliminary documents under KRS 61.878(1)(i) and (j)

Finally, we consider the arguments of the parties under KRS 61.878(1)(i) and (j). Those subsections permit the withholding of, respectively:

[4] In its separate review of this matter, the circuit court alternatively concluded that this exemption did not apply because, in its view, the Commonwealth's indirect purchase of equity (*i.e.*, through the Cabinet and CSC) did not qualify as "assessments, incentives, inducements, and tax credits as described in KRS Chapter 154." The Cabinet primarily focuses upon this alternative point in its arguments of error before this Court.

We need not address this point, though, because we agree with the circuit court's initial reason for rejecting this exemption – namely, that the Cabinet failed to carry its burden of demonstrating that the names of shareholders are generally recognized as confidential or proprietary.

> Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency; [and]
>
> Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.

The *Courier-Journal* argues that the requested lists of shareholder names "are not 'preliminary' in any way" because the Cabinet has already completed the investment of funds in Braidy Industries and "expressly admitted that its decision to do so was based upon its review of the identities of stockholders or investors in the company." The Cabinet responds:

> It is important to note that the names of the shareholders not disclosed to Loftus concern those that did not become shareholders in Braidy Industries until May 4, 2017, the date when Braidy Industries and its shareholders entered into a stock purchase agreement. (A list of Braidy Industries' shareholders is an exhibit to the stock purchase agreement.) Before the Partnership authorized transfer of $15 million in funds to be used as a capital contribution to CSC on April 28, 2017, the Cabinet issued written communications and exchanged email correspondence with potential parties that *would become investors or shareholders* in Braidy Industries. Cabinet staff also exchanged email and possessed information relating to negotiations that would eventually culminate in those parties not disclosed to Loftus becoming shareholders on May 4, 2017.

(Emphasis added.) For this reason, the Cabinet argues that KEDP did not rely on "their status as shareholders" in deciding to transfer the funds to CSC, because the shareholders in dispute did not become shareholders until the stock purchase agreement was concluded.

This constitutes, in our view, a distinction without a difference. In *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992), the Kentucky Supreme Court made clear that "materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action."

In 01-ORD-47, we summarized the manner in which "preliminary" records under KRS 61.878(1)(i) or (j) may retain or lose their exemption after final agency action is taken:

> Until final administrative action is taken, *or a decision is made to take no action*, the requested records are protected by KRS 61.878(1)(i) and (j). If the records are adopted as part of that final action, they will forfeit their preliminary characterization. If not adopted, they will retain their preliminary character.

(Emphasis added.) It is not necessary that the record be explicitly adopted or incorporated by reference, so long as it constitutes the basis for the final agency action. "In our view, the courts purposefully employed the broader concept of 'adoption' rather than 'incorporation,' relative to preliminary investigative reports and records, to avoid a narrow, legalistic interpretation." 01-ORD-83 (citing *City of Louisville*, *supra*).

Whether the Cabinet relied upon the investors' identity as existing stockholders of Braidy, or as future stockholders of Braidy, does not alter the fact that the review of this

> information constituted part of the basis of the Cabinet's investment decision. Thus, we find that the names in question were adopted as part of the basis of final agency action and therefore no longer retain a preliminary character under KRS 61.878(1)(i) or (j). Accordingly, the requested names must be disclosed.

In short, we affirm to this extent. Before departing from this subject, though, two additional points remain.

First, we note that *Braidy* argues the circuit court erred "by failing to address whether Braidy's shareholder information is protected by KRS 131.190." But in making this argument, Braidy forgets its role in these proceedings. We will not address this point because the Cabinet has never raised KRS 131.190 as an issue in this matter, and it is not the function of an *amicus curiae* to inject new issues into the litigation. *See Robertson v. Hert's Adm'rs*, 312 Ky. 405, 227 S.W.2d 899, 904 (1950).

Second, our decision is founded upon the limited conclusion that *the names of Braidy's stockholders or investors* were subject to the purview of the ORA. Indeed, that was the extent of the Attorney General's opinion; and *the names of Braidy's stockholders or investors* was the extent of the Courier-Journal's request.

As a general matter, "a judgment should grant whatever relief a party may be entitled to, provided, however, that it must have at least some discernible relationship to the controversies in issue or be consonant with what is specifically

pleaded and proved." *Nagle v. Wakefield's Adm'r.*, 263 S.W.2d 127, 130 (Ky. 1953) (citations omitted). Here, "the terms and conditions of the agreements which govern the investment and use of tax dollars" relative to Braidy or "important information on the operation of Braidy" was not the subject of *this* ORA request that the circuit court was tasked with reviewing. Thus, we are puzzled by the circuit court's apparent decision to prohibit the Cabinet from redacting the documents submitted for *in camera* review to the extent that those documents included information *beyond* the names of Braidy's stockholders or investors.

Accordingly, we reverse in this respect. The circuit court is directed to permit the Cabinet to redact any information set forth in the various documents submitted for *in camera* review that does *not* concern *the names of Braidy's stockholders or investors*. This includes but is not limited to: (1) the May 4, 2017 Voting Agreement; (2) the May 4, 2017 Stock Purchase Agreement; (3) the May 4, 2017 Investor's Rights Agreement; and (4) the April 13, 2017 Letter of Intent.

2. ATTORNEY'S FEES AND PENALTIES

The ORA permits the assessment of penalties, costs, and attorney's fees against noncompliant public agencies. Specifically, KRS 61.882(5), provides:

> Any 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. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof. In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars ($25) for each day that he was denied the right to inspect or copy said public record. Attorney's fees, costs, and awards under this subsection shall be paid by the agency that the court determines is responsible for the violation.

When the Courier-Journal responded to the Cabinet's action below, it sought penalties and attorney's fees from the Cabinet pursuant to KRS 61.882(5) and filed subsequent motions to that effect. As noted, the circuit court granted the Courier-Journal's request; after prevailing below, the Courier-Journal was awarded a total of $30,693.20 in attorney's fees, along with $2,225 in statutory penalties.[5]

At the onset, the Cabinet concedes the circuit court had the *authority* to assess it with penalties and attorney's fees. It does not contest the *amount* of what the circuit court awarded. But, it argues the circuit court lacked the *jurisdiction* to make any award under the circumstances. In this vein, the Cabinet focuses upon the circuit court's March 29, 2018 order. The Cabinet argues that this order qualified as "final" and "appealable" within the meaning of our civil

[5] The Courier-Journal submitted its ORA request on June 30, 2017. The Cabinet responded and claimed exemptions on July 6, 2017. The Courier-Journal then appealed to the Office of the Attorney General on October 3, 2017. The circuit court calculated the penalties as follows: 89 days (July 6, 2017 – October 3, 2017) x $25 per day = $2,225.

rules. It reasons that because the circuit court did not assess it with penalties or attorney's fees in *that* order, the circuit court consequently lost all jurisdiction to assess it with penalties or attorney's fees in any subsequent order. Thus, it reasons that when the circuit court eventually assessed penalties and attorney's fees on July 5, 2018, the circuit court's order in that respect was a legal nullity.

We disagree. The Cabinet's logic fails primarily because the circuit court's March 29, 2018 order was *not* final and appealable. This is so for at least two reasons. First, less than ten days after that order was entered, the Cabinet *itself* moved to alter, amend, or vacate it pursuant to CR[6] 59.05 – a motion the circuit court did not deny *until* July 5, 2018. *See Atkisson v. Atkisson*, 298 S.W.3d 858, 866 (Ky. App. 2009) (citation omitted) (explaining "[u]pon the filing of a timely CR 59.05 motion, a 'final judgment' is converted into an interlocutory judgment until the motion is adjudicated").

Second, the circuit court's March 29, 2018 order did not include the appealability certification language required by CR 54.02(1) that authorizes this Court to review an adjudication of less than all the claims asserted between litigating parties; and as the Cabinet *itself* points out, the March 29, 2018 order did not resolve all the claims asserted below. Specifically, it did not resolve the Courier-Journal's pre-judgment request for statutory attorney's fees. *See, e.g.*,

[6] Kentucky Rule of Civil Procedure.

Mitchell v. Mitchell, 360 S.W.3d 220, 223 (Ky. 2012) (explaining a pre-judgment request for attorney fees made by a party opposed to the initial action is "akin to a counterclaim and stands on the same legal ground under CR 54.02(1).")

Next, the Cabinet argues that because the specific issue presented in this matter has not been addressed in any other Kentucky case, it cannot be deemed to have acted "willfully" or in bad faith for purposes of the assessment of statutory penalties and attorney's fees.

Again, we disagree. As explained in *Cabinet for Health & Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 384 (Ky. App. 2016),

> To be entitled to attorneys' fees, costs, and penalties under KRS 61.882(5), the circuit court must find that the public agency acted "willfully" in denying a "person" access to requested records under the Open Records Act. Willful action "connotes that the agency withheld records 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). The circuit court's "decision on the issue of willfulness is a finding of fact and, as such, will not be disturbed [on appeal] unless clearly erroneous." *Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 343-344 (Ky. 2005). Our Supreme Court has emphasized that "[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." *Id*. at 343. If the circuit court awards attorneys' fees, costs, or penalties, the amount thereof is within the discretion of the circuit court and may be only disturbed on appeal when an abuse of discretion is manifest. *City of Fort Thomas*, 406 S.W.3d at 854.

In its July 5, 2018 order, the circuit court determined the Cabinet acted willfully within the meaning of KRS 61.882(5), explaining in relevant part as follows:

> In the present case, the Cabinet refused to provide the requested documents, claiming exemption under the Open Records Act's personal privacy exception (KRS 61.878(1)(a)), confidential records exceptions (KRS 61.878(1)(c)(1), (2)(a), (2)(b)), and preliminary documents exception (KRS 61.878(1)(i) and (j)). However, as the Court explained in its March 29, 2018 Order, the [Courier-Journal] requested only the *names* of Braidy's shareholders. It did not seek any information related to the timing or amount of investments, the percentage of ownership, or any proprietary manufacturing processes or trade secret, nor did it seek private financial information of any shareholder or entity. The Cabinet therefore lacked plausible justification in claiming that the request sought information of a highly personal nature and might conceivably lend an unfair commercial advantage to the competitors of Braidy or its investors. Furthermore, as noted above, Braidy eventually voluntarily released the requested information of its own accord. At that point, the Cabinet could no longer claim that release of that information posed a threat to those investors.

As discussed, we review a circuit court's determination of whether an agency withheld records without plausible justification and with conscious disregard of the requester's rights (*e.g.*, "willfulness") under the "clear error" standard. In other words, the finding will not be disturbed if supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d

409, 414 (Ky. 1998). Here, while the ORA may not have been interpreted in this precise context, the Cabinet did not lack guidance on this issue from Kentucky precedent; and in light of what is set forth above, the Cabinet had no legal basis for denying the Courier-Journal a bare indication of the names of Braidy's shareholders.

Braidy's decision to disclose the names of its shareholders on its own accord is likewise pertinent. Braidy may have done so believing it was waiving a right to keep that information confidential; or it may have done so as an acknowledgement that the information was not confidential. But as the circuit court pointed out, *after* it disclosed their names, the Cabinet lost any justification for its continued refusal to divulge the same information – information that would have allowed the public to trust, but *verify*, the truth of Braidy's disclosure. In short, the circuit court's determination was supported by substantial evidence. Thus, with respect to its decision to award the Courier-Journal penalties and attorney's fees, we affirm.

CONCLUSION

Consistent with the foregoing, we AFFIRM IN PART, and REVERSE IN PART, the decision of the Franklin Circuit Court.

ALL CONCUR.

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