

August 3, 2021

Kentucky Open Government Coalition
612 S. Main St., Suite 203
Hopkinsville, KY 42250

Representative Nima Kulkarni
702 Capital Avenue
Annex Room 429E
Frankfort, KY 40601

Dear Representative Kulkarni:

The Kentucky Open Government Coalition, Inc., supports passage of an anti-SLAPP bill in the Commonwealth as a means of ensuring the robust exercise of rights established by the Commonwealth's open government laws. These laws are purposed to "make transparent the operations of the state's agencies" in recognition of "the public's right to know what its government is up to." *Lawson v. Office of the Attorney General*, 415 S.W.3d 59,70 (Ky. 2013).

The Coalition is a nonpartisan, nonprofit corporation established in 2019 to preserve the statutory rights of access to public records and meetings under Kentucky's open government laws. From its inception, the Coalition identified transparency and accountability as core principles.

These core principles are under attack.

Earlier this year, University of Georgia media law professor Jonathan Peters expressed concern about the sharp increase in the "democratically dangerous" phenomenon of public agencies filing Strategic Lawsuits Against Public Participation against open records requesters.

These lawsuits, Peters explained, “frustrate the purpose and design of freedom-of-information laws and threaten the political duty of the public and press alike to engage in the open exchange of information and ideas about government affairs.”

“Our democracy’s foundation,” Peters continued, “is the consent of the governed, implemented through popular participation in public affairs. The governed give consent through the electoral process and exercise of the franchise, and they participate in discussions about matters of public concern. Actions against requesters often arise out of these discussions — out of information gathering and expressive activities related to public issues, such as sexual harassment investigations, school enrollments, and candidates for sheriff.”

“The right to speak is a corollary of the right to obtain information,” Peters concluded, “and by suing requesters who are trying to learn about their government, the government is discouraging public participation in its activities and the discharge of political duties articulated by no less than the SCOTUS.”

Peters’ comments were prompted by a February 2021 lawsuit filed by Louisiana Attorney General Jeff Landry against The Advocate and Times Picayune reporter Andrea Gallo for her public records request for sexual harassment complaints against the head of the Attorney General’s criminal division, and records reflecting how the complaints were handled. The lawsuit drew harsh criticism from newspapers and media groups across the country. In March, a Baton Rouge judge ruled against Landry and ordered him to pay Gallo’s attorney’s fees.

In June, 2021, The Seattle Times sued the City of Seattle for the city’s handling of a public records request for Mayor Jenny Durkin’s text messages during last summer’s civil unrest. Durkin’s publicly issued phone, the newspaper later learned, was set to delete all texts after 30 days in contravention of state law requiring two years retention. The city countersued one month later, demanding that the newspaper pay the city’s attorney’s fees. On July 27, the city withdrew its countersuit “as a token of

good faith and in the interests of an amicable solution.” In reality, Seattle’s city attorney yielded to overwhelming public pressure.

Closer to home, in September 2020 a “cease and desist” demand was made on WPSD Local 6 News following its publication of a 103 page report prepared by Anderson Economic Group and obtained by WPSD from the City of Paducah through an open records request.

In the September 3 letter to WPSD news director Perry Box, Anderson “request[ed] that this report and all information used in the news story obtained from the report be removed from your website immediately because the document was not lawfully obtained in accordance with the Commonwealth’s Open Records Act.” The news station rejected the demand, asserting that Anderson’s “effort to threaten legal action for reporting on a public record it obtained through a lawful open records request is completely meritless.”

A similar threat was leveled against The State Journal in July, 2021, when a Louisville law firm representing an undisclosed client threatened legal action against the newspaper for anticipated publication of public records requested under the open records law relating to communications between the City of Frankfort and a local official “regarding past personnel actions and claims of discrimination against the city.”

Also in July, 2021, an attorney representing the Fish and Wildlife Resources Commission sent a letter to the appellant in a pending Franklin Circuit Court open meetings appeal, as well as a non-party, demanding that the appellant “call this attack over” and “urging” the appellant “to consider an Agreed Order of Dismissal of the case,” indicating that if the appellant failed to do so, the attorney “will advise those individuals involved [presumably the commission members] of what rights they may have to pursue.” The appellant refused the demand, the non-party responded in kind, and the open meetings appeal is proceeding.

In each of these cases, a word to the “wise” was sufficient. But a three year legal battle that began with a legal action for compensatory and punitive damages filed by the City of Taylorsville Ethics Commission against a local critic and frequent open records requester -- in an apparent attempt to exhaust his resources and silence him -- culminated in a scathing Court of Appeals opinion in the requester’s favor and an award of \$30,950 in statutory penalties and \$23,468 in legal fees.

In *City of Taylorsville Ethics Commission v. Lawrence Trageser*, No. 2019-CA-000152 (Ky.App. 2020), the court sternly admonished the commission declaring, ““The ORA is a statute that provides one mechanism for members of the general public to obtain government records through an official and orderly channel. The ORA does not provide a remedy to the City or to any government entity to seek civil damages for the publication of a document, even one exempt under the ORA. To put the matter a different way, the government can use the ORA as a shield; it cannot use it as a sword. The circuit court correctly dismissed the City’s claim against Trageser.”

But the Spencer Circuit Court may have said it best in a lengthy quotation that appears in the published Court of Appeals opinion: “Equally troubling is the fact that the city brought an unfounded claim in this case for compensatory and punitive damages against Trageser in an apparent attempt at intimidation to dissuade him from further exercising his rights under the Open Records Act in this case and in future cases. This court finds this tactic by the City and its Ethics Commission to be in bad faith and designed to subvert the intent and purpose of the Open Records Act.”

Had Kentucky enacted an anti-SLAPP law prior to the commencement of the *Trageser* case, this protracted litigation, along with its attendant costs, might have been avoided.

It is for this reason that the Kentucky Open Government Coalition strongly supports passage of an anti-SLAPP bill in Kentucky. The uptick in the number of punitive and harassing lawsuits, or threatened lawsuits, against members of the public and the media exercising statutory rights established under our open government laws confirms the need for such a law to stem the tide of these “democratically dangerous” lawsuits and facilitate their prompt resolution.

As we have in the past, the Coalition endorses the proposed anti-SLAPP bill as the best hope of discouraging Strategic Lawsuits Against Public Participation – lawsuits which have no purpose other than to impede members of the public and the media in the exercise of statutory rights of access to public records and meetings and participation in public affairs, a foundational principle of our democracy.

Respectfully,

/-S-/ Amye Bensenhaver

Amye Bensenhaver

Retired Assistant Attorney General

Co-Director, Kentucky Open Government Coalition