Local Government Mandate Statement Kentucky Legislative Research Commission 2020 Regular Session

Part I: Measure Information

Bill Request #: 900
Bill #: HB 232
Document ID #: <u>1818</u>
Bill Subject/Title: AN ACT relating to open records.
Sponsor: Rep. Maria Sorolis
Unit of Government: X City X County M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M M <t< td=""></t<>
X Charter County X Consolidated Local X Government
Office(s) Impacted: All local offices that respond to requests for open records
Requirement: <u>X</u> Mandatory Optional
Effect on Powers & Duties: X Modifies Existing Adds New Eliminates Existing

Part II: Bill Provisions and the Estimated Fiscal Impact Relating to Local Government

Under current Open Records law in KRS 81.882, a court "may" award costs and attorney's fees to a person upon a finding that records were withheld "willfully." HB 232 *requires*, rather than permits, the awarding of costs and attorney's fees to a person who prevails in litigation where "there was a complete absence of a justiciable issue" and deletes the "willfully" requirement. The change to the "absence of a justiciable issue" language alters the standard for an award of costs. The award would be apportioned in part, if the person prevailed in part. The court still has the discretion to award the person \$25 per day that the person was denied the right to inspect or copy the public record, but this discretionary provision is part of existing law.

The fiscal impact of the bill is undeterminable to significant. The bill does *not* require an award of costs in *every* case in which a person prevails against an agency, but a practical result of the bill is to require a determination as to whether "there was a complete absence of a justiciable issue" followed by an award of costs, if there was none.

It is not possible to determine the number of lawsuits that might be filed to enforce Open Records provisions (KRS 61.870 to 61.884). Litigation expenses (costs, attorney's fees) could total several to many thousands of dollars for a single case if there was no justiciable issue.

There are numerous reported court decisions that discuss the willful standard and the award of costs and attorney's fees under the existing law. These cases seem to take into account whether there was a good faith reason to withhold records. Determining whether there was a "complete absence of a justiciable issue" could be interpreted as a statutory nod to the court cases requiring an examination of the reasons for withholding records.

In *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Kentucky Supreme Court found that the willfulness standard was not met when an agency withheld records pursuant to a good faith application of a statutory exemption that was determined by the court to be incorrect. In *Cabinet for Health and Family Services v. Courier-Journal*, 493 S.W.3d 375 (2016), the Court of Appeals upheld an award of attorney's fees and costs as follows:

- To the Herald-Leader, \$72,896.80
- To the Courier-Journal, \$228,887.06
- Additional statutory penalties, \$756,000, calculated at \$25 per day for each record and per person.

Thus, while an award could be significant, costs are already being awarded under existing law. HB 232, however, would require, *in all cases*, a determination as to whether there was a justiciable issue, followed by an award of costs. Because the award in any case is likely to be at least several thousand dollars, the costs of just one or two cases could be significant.

Part III: Differences to Local Government Mandate Statement from Prior Versions

Part II, above, pertains to the bill as introduced.

Data Source(s): <u>LRC Staff</u>

Preparer:Robert JenkinsReviewer:KHCDate:1/13/20
