

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): LRC Staff

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