

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 17-CI-1137**

**COMMONWEALTH OF KENTUCKY,
CABINET FOR ECONOMIC DEVELOPMENT**

PLAINTIFF

v.

OPINION AND ORDER

THE COURIER JOURNAL, INC.

DEFENDANT

This matter is before the Court on remand from the Court of Appeals. The Court of Appeals directed this Court to supplement its *in camera* review and to consider any additional redactions requested by the Economic Development Cabinet that are supported by the Open Records Act. Defendant has filed its Motion for *In Camera* Review and Supplemental Award of Attorney’s Fees on remand. On September 13, 2019, the Court received for *in camera* review from the Plaintiff Kentucky Cabinet for Economic Development a number of documents that were requested by the Defendant. These documents had been previously supplied to the Court in its original review of the Open Records request. After completing its supplemental review, the Court **GRANTS** the motion of the Courier-Journal for public disclosure of the four documents which name the investors in Braidy Industries, and are related to the Cabinet’s actions in investing tax dollars in this company. The Court will also award supplemental attorneys fees to the Defendant for the additional legal expenses it has incurred.

The Court of Appeals issued its opinion on May 17, 2019 and the Supreme Court of Kentucky denied Plaintiff’s Motion for Discretionary Review on August 21, 2019. The Court of Appeals affirmed this Court in its determination that the Cabinet for Economic

Development violated the Open Records Act in refusing to release documents revealing the identity of stockholders or investors in Braidy Industries, Inc. The Court of Appeals has made clear the requested names must be disclosed. *See* May 17, 2019 Opinion, pp. 24. Further, the Court of Appeals remanded with instructions “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.*” *Id.* at 25.

The Economic Development Cabinet submitted numerous documents for *in camera* review, and the Court has carefully examined each document. Many of these documents deal with the Cabinet’s legal research and policy development regarding the issue of whether the Cabinet can make a direct investment of taxpayer funds in a company as a “venture capital” investment. Many documents deal with other extraneous issues that are beyond the scope of the newspaper’s Open Records request. The Court finds that these documents are non-responsive and are plainly beyond the scope of Defendant’s original request pursuant to the ORA. These documents do not contain shareholder names. Therefore, the Court will permit Plaintiff to withhold those documents containing internal memoranda and correspondence in their entirety.

However, the *in camera* review demonstrated that there are four documents that fall squarely within the scope of the ORA request: (1) May 4, 2017 Voting Agreement; (2) May 4, 2017 Stock Purchase Agreement; (3) May 4, 2017 Investor’s Rights Agreement; and (4) April 13, 2017 Letter of Intent sent to shareholders in Braidy, Inc. The Court of Appeals directed that this Court allow redaction of information that is not relevant to the original request for documents with the names of shareholders, so long as the Cabinet can

sustain its burden to demonstrate an applicable exception to the rule of disclosure under the ORA.

The Court has conducted a supplemental *in camera* review to address this question, as mandated by the Court of Appeals. This Court notes that the Court of Appeals expressed that it was “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 name of Braidy’s stockholders or investors.” (May 17, 2019 Opinion Affirming in Part and Reversing in Part, pp. 24-25). The Court of Appeals then directed that this Court 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.” *Id.* The Court of Appeals’s puzzlement about this Court’s prior ruling appears to stem from this Court’s inartful explanation of the scope of its initial *in camera* review, and the scope of the original ORA request. The original Open Records request did not seek merely the *names* of the investors, but the *documents* that included the names of the investors.

The vast majority of the documents originally submitted for *in camera* review contained the Cabinet’s legal research and other extraneous matters (as noted above). Those documents were simply non-responsive to the newspaper’s request, and the Court believed there was no need to redact non-responsive documents. To clarify, the Court will simply sustain the Cabinet’s request to withhold the non-responsive documents it originally submitted for *in camera* review. However, with regard to the four documents identified in the Court of Appeals decision as appropriate for further review with regard to

redaction¹, this Court will attempt to more fully explain its reasoning, as directed by the Court of Appeals, with the understanding that the newspaper's request seeks the documents, not merely the names of investors referenced in the documents.

Defendant Courier Journal, Inc. claims the four enumerated documents should be released in full because the contents of documents are wholly responsive. In fact, the original request sought "any and all documents that list the stockholders or investors in Braidy Industries, Inc." Plaintiff Kentucky Cabinet for Economic Development contends the disclosure should be limited solely to the *names* of the stockholders in Braidy Industries, Inc. The Court has reviewed these documents on remand and finds there is no basis under the ORA to redact the four identified documents, with the exception of minor portions discussed at length herein. Clearly, the original ORA request specifically identified *documents* and not merely *names*. Moreover, the substance of these documents is clearly relevant to the identities of the shareholders, in that the nature of the business agreement entered into on behalf of the taxpayers of the Commonwealth with those investors cannot be understood without public access to these four documents which set forth the rights of those investors (including Kentucky taxpayers) in this business.

The Court of Appeals opinion provides that the Cabinet has a right to redact those documents consistent with the established exceptions of the ORA, and the Court has attempted to apply those principles in this ruling. Three of the documents in question are standard corporate documents: the Voting Agreement; the Stock Purchase Agreement; and the Investors Rights Agreement. These documents contain standard "boilerplate" provisions governing the rights of shareholders. The Cabinet has asserted that these

¹ (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.

documents are exempt under the exemptions set forth in KRS 61.878(1)(a), KRS 61.878(1)(i), KRS 61.878(1)(j), KRS 61.878(1)(c)1, and KRS 61.878(1)(c)2.b. The fourth document is a Letter of Intent between the Cabinet and Braidy Industries, dated April 17, 2017 (immediately after the appropriation of \$15 million of public tax dollars for the Braidy project), setting forth the agreement in principle for the state to invest in Braidy. Despite Plaintiff's claims, the Court cannot identify any exemption that would shield any of these four documents from public disclosure, with a few minor exceptions.

The Cabinet has argued that to require disclosure of the corporate documents under ORA would be similar to requiring disclosure of the corporate documents of private companies that the Ky. Retirement Systems has invested in. The Court rejects this reasoning. The kinds of documents at issue here are often publicly available through filings with the Securities Exchange Commission and other public agencies for publicly traded companies, and all investors have rights to inspect and review similar documents. None of the corporate documents, except the Investor's Rights Agreement, has a confidentiality clause. And the confidentiality clause of the Investors Rights Agreement does not appear to make the agreement itself confidential, but rather to stipulate that investors have a duty to protect confidential information of the company from disclosure. The Court finds that there are no trade secrets or legitimately confidential information in the documents at issue. The confidentiality clause included in the Letter of Intent plainly states negotiations remain confidential until the completion of investment, which occurred on May 4, 2017.

In light of recent developments in which Braidy has been reported to have negotiated additional capital investments from Russian investors², the taxpayers of Kentucky have a heightened interest in public disclosure, and a legitimate need to confirm the expectation that the rights of the public have been adequately protected by the Cabinet. Kentucky citizens have a right to know the nature of the agreement made on their behalf. The deadline for raising the required \$1 billion in capital has already been repeatedly extended, and the taxpayers have a right to know the nature of the agreements that were entered into on their behalf.

a. Voting Agreement

The Cabinet for Economic Development is directed to disclose the Voting Agreement, dated May 4, 2017 with only minor redactions. The Cabinet has not provided facts to support its contention that the Voting Agreement contains information that is private under KRS 61.878(1)(a), preliminary under KRS 61.878(1)(i)-(j), likely to permit an unfair commercial advantage to competitors of Braidy under KRS 61.878(1)(c), or confidential or proprietary to warrant an exemption under KRS 61.878(1)(c)(1)2.b. The Court of Appeals affirmed to this extent.

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 capital injection into Braidy. Moreover, the Commonwealth is now in business with those shareholders. This creates a heightened public interest in disclosure. *See* May 17, 2019 Opinion, pp. 15

The Court of Appeals determined the Cabinet's preliminary exemption to be inapplicable.

"We find that the names in question were adopted as part of the basis of final agency action

² *See, e.g.* "US Senator questions Braidy Industries CEO about \$200M Russian investment in Kentucky Mill" *Courier-Journal*, 10/9/19, <https://www.courier-journal.com/story/news/2019/10/09/braidy-industries-ceo-questioned-senator-russian-investment/3921275002/> (accessed November 11, 2019).

and therefore no longer retain a preliminary character under KRS 61.878(1)(i) or (j). *Id.* at 24.

The Court of Appeals, referring to the Attorney General Opinion, cites the corporate inspection provisions of KRS 271B.16-020(2)(c). KRS 271B.16-020(2)(c) allows shareholders in a corporation to inspect corporate records, including its articles of incorporation, bylaws, resolutions adopted by its board of directors, the minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years, and a list of the names and business addresses of its current directors and officers. KRS 271B.16-010.

As the record indicates, the citizens of the Commonwealth of Kentucky have become shareholders in Braidy Industries, Inc., through the appropriation made by the General Assembly at the request of Governor Bevin, and the subsequent investment of those tax dollars in Braidy through the vehicle of Commonwealth Seed Capital, LLC, which is an instrumentality of the Cabinet. The direct investment of \$15 million of taxpayer money in this venture, through the vehicle of Commonwealth Seed, LLC, has established that Kentucky taxpayers have a direct interest in the operation and management of this corporation. As a result, the public is entitled to the rights and privileges of a shareholder. The Voting Agreement falls squarely within the sort of documents shareholders are permitted to inspect. The shareholder inspection rights in KRS 271B allow inspection of business addresses of current directors and officers. The Court notes the omission of shareholder addresses in the language of KRS 271B.16-101 and to this extent, permits the Cabinet to redact only the addresses of shareholders included in the Voting Agreement.

The Cabinet also maintains the information regarding the shareholders of Braidy Industries is exempted pursuant to KRS 61.878(1)(c)1, which exempts from disclosure records which would permit an unfair commercial advantage to competitors of the entity that disclosed the records. The Court finds the Cabinet has not provided any facts which support such a conclusion and the Court of Appeals agreed. “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.” *See* May 17, 2019 Opinion, pp. 20. The identity of shareholders, as the Cabinet states, can provide important information about the financial strength of a company, and wrongful use of the same can potentially cause damage or harassment. Lastly, the Court of Appeals found no reason the documents should be withheld on the basis of confidentiality. “Accordingly, we do not find this information confidential or proprietary.” *Id.* at 18. As a result, the Court hereby directs the Cabinet to disclose the Voting Agreement, redacting only the addresses of shareholders. The taxpayers of Kentucky have a right to know who controls the corporate decisions for the private company in which tax dollars are invested.

b. Stock Purchase Agreement

Similar to the Voting Agreement, the Court finds that the Stock Purchase Agreement does not fall within any enumerated exemption in KRS 68.878. The Cabinet’s objection to disclosure pursuant to KRS 61.878(i) and KRS 61.878(j) was also invalidated by the Court of Appeals. “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.” *See* May 17, 2019 Opinion, pp. 24. The Stock Purchase Agreement was adopted

as part of the Cabinet's basis of final agency action and therefore, longer retains its preliminary status.

The Court of Appeals found no support for the Cabinet's refusal to disclose responsive records on the basis of a putative unfair commercial advantage to Braidy's competitors.

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 of 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 *Id.* at 19-20.

The Court of Appeals made clear Braidy shareholders could not reasonably expect that their identities would be kept secret from their co-investors and any invasion of privacy would be minimal. *Id.* at 7. However, individual's addresses present a different matter. This information, unlike the names of shareholders and terms of agreements to which the Commonwealth is party, is exempted under the personal privacy exception set out in KRS 61.878(1)(a). Information such as addresses and telephone numbers are "generally accepted by society as details in which an individual has at least some expectation of privacy." *Zink v. Com., Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 828 (Ky. App. 1994). As a result, the Cabinet is permitted to redact the address of each shareholder.

c. Investor's Rights Agreement

The Investor Rights Agreement presents similar considerations compared to the Voting Agreement and Stock Purchase Agreement in that it does not contain proprietary,

confidential, or private information. The Court of Appeals identified the heightened public interest in disclosing the documents containing shareholder names as a result of the “extraordinary investment of public funds in Braidy.” *See* May 17, 2019 Opinion, pp. 15.

We believe that revealing the identities of shareholders of Braidy serves the purpose of the Open Records Act because it will allow the public to evaluate the Cabinet’s decision to invest substantial resources in that company. *Id.*

The Investor’s Rights Agreement is directly responsive to Defendant’s original request for “any and all documents that list the stockholders or investors in Braidy Industries, Inc.” The Investor Rights Agreement, as indicated by its title, informs Braidy shareholders of the rights and privileges they enjoy as shareholders. As an investor, the Commonwealth, and its citizens and taxpayers should be informed and aware of those rights and privileges set out in the Investor’s Rights Agreement. The Investor’s Rights Agreement does not contain personal or proprietary information, it is not preliminary because it was utilized as part of the Cabinet’s final decision, and there is no support to determine the information will provide an unfair advantage to Braidy’s competitors. Relying on the same rationale applied with the Voting Agreement and Stock Purchase Agreement, the Court will permit Plaintiff to redact only shareholder addresses.

d. Letter of Intent

The Letter of Intent, dated April 13, 2017 and printed on Cabinet letterhead, is distinguishable from the previous three documents, which are predominantly corporate documents. This letter is an agreement between the Cabinet for Economic Development, signed by the Secretary of the Cabinet, and Braidy Industries, Inc., signed by the President and other officers of the corporation. The Court of Appeals determined the Letter of Intent, particularly the names of prospective stockholders in Braidy Industries, were adopted as

part of the basis of final agency action and no longer retain a preliminary character under KRS 61.878(1)(i) or (j). *See* May 17, 2019 Opinion, pp. 11.

The April 13, 2017 Letter of Intent addresses the issue of confidentiality, and specifically provides that

“[s]ubject to the CSC’s obligations under Kentucky’s Open Records Act, the Company and CSC agree to keep the terms and conditions of this Letter and the negotiations between themselves completely confidential *until CSC closes on its investment in the Series A-1 Preferred Stock.*”

(Letter of Intent, 4/13/17, p. 3) (emphasis added).

It appears that CSC (Commonwealth Seed Capital, LLC) is a limited liability company that is wholly owned and controlled by the Kentucky Economic Development Cabinet, and the Kentucky Economic Development Partnership (the governing board for the Cabinet) which is established under KRS154.10-010(1). As such, it is a public agency which is controlled by the Commonwealth of Kentucky, and subject to the Open Records Act. Under the terms of the letter itself, the confidentiality provisions expired upon the closing of the stock purchase in which CSC paid \$15 million in tax dollars for the Braidy preferred stock.

The Letter of Intent is responsive to the original request made under the Open Records Act because it is a document in the possession of the Cabinet which includes shareholder names. In light of the Court of Appeal’s decision, no other information included in the document may be withheld according to an exception in KRS 61.878. As a result, the Cabinet is not permitted to redact any portion of the Letter of Intent and is directed to disclose the document in full.

e. Remaining Documents

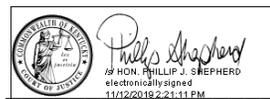
After reviewing the entirety of the documents reviewed by the Court for an *in camera* review, the Court finds the remaining documents, including all internal memorandums correspondence, are beyond the scope of the original request. The Cabinet is permitted to withhold these documents because they are non-responsive to the Open Records request.

CONCLUSION

As such, the Court **ORDERS** the Economic Development Cabinet to produce these requested records to the Courier-Journal, with only the redactions allowed under this Opinion and Order. These documents shall be released forthwith, unless the Plaintiff moves for injunctive relief within five (5) days of the entry of this Order. In the event such a motion is filed, the Court will stay compliance with the order directing release pending a final ruling on the merits of any motion for injunctive relief under CR 65.

The Court will allow both parties to supplement the record with regard to attorneys fees and costs before making this Order final and appealable. Accordingly, the defendant is directed to file any supplement to its motion for attorneys fees and costs under KRS 61.882(5) within ten (10) days of the entry of this Order, and set such motion for a hearing at the Court's motion hour docket. If the Plaintiff has specific information to challenge the Defendant's request, or to support its objection to the number of hours or reasonableness of rates, it shall file any supplemental response and affidavit within five (5) days of the Defendant's filing.

So **ORDERED** this 12th day of November, 2019.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

DISTRIBUTION:

Hon. Jon L. Fleischaker
Hon. Michael P. Abate
Hon. Heather Harrell
710 W. Main St., 4th Floor
Louisville, KY 40202

Hon. Jessica Burke
Hon. Reid Glass
Old Capitol Annex
300 W. Broadway
Frankfort, KKY 40601

Hon. Andy Beshear, Attorney General
Office of Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

Hon. Timothy J. Eifler
Hon. Stephen A. Sherman
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202