

COMMONWEALTH OF KENTUCKY
 FRANKLIN CIRCUIT COURT
 DIVISION __
 CASE NO. _____
Electronically filed

ALLISON JOY BALL, in her official capacity as
 the Kentucky Auditor of Public Accounts

and

JONATHAN GRATE, in his official capacity as
 the Ombudsman for the Commonwealth Office
 of the Ombudsman

Plaintiffs

v.

ANDREW GRAHAM BESHEAR, in his official capacity as
 Governor of the Commonwealth of Kentucky;

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Defendants

**VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Eight-month-old Miya Rudd had been missing since April of this year.¹ So Kentucky State Police searched her debris and drug-ridden home. Officers found her lifeless, hidden body decomposing in the corner of the home.

¹ Dennis Romero, *Remains found hidden in Kentucky home of 8-month-old girl missing since April*, NBC News (June 14, 2024), available at <https://www.nbcnews.com/news/us-news/remains-found-hidden-kentucky-home-8-month-old-girl-missing-april-rcna157285>.

2. When she was born, Baby Miya’s umbilical cord tested positive for methamphetamine.² Kentucky’s Cabinet for Health and Family Services (“Cabinet”) knew about this.³

3. So did the Cabinet investigate Baby Miya’s situation? What actions did it take? Did it visit Baby Miya’s sordid home? Why did the Cabinet not take steps to protect Baby Miya from harm?

4. Sadly, Baby Miya’s case is not the only instance in which an infant has died after the Cabinet had knowledge of infant abuse.⁴ So what is the Cabinet doing to address the seemingly systemic problem of its lack of responsiveness to allegations of infant abuse?

5. There are other systemic problems within the Cabinet. For around two years now, almost 300 foster children across Kentucky have spent days, sometimes weeks, living in office buildings.⁵ Even when Judge Gina Kay Calvert

² Mitchell Carter, *Father shares eerily similar experience to Miya Rudd’s family, drastically different results*, 14News (June 19, 2024), available at <https://www.14news.com/2024/06/19/father-shares-eerily-similar-experience-miya-rudds-family-dramatically-different-results/>.

³ Mitchell Carter, *KSP continues search for missing baby; ‘The community deserves to know what happened to Miya’*, 14News (June 11, 2024), available at <https://www.14news.com/2024/06/11/happening-now-ksp-using-cadaver-dogs-search-missing-baby/>.

⁴ Kayleigh Randle, *‘He just wanted somebody to love him’: Family speaks out about 20-month-old’s death*, LEX18 (July 16, 2024), available at <https://www.lex18.com/homepage/he-just-wanted-somebody-to-love-him-family-speaks-out-about-20-month-olds-death>.

⁵ Jason Riley, *Kentucky continues to place children in state office buildings, fighting a Louisville judge’s ruling*, WDRB (Apr. 4, 2024), available at

intervened to try and remedy the situation for at least one child, the Cabinet ignored her orders. So what is the Cabinet doing to try and solve this problem?

6. All of these questions, and more, could be addressed by the Commonwealth Office of the Ombudsman (“Office”) having direct access to a database called iTWIST. It is the duty of the Office to investigate problems, both case-by-case and systemic, within the Cabinet. KRS 43.035. And iTWIST houses a host of information that the Office could explore and use to offer solutions to many of the Cabinet’s systemic problems.

7. But the Cabinet does not want the Office to investigate it and offer solutions to problems. Or, at least, it no longer wants that. The Office has always had full, direct, and real-time access to iTWIST. And when the General Assembly announced the transition of the Office from under the umbrella of the Cabinet to under the umbrella of the Kentucky Auditor of Public Accounts (“APA”), 2023 Ky. Senate Bill 48, the Cabinet did not oppose the Office continuing to have that access.

8. It was only after the end of the General Assembly’s 2024 session—the second session where the Cabinet could have brought this issue to the attention of the General Assembly and the last session before the transition was

https://www.wdrb.com/in-depth/kentucky-continues-to-place-children-in-state-office-buildings-fighting-a-louisville-judges-ruling/article_319712c8-f1fc-11ee-83a6-f77ada67e215.html.

to take effect—that the Cabinet began opposing the Office’s direct, full, and real-time access to the iTWIST database. Exhibit 1.

9. The Cabinet, however, does not get to make that decision. The General Assembly has already spoken. When it transferred the Office to the Auditor, the General Assembly made clear that everything associated with the Office was to be transferred along with it. 2023 Ky. Senate Bill 48, § 102 (“All programmatic staff, personnel, records, files, equipment, resources, funding, and administrative functions . . . shall be transferred.”). The General Assembly also told the Cabinet to refrain from interfering with the Office’s investigations and access to data and information. KRS 43.035(1) (“[T]he Cabinet for Health and Family Services shall not willfully obstruct an investigation [or] restrict access to records.”).

10. Just as bad, the Cabinet is putting some of Kentucky’s federal funding at risk by preventing the Office from directly accessing iTWIST. Federal law allows States to receive federal dollars to improve child protective services. 42 U.S.C. § 5106a(a). Part of that grant money should go toward developing and implementing procedures for collaboration among agencies in “investigations” for the benefit of improving such services. 42 U.S.C. § 5106a(a)(14). And federal law requires that the Cabinet submit a plan, signed by Governor Andrew Graham Beshear, with provisions that “require” the disclosure of information to any state entity “that has a need for such information in order to carry out its

responsibilities under law to protect children from child abuse and neglect.” 42 U.S.C. § 5106a(b)(2)(B)(ix). Not only that, but the plan must also ensure “cooperation” among “appropriate State agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse and neglect.” 42 U.S.C. § 5106a(b)(2)(B)(xi).

11. There is simply no legitimate reason for the Cabinet to refuse to allow the Office to have full, direct, and real-time access to iTWIST. That access is necessary for the Office to ensure that Kentucky’s most vulnerable children and adults receive the care they need from the Cabinet. And that is why Auditor Ball and Ombudsman Grate are here to demand that the Cabinet provide the Office with full, direct, and real-time iTWIST access.

12. Auditor Ball and Ombudsman Grate have tried to work with the Cabinet before resorting to the judiciary. They even elevated the issue to the Governor’s Office three times before filing this lawsuit. But, regrettably, the time has now come for the judiciary to step in and end the Cabinet’s and the Governor’s obstruction. As long as the Cabinet and the Governor refuse to give the Office the information it needs to ensure the well-being of all Kentuckians touched by the Cabinet, Auditor Ball and Ombudsman Grate will continue to do everything in their power to ensure that information is provided.

NATURE OF ACTION

13. This Complaint for Declaratory and Injunctive Relief is governed by the Kentucky Declaratory Judgment Act, KRS 418.005, et seq., and Kentucky Rules of Civil Procedure 57 and 65.

14. KRS 418.040 provides that where “an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.”

15. An actual and justiciable controversy exists in this action.

16. Given the grave concerns outlined in this Complaint, Auditor Ball and Ombudsman Grate respectfully request expedited review under KRS 418.050 and CR 57.

PARTIES

17. Allison Ball is the duly elected Kentucky Auditor of Public Accounts. She has broad investigatory authority, including the ability to examine the conduct of state officers and agencies. KRS 43.050. She also has broad authority to review any information an individual or entity has and can assert that authority through subpoenas and by compelling testimony. KRS 43.080. As it relates to the Commonwealth Office of the Ombudsman that is administratively attached to the APA, KRS 43.035, Auditor Ball appoints the Ombudsman and

is responsible for ensuring the Office is doing its job and has all the tools it needs to do so.

18. Jonathan Grate is the duly appointed Ombudsman for the Commonwealth Office of the Ombudsman. The Office has broad authority to investigate the Cabinet, the goal of those investigations being to improve the Cabinet's performance and compliance with state and federal law. KRS 43.035.

19. Andrew Graham Beshear is the Governor of the Commonwealth of Kentucky. The Governor is the Commonwealth's "Chief Magistrate," Ky. Const. § 69, and is charged with "tak[ing] care that the laws be faithfully executed," Ky. Const. § 81.

20. Eric Friedlander is the Secretary of the Cabinet for Health and Family Services. The Cabinet "is the primary state agency for operating the public health," and its function "is to improve the health of all Kentuckians." KRS 194A.010(1). The Cabinet is also the "primary state agency responsible for leadership in protecting and promoting the well-being of Kentuckians through the delivery of quality human services." KRS 194A.010(2).

21. Ruth Day is the Chief Information Officer of the Commonwealth Office of Technology ("COT"). COT provides "technical support and services to all executive agencies of state government in the application of information technology," KRS 42.726(2)(a), and is the Cabinet's primary database manager.

JURISDICTION AND VENUE

22. This Court has jurisdiction over this action under Section 112(5) of the Kentucky Constitution, KRS 23A.010(1), and KRS 418.040.

23. Venue for this action is proper in this Court under KRS 452.405(2) and KRS 452.480.

FACTUAL BACKGROUND

The Transfer of the Office

24. On June 3, 2022, the Legislative Research Commission established the CHFS Organizational Structure, Operations, and Administration Task Force (“Task Force”). Exhibit 2. The overarching goal of the Task Force was to determine what action could be taken to improve the Cabinet. In conducting its review, the Task Force heard testimony from Cabinet leadership about the Cabinet’s organizational structure, budget, workforce, and scope of specific department program areas. Exhibit 2 at 2.

25. At the conclusion of its investigation, the Task Force recognized the inherent hollowness of having the entity charged with investigating the Cabinet under the control of the Cabinet. So it recommended moving the Office of the Ombudsman elsewhere. Exhibit 2 at 7.

26. The General Assembly acted on that recommendation during the 2023 regular session. 2023 Ky. Senate Bill 48. Senator Stephen Meredith, one of the sponsors of Senate Bill 48, noted that separation of the Office from the

Cabinet was needed so the public could have confidence in the integrity of the Office’s investigations of and suggestions for improvement to the Cabinet.⁶ To effectuate this, Senate Bill 48 placed the Office under the umbrella of Kentucky’s Auditor of Public Accounts, 2023 Ky. Senate Bill 48, § 86 (codified at KRS 43.035), to be an “independent” investigatory body.⁷ Again, as Representative Samara Heavrin noted, the “independent” Office needed to be moved from the Cabinet to the APA to eliminate the “conflict of interest” arising from the Cabinet investigating itself.⁸

27. In the end, all of Senate Bill 48’s changes were meant to “better address the needs” of Kentuckians.⁹ Senate Bill 48 passed by a supermajority of both the Senate and House and became law without the Governor’s signature.

The Functions of the Office

28. The General Assembly assigned the Office a variety of duties and responsibilities, first and foremost of which is the Office’s investigatory function.

⁶ Senator Stephen Meredith, Senate Families & Children Committee, 9:30–10:12 (Feb. 14, 2023), available at <https://ket.org/legislature/archives/2023/regular/senate-families---children-committee-200813>.

⁷ Senator Stephen Meredith, Senate Chambers, 1:19:32–46 (Feb. 22, 2023), available at <https://ket.org/legislature/archives/2023/regular/senate-chambers-200851>.

⁸ Representative Samara Heavrin, House Chambers, 57:20–33 (Mar. 14, 2023), available at <https://ket.org/legislature/archives/2023/regular/house-chambers-198732>.

⁹ Senator Meredith, Senate Families & Children Committee, *supra*, at 13:00–10.

See generally KRS 43.035. Investigations can arise “upon complaint or [the Office’s] own initiative,” and the Office can investigate “any administrative act of an organizational unit, employee, or contractor of the Cabinet for Health and Family Services without regard to the finality of the administrative act.” KRS 43.035(1).

29. But the Office does not investigate simply for the sake of investigating. Investigations should result in the Office “[m]ak[ing] recommendations that resolve citizen complaints about the Cabinet for Health and Family Services and improve the cabinet’s performance and may require corrective action when policy violations are identified.” KRS 43.035(2).

30. The goal of improving the Cabinet’s performance is also achieved by the Office “[p]rovid[ing] evaluation and information analysis of the Cabinet for Health and Family Service’s performance and compliance with state and federal law.” KRS 43.035(3).

31. And in carrying out its mission, the Office must “[p]lace an emphasis on research and best practices, program accountability, quality service delivery, and improved performance of the Cabinet.” KRS 43.035(4).

32. To carry out all of the Office’s duties, the Office has created two main divisions: 1) the Division of Citizen Services and Policy Integrity and 2) the Division of Program Performance.

33. Beginning with the latter, the Division of Program Performance itself has three branches: 1) the Performance Enhancement Branch, 2) the Public Assistance Quality Control Review Branch, and 3) the SNAP Quality Control Review Branch. Generally, the Division of Program Performance and its three branches facilitate the accurate, effective, and efficient disbursement of public assistance.¹⁰

34. The Division of Citizen Services and Policy Integrity, on the other hand, has two branches: 1) the Complaint Review Branch and 2) the Quality Advancement Branch.¹¹

35. The Complaint Review Branch reviews and makes recommendations to resolve complaints about the Cabinet and services delivered by Cabinet employees. This branch issues recommendations to the Cabinet concerning complaint trends to improve the Cabinet's performance and may require corrective action when policy violations are identified.

36. The Quality Advancement Branch completes comprehensive reviews of services provided by the Cabinet to ensure accountability and proper

¹⁰ More information about the Division of Program Performance can be found at <https://www.auditor.ky.gov/kyombud/Pages/DivisionProgramPerformance.aspx>.

¹¹ More information about the Division of Citizen Services and Policy Integrity can be found at <https://www.auditor.ky.gov/kyombud/Pages/CitizenServicesPolicyIntegrity.aspx>.

delivery of service to Kentuckians. This branch is responsible for the investigation of services or administrative acts provided by the Cabinet without regard to the finality of the administrative act. This branch also packages administrative appeals for review by hearing officers now under the umbrella of the Attorney General's Office. *See generally* 2023 Ky. Senate Bill 48.

37. Distilled, the Office has three main functions of relevancy here: 1) conducting self-initiated investigations, both systemic and case-by-case, and offering recommendations for improvement; 2) investigating and resolving constituent complaints, both systemic and case-by-case; and 3) packaging documents for administrative appeals sent to the Attorney General's Office.

The Need for iTWIST

38. When it transferred the Office to the Auditor, the General Assembly made it abundantly clear that the Office was to have every tool available at its disposal that it did when it was under the umbrella of the Cabinet: "All programmatic staff, personnel, records, files, equipment, resources, funding, and administrative functions of the Office of the Ombudsman and Administrative [R]eview shall be transferred to the Commonwealth Office of the Ombudsman as it relates to the duties and responsibilities prescribed in Section 86 of this Act." 2023 Ky. Senate Bill 48, § 102. In short, everything available to the Office before the transition was to be available to the Office after the transition.

39. The General Assembly doubled down on this with respect to the Office's ability to access information: "Organizational units, employees, or contractors of the Cabinet for Health and Family Services shall not willfully obstruct an investigation, restrict access to records or personnel, or retaliate against a complainant or cabinet employee." KRS 43.035(1).

40. iTWIST is one of the tools to which the Cabinet is supposed to provide the Office with full, direct, and real-time access. Relevant here, iTWIST is a database housing all information pertaining to child and adult abuse, neglect, and dependency in Kentucky.

41. iTWIST access is needed for the Office to optimally perform its functions for the betterment of Kentucky and all Kentuckians.

42. As mentioned above, one of the functions of the Office is to package administrative appeals for adjudication by the Office of Attorney General. An example or two of why the Office's iTWIST access is instrumental for this function may help. A Kentuckian may appeal a Cabinet act that affects that Kentuckian's child welfare services or child protective services case. 922 KAR 1:320. Same thing with respect to a Kentuckian who has a finding of caretaker misconduct made against him. 922 KAR 5:120. The Office's Quality Advancement Branch is responsible for accessing iTWIST to obtain and gather all relevant information for appeals like those to be sent to a hearing officer for

review. Exhibit 3 at Slides 6–8.¹² Without full, direct, and real-time access to iTWIST, the Office’s Quality Advancement Branch cannot guarantee that function is being performed correctly.

43. In fact, as described more below, Cabinet employees have asked Office employees for help in navigating iTWIST to do this function. So Office employees have had to direct Cabinet employees on how to obtain relevant iTWIST data, which has slowed down both the Office’s and the Cabinet’s ability to provide necessary services to Kentuckians.

44. Not only that, but another key function of the Cabinet has evaporated because of the Office’s inability to access iTWIST. A bit of background. The Cabinet is responsible for maintaining a caretaker misconduct registry, which lists individuals who have had validated substantiated findings of abuse, neglect, or exploitation of an adult made against them. 922 KAR 5:120, § 2(1). One of the functions of the Quality Advancement Branch is to prepare for Secretary Friedlander’s signature final orders issuing those findings, which then triggers the placement of those individuals on the caretaker misconduct registry. 922 KAR 5:120, § 5(3). Quality Advancement Branch employees would know to

¹² This PowerPoint presentation demonstrating (in red) the Office’s role in the process of packaging appeals was prepared by someone who was, at that time, a Cabinet employee. That individual transitioned over to the Attorney General’s Office per Senate Bill 48. The Cabinet has never objected to the contents of this PowerPoint.

prepare those orders by viewing what is called the BI Report, a daily report generated within iTWIST that would inform those employees of all the individuals for whom those orders must be issued.

45. Because Quality Advancement Branch employees have been precluded from accessing iTWIST, the Cabinet confirmed in a meeting held on July 17 that, since July 1, no one has been checking the BI Report. This means that, since July 1, adult abusers who have had validated substantiated findings of abuse, neglect, or exploitation of an adult made against them have not been put on the caretaker misconduct registry to preclude them from operating in situations where they can continue to abuse. That would have never happened had the Office had iTWIST access.

46. There is another issue in this lane. Quality Advancement Branch employees are also responsible for removing individuals from the caretaker misconduct registry who should not be there (for example, individuals who have not yet had a validated substantiated finding of abuse, neglect, or exploitation made against them but who have been accidentally placed on the registry). Accessing iTWIST and using the relevant functions within that database is the way to do that. It is unlikely that the Cabinet is ensuring that this task is completed.

47. Outside of merely packaging appeals, the Office has a more fundamental function: receiving and addressing constituent complaints about the

Cabinet and its employees and functions. To do this, employees of the Complaint Review Branch would access relevant information within iTWIST to understand the situation outlined in the complaint and work toward a resolution of it.

48. Now though, no employee of the Complaint Review Branch has access to iTWIST to be able to appropriately resolve citizen complaints.

49. Finally, the most fundamental function of the Office: conducting case-by-case and systemic investigations of the Cabinet for the purpose of improving its functions. iTWIST has all the information that the Office needs to ensure that the Office is conducting the most thorough and complete investigation possible that offers the best solutions to the Cabinet's problems.

50. Without full, direct, and real-time access to iTWIST, the Office has no way of knowing whether it is conducting a complete, accurate, and productive investigation that protects Kentucky's most vulnerable.

The Cabinet's and the Governor's Obstruction Before July 1, 2024

51. When the General Assembly passed Senate Bill 48 during the 2023 regular session, it gave the Cabinet and the APA plenty of time—until July 1, 2024—to conduct a seamless transition for the benefit of all Kentuckians.

52. For the most part, the transition has been smooth. Both sides have come together and have been able to work out almost all their differences to ensure an effective transition.

53. One hang up has been the Office's iTWIST access. But that hang up is a big one and did not manifest until late in the transition process.

54. Transition meetings between the APA and the Cabinet have been regularly happening since the General Assembly passed Senate Bill 48.

55. Before the end of the General Assembly's 2024 regular session, discussion about the Office's iTWIST access arose, with the Cabinet never manifesting opposition to that access.

56. It was not until late April, after the close of the General Assembly's 2024 regular session, that the Cabinet began opposing the Office's full, direct, and real-time iTWIST access. Exhibit 1.

57. The Cabinet's sole argument has been that KRS 620.050(5) precludes the Office from having such access.

58. Even after it was explained to the Cabinet why that is not the case, Exhibit 1, the Cabinet not only refused to budge but also refused to engage with any of the counterpoints made by the APA.

59. After further discussion went nowhere, a meeting to try and further hash out the issue occurred on June 6, 2024. At that meeting were representatives from the APA, the Attorney General's Office, the General Assembly, and the Cabinet.

60. Representatives from the General Assembly, which included Speaker Pro Tempore David Meade (a main proponent of Senate Bill 48) and

Senator Stephen Meredith (a sponsor of Senate Bill 48), told the Cabinet—multiple times—that the clear intent of Senate Bill 48 was to afford the Office full, direct, and real-time iTWIST access.

61. The APA reiterated its counterpoints made in late April.

62. The Cabinet's response was interesting. If the Cabinet's KRS 620.050(5) argument is to be believed, then no one within the Office should be allowed to view iTWIST records. After all, the Cabinet's position is that, because the Office is not listed as one of the enumerated exceptions in that statute, it cannot have iTWIST access. Yet remarkably, in a move that completely undermines its statutory argument, the Cabinet appeared to offer to provide iTWIST data to the Office upon request as it related to the administrative appeal and complaint functions of the Office. But the Cabinet did not go into detail about that proposal at the time and said it would take the issue under further advisement.

63. The Office viewed this as a move in the right direction. But it still did not address any of the Office's issues, outlined below, arising from the inability to fully and directly access iTWIST in real time.

64. First, if the Office had to go through the Cabinet every time it packaged an administrative appeal, unnecessary delay would be introduced in a Kentuckian's administrative appeal. Not only that, but such a system would also prevent the Office from ensuring that administrative appeals were being

correctly packaged with all necessary and relevant information. And, this process introduced the caretaker misconduct issues mentioned above.

65. Second, if the Office had to go through the Cabinet every time it needed iTWIST data to address a complaint, unnecessary delay would be introduced in addressing a Kentuckian's complaint. And the intent of Senate Bill 48 would be completely undermined. As discussed, the whole point of moving the Office from the Cabinet to the APA was to eliminate the inherent conflict of interest in the Cabinet investigating itself. Yet the Cabinet's proposal would force the Office to expose complainant information to the Cabinet if the Cabinet were to be the one to go and pull information from iTWIST for the Office. This would allow the Cabinet to screen for complaints made against it and manipulate the process to sweep away those complaints without appropriate resolution. Not only that, but the Cabinet's proposal would also allow it to retaliate against whistleblowers who have attempted to expose issues within the Cabinet, which has happened before.

66. Third, again, if the Office had to go through the Cabinet every time it needed iTWIST data for investigatory purposes, the intent of Senate Bill 48 would be completely undermined. In that scenario, the Cabinet controls all the information the Office would receive in the course of an investigation without the Office's ability to verify that it was getting the complete picture it needed to for an accurate and productive investigation. In other words, the thoroughness,

accuracy, and effectiveness of the Office's investigation is at the complete mercy of the Cabinet.

67. With all of that in mind, but still hopeful that the Cabinet would realize the falsity of its argument, the APA waited for the Cabinet to sort out its views on the Office's iTWIST access.

68. Having heard nothing for almost two weeks, the APA then reached out to both the General Counsel and the Chief of Staff for the Governor's Office on June 19, explaining the situation to both individuals. The APA did this because the Governor's Chief of Staff told the APA, in December of 2023, that if the APA was having difficulty with one of the Governor's cabinets, that it should reach out directly to the Governor's Chief of Staff.

69. The Governor's Chief of Staff completely ignored the APA.

70. After some back and forth, the response from the General Counsel was that it was his understanding that this matter could be chalked up as a difference of opinion on statutory interpretation.

71. Then, on June 28, three days before the transition was scheduled to occur, the Cabinet offered the APA a new proposal: The Cabinet was willing to enter into a Memorandum of Understanding to allow Office employees to have read-only access to iTWIST on a case-by-case basis. Exhibit 16.

72. But this proposal remained unresponsive to any of the aforementioned problems pointed out by the Office. For instance, under that

proposal, the Cabinet still controls what iTWIST data and information the Office can view without any ability of the Office to verify the completeness and accuracy of the information it is getting. And that proposal allows the Cabinet to continue to screen for complaints made and investigations conducted against it, which would allow the Cabinet to take various steps to undermine or even completely sweep away the Office's ability to address those complaints and conduct those investigations. Note that this proposal also continues to undermine the Cabinet's reading of KRS 620.050(5).

73. This time, the APA also pointed out to the Cabinet that its position could cause the Cabinet to be in violation of federal law. Exhibit 16.

74. Federal law allows States to receive federal dollars to improve child protective services. 42 U.S.C. § 5106a(a).

75. Part of that grant money should go toward developing and implementing procedures for collaboration among agencies in "investigations" for the benefit of such services. 42 U.S.C. § 5106a(a)(14).

76. To be eligible for federal grant money, Kentucky must submit a plan to the federal government, *signed by the Governor*, with "provisions to *require* a State to disclose confidential information to any . . . State . . . entity . . . that has a need for such information in order to carry out its responsibilities under law to protect children from child abuse and neglect." 42 U.S.C. § 5106a(b)(2)(B)(ix)

(emphasis added). As outlined above, the Office needs full, direct, and real-time iTWIST access to carry out its duties.

77. Similarly, Kentucky’s plan must ensure “cooperation” among “appropriate State agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse and neglect.” 42 U.S.C. § 5106a(b)(2)(B)(xi). Again, as outlined above, the most fundamental function of the Office is to investigate child abuse and neglect. And the Cabinet is currently uncooperative with the Office.

78. As with the APA’s other points, the Cabinet completely ignored these points.

The Cabinet’s and the Governor’s Obstruction After July 1, 2024

79. Instead of addressing the Office’s¹³ concerns with the Cabinet’s proposals, on July 2, the Cabinet offered yet another proposal that continues to undermine its statutory position and is still unresponsive to the Office’s concerns: To receive iTWIST information, the Office would need to identify all the specific iTWIST data and information it is requesting, coupled with sending the personal identifiable information about the individual to whom that data and information pertain. Exhibit 5.

¹³ Senate Bill 48 became effective on July 1, 2024. So the Office began speaking with its own voice that day instead of simply through the APA.

80. In addition to the unresponsiveness of that proposal to the Office's concerns, that proposal is unworkable. In many cases, the Office would have no idea what specific data or records even exist or the personal identifiable information that goes along with it. It is only by directly exploring iTWIST for relevant information to a complaint or investigation that such information becomes apparent.

81. The Office attempted to explain all of this to the Cabinet, but the Cabinet was unresponsive. Exhibit 6. Left with the choice of having some iTWIST access versus nothing, the Office relented and agreed to the Cabinet's proposal without waiving any rights to continue to press for full, direct, and real-time iTWIST access.

82. In exercising one of those rights, on July 9, the APA and the Office publicly demanded that the Cabinet and Governor give the Office full, direct, and real-time iTWIST access and that the Cabinet and COT preserve all iTWIST data. Exhibit 4.

83. While the Cabinet and Governor's Office never responded directly to the APA or Office about these letters, they both publicly admitted that the Office should have "full access."¹⁴ But they still refused to provide such access,

¹⁴ Bruce Schreiner, *Dispute over access to database pits GOP auditor and Democratic administration in Kentucky*, Associated Press (July 9, 2024), available at <https://apnews.com/article/kentucky-auditor-governor-government-services-database-245ea63e0663e134aeccc7424c09b2cc#>; McKenna Horsley, *Auditor's*

chalking this up to a simple legislative error that could be fixed this upcoming session.

84. On July 17, representatives from the Office, the Cabinet, and the Attorney General's Office met to discuss the post-transition administrative appeals process.

85. More specifically, the discussion centered on the flow of the various types of Cabinet administrative appeals. Exhibit 3. The Office pointed out to the Cabinet that to ensure timely and accurate packaging of some of those types of appeals, Exhibit 3 at Slides 6–7, the Office must have full, direct, and real-time iTWIST access.

86. The Office also pointed out that to ensure that caretaker abusers are properly placed on the caretaker misconduct registry, Exhibit 3 at Slide 8, the Office must have full, direct, and real-time iTWIST access.

87. The Office additionally reiterated its point that providing the Cabinet with the information it sought in addressing citizen complaints would expose whistleblowers and invite retaliation by Cabinet employees against those citizens.

office calls Beshear's 'hope' to 'work through' database dispute 'disingenuous', Kentucky Lantern (July 11, 2024, available at <https://kentuckylantern.com/briefs/auditors-office-not-satisfied-with-beshears-hope-to-work-through-dispute-over-database-access/>).

88. The Cabinet's response to these three points was twofold. First, the Cabinet realized and admitted that because of its refusal to provide Office employees with iTWIST access, the caretaker misconduct registry had been completely unmanaged since July 1. Second, the Cabinet seemed to finally begin to understand the problems identified above with its proposal.

89. So on July 26, the Cabinet reached out to the Office to revisit its offer of read-only access to iTWIST. Exhibit 7.

90. The Office immediately responded, and after a series of email exchanges, Exhibit 8, the Office proposed a Memorandum of Understanding memorializing what it thought was the agreed-upon iTWIST access, Exhibit 9. More specifically, the full, direct, and real-time iTWIST access that the Office thought was agreed upon was exactly what the Office's employees had before the transition: Log-ins to iTWIST giving each employee read-only access to all iTWIST information.

91. The Cabinet responded with its version of a proposed Memorandum of Understanding on July 29. Exhibits 10, 11.

92. That proposal inserted two unworkable conditions on the Office's iTWIST access that have never before existed. Exhibit 11. First, the Cabinet would not allow an Office employee to access iTWIST without that employee obtaining "the proper consent" of the individual about whom the iTWIST

records pertain. Second, the Cabinet wanted to restrict the Office's ability to disseminate information it uncovered about the Cabinet.

93. An example shows how absurd that first condition is. If the Office needs to access the records of an abused infant, the Cabinet's consent condition would require the Office *to obtain the consent of the infant* to access that information. But the Office obviously cannot obtain valid consent from an infant. So the Cabinet would then have the Office obtain the consent of that infant's parents, one or both of whom may be abusing the infant, to access records showing that the parents are abusing the infant. In other words, the Cabinet wants the Office to ask abusers to give the Office permission to investigate and view information related to those abusers' abuse.

95. As for the second condition, it is the Office's understanding that it would, for example, prevent the Office from contacting law enforcement to conduct a welfare check of a child.

96. While the Office and the Cabinet went back and forth with their proposals, on July 30, Auditor Ball gave an update on the transition at the Legislative Research Committee's Interim Joint Committee on Families & Children.¹⁵

¹⁵ Auditor Allison Ball, Interim Joint Committee on Families & Children, :45–20:36 (July 30, 2024) available at <https://ket.org/legislature/archives/2024/interim/interim-joint-committee-on-families-children-5z6pt3>.

97. Auditor Ball recapped the transition to that point, explained the importance of iTWIST, explained why it was necessary to have iTWIST access, explained why the Cabinet’s legal arguments make no sense, and relayed all of the damage being done to Kentucky’s children and adults without the Office’s full, direct, and real-time access to iTWIST.

98. Senator Meredith spoke at the hearing, as well.¹⁶ He reiterated his point that the reason for the move of the Office from the Cabinet to the Auditor’s Office was to eliminate the inherent conflict of interest in the Cabinet controlling investigations of itself.

99. Senator Meredith also proposed a solution. He noted that, if the Cabinet was resolved to press its KRS 620.050(5) argument, that statute allows the Cabinet’s “delegated representative” to have full, direct, and real-time iTWIST access. So Senator Meredith proposed that the Office and Cabinet enter into a Memorandum of Understanding designating the Office as a delegated representative entitled to such access. Senator Meredith also noted that the Office could obtain necessary access under KRS 620.050(5)(i) “by court order.” Either of these proposals would be valid ways of resolving the iTWIST data access issue and to, as Senator Meredith described, prevent the Cabinet from continuing its historical practice of “secrecy.”

¹⁶ *Id.* at 14:20–18:10.

100. The Committee then called Secretary Friedlander and the Cabinet's general counsel to testify.¹⁷

101. Speaker Pro Tempore Meade specifically asked the Cabinet whether it would be willing to enter into an agreed upon court order giving the Office full iTWIST access, to which the Cabinet was unwilling to agree.¹⁸

102. Speaker Pro Tempore Meade also reiterated that it was absolutely the intent of the General Assembly to provide the Office with full, direct, and real-time iTWIST access, recognizing that it is impossible for the Office to do its job without such access.¹⁹

103. In response to Speaker Pro Tempore Meade, the Cabinet admitted that the Office cannot operate fully without full, direct, and real-time iTWIST access.²⁰

104. In response to concerns from Representative Stephanie Dietz and Senator Greg Elkins, the Cabinet also admitted that it did not voice any of its concerns about iTWIST until after the General Assembly's regular session ended.²¹

¹⁷ *Id.* at 21:02–35:25.

¹⁸ *Id.* at 21:02–50.

¹⁹ *Id.* at 22:40–23:25.

²⁰ *Id.* at 24:50–25:04.

²¹ *Id.* at 25:28–40, 27:05–28:02.

105. Finally, in response to Senator Danny Carroll’s line of questioning, the Cabinet admitted again that it supports the Office having full, direct, and real-time iTWIST access.²² The Cabinet admitted that employees of the Office have always had log-ins that would give them read-only access to all iTWIST data to be able to do their jobs.

106. When testimony turned back to Auditor Ball, she noted that every day the Office receives complaints from the public that necessitate full, direct, and real-time iTWIST access to resolve.²³ Auditor Ball relayed the fact that, based on the number of complaints this time last year to the Office, it appeared as though the Cabinet was not informing the public of the transition and failing to direct those Kentuckians to the Office to resolve those complaints.

107. After the hearing, on August 2, the Office reengaged with the Cabinet by proposing a Memorandum of Understanding in line with Senator Meredith’s “delegated representative” proposal. Exhibits 12, 13. It was summarily rejected by the Cabinet.

108. On August 5, the Office proposed another Memorandum of Understanding. Exhibits 14, 15. That, too, was summarily rejected by the Cabinet.

²² *Id.* at 33:44–35:20.

²³ *Id.* at 37:00–38:15.

109. At this point, it is clear that the Cabinet will not agree to a Memorandum of Understanding with the Office unless that agreement contains the Cabinet's unworkable consent restrictions and restricts the Office's use of iTWIST data.

110. Despite knowing how crucial iTWIST access is for the Office to ensure that the Cabinet is properly serving Kentucky's most vulnerable, Governor Beshear has manifested no intent to call a special session, Ky. Const. § 80, to get that alleged error easily fixed.

111. The APA and Office have done everything they can think of to try and get this issue resolved without running to the judiciary. But they, and the Kentuckians served by the Cabinet, are out of options. The Office needs full, direct, and real-time iTWIST access to optimally perform its duties for the betterment of Kentucky and all Kentuckians touched by the Cabinet.

112. Last point. On August 20, the Office conducted a listening session that included Kentuckians from all around the Commonwealth to inform the public of the transition and to give them an opportunity to voice their concerns about the Cabinet.

113. At that session, Kentuckians voiced the exact concerns that the Office feared would happen without full, direct, and real-time iTWIST access: unnecessary delays in processing administrative appeals and addressing constituent complaints; fear of coming forward to voice concerns about specific

Cabinet employees because of the potential exposure to Cabinet retaliation that could occur with the use of the Cabinet's current iTWIST data request process; and the inability to speak to the right people because the Cabinet is failing to direct constituents to Office, among other concerns.

114. The Office's own employees have experienced frustration, delay, and the general impossibility of being able to do their jobs without full, direct, and real-time iTWIST access: the inability to verify the accuracy of the iTWIST data received; receiving incorrect documents, requiring more back and forth than necessary; receiving documents about the wrong person, which would not happen if Office employees had iTWIST access because they would easily be able to verify the right person; receiving an overabundance of unnecessary documents that have to be sifted through, which would be avoided if the Office's employees had iTWIST access because they know exactly what they need; needing to instruct Cabinet employees on how to operate the iTWIST system; unnecessarily delays in obtaining necessary iTWIST data because of constant back and forth communication; and the inability to issue corrective action plans without knowing the full picture of what is going on.

115. Finally, without iTWIST access, the Office has been unable to conduct any systematic investigations because it is impossible to obtain the necessary data to guide the investigation. And it is unclear whether the caretaker

misconduct registry is being appropriately managed by the Cabinet now that Office employees no longer have iTWIST access.

116. Without iTWIST access, the Office cannot do its job. If the Office cannot do its job, then the children and adults across Kentucky within the purview of the Cabinet that are being harmed have no recourse.

COUNT I – DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF: The Governor and the Cabinet must provide the Ombudsman with full, direct, and real-time iTWIST access.

117. The APA and the Office incorporate all previous paragraphs by reference.

118. This dispute boils down to rudimentary statutory interpretation.

119. The General Assembly made clear that everything associated with the Office before the transition, including iTWIST access, was to continue to be associated with the Office after the transition. 2023 Ky. Senate Bill 48, § 102.

120. The General Assembly also made clear that the Cabinet was not to interfere with the Office's ability to access iTWIST data and information. KRS 43.035(1).

121. A straightforward application of basic canons of statutory construction shows why these statutes, and not KRS 620.050(5), apply here.

122. To start, both the plain text of Section 102 of Senate Bill 48 and KRS 43.035(1) (and any legislative history resorted to) establish that the clear intent of the General Assembly was for the Office to have full, direct, and real-

time access to iTWIST. *See Martin v. Warrior Coal LLC*, 617 S.W.3d 391, 396 (Ky. 2021) (noting that “the fundamental principle of statutory interpretation [is] that when the General Assembly clearly expresses its intent, that intent is controlling”).

123. This plain reading is magnified by the fact that precluding the Office from having full, direct, and real-time iTWIST access would completely undermine the ability of the Office to carry out the duties that the General Assembly bestowed upon it. *See McMillin v. Sanchez*, 686 S.W.3d 145, 150 (Ky. 2024) (avoiding a construction of a statute that would “frustrate the intent of the legislature”).

124. Additionally, the General Assembly knew about KRS 620.050(5) at the time that it transferred the Office to the APA. *See Commonwealth v. Boarman*, 610 S.W.2d 922, 924 (Ky. App. 1980) (“It is to be presumed, also, that the legislature is acquainted with the law, that it has knowledge of the state of the law on subjects on which it legislates, and that it is informed of previous legislation and the construction that previous legislation has received.”). So, knowing that KRS 620.050(5) existed, that the Office had access to iTWIST while under the umbrella of the Cabinet, and that continued iTWIST access is vital to the duties of the Office, when the General Assembly moved the Office to the APA and explicitly told the Cabinet to continue to give the Office iTWIST access, there was no reason to view KRS 620.050(5) as a barrier to that access.

125. Indeed, the most harmonious reading of Section 102 of Senate Bill 48, KRS 43.035(1), and KRS 620.050(5) would be to construe the two former provisions to have created an exception to whatever barrier the Cabinet thinks is imposed by KRS 620.050(5). *See Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) (“We presume that the General Assembly intended for the statute . . . to harmonize with related statutes.”).

126. In any event, to the extent that it is believed that Section 102 of Senate Bill 48 and KRS 43.035(1) versus KRS 620.050(5) conflict, the more recently enacted statutes, which in this case are the two former, control. *See Williams v. Commonwealth*, 829 S.W.2d 942, 944 (Ky. App. 1992) (“Where a conflict exists between two statutes, the later statute enacted is generally controlling.”).

127. Moreover, any purported conflict would also result in the more specific statutes—Section 102 of Senate Bill 48 and KRS 43.035(1)—controlling here. *See Light v. City of Louisville*, 248 S.W.3d 559, 563 (Ky. 2008) (“[I]he more specific statute controls over the more general statute.”). Those two statutes are the more specific ones here because the application of that canon of construction is guided by the situation that the statutes are addressing. Here, the situation is the Office’s access to iTWIST. Section 102 of Senate Bill 48 and KRS 43.035(1) are directly on point as to the information and data access that, specifically, the Office gets.

128. In any event, to the extent that KRS 620.050(5) actually applies here, the Office would be considered a “social service agenc[y]” afforded access to iTWIST data and information. KRS 620.050(5)(e); *see also Council on Developmental Disabilities, Inc. v. CHFS*, 473 S.W.3d 597, 603–04 (Ky. 2015) (interpreting that phrase in an analogous statute to mean an entity that has three characteristics all of which the Office has here: (1) “a governmental entity charged with carrying out some function on behalf of the executive branch of government,” (2) “provid[ing] services on behalf of society at the behest of the government,” and (3) “that need[s] the information do [its] job”).

129. And finally, if construed according to the Cabinet’s interpretation, KRS 620.050(5)(e) would violate federal law by precluding the Office’s access to information that would help improve Kentucky’s child protective and social services. *See, e.g.*, 42 U.S.C. § 5106a(a), (a)(14), (b)(2)(B)(ix), (b)(2)(B)(xi); *cf. Commonwealth v. Int’l Harvester Co. of Am.*, 115 S.W. 703, 706 (Ky. 1909) (“State statutes, therefore, when they come within the domain of the powers of government over which the federal Constitution extends, must be read and applied with reference to the provisions of that instrument.”), *overruled on other grounds by Gay v. Brent*, 179 S.W. 1051, 1055–56 (Ky. 1915).

130. Two other points of note. First, KRS 620.050(5) is black and white. There is no wiggle room as to who is and is not afforded certain data access under that statute. The fact that the Cabinet is willing to read in that wiggle room

and allow the Office to acquire some of that data, despite the black and white statutory rule, completely undermines its own and only statutory argument.

131. Second, recall that iTWIST possesses information about both children and adults. The Cabinet and Governor are using a juvenile code statute to also preclude the Office's access to adult iTWIST data and information. That makes no sense and shows that the Cabinet's statutory reading here is only meant to preclude the Office iTWIST access for some other unspecified reason.

132. For all of these reasons, the APA and the Office respectfully request that the Court issue a declaration that the Office shall have full, direct, and real-time access to iTWIST. More specifically, the APA and the Office request the Court issue a declaration that all employees of the Office be given log-ins to iTWIST that gives them read-only access to all iTWIST data.

133. And pursuant to CR 65, the APA and Office respectfully request that the Court issue injunctive relief forcing the Cabinet to give the Office full, direct, and real-time access to iTWIST. Again, more specifically, the APA and Office request that the Court issue injunctive relief forcing the Cabinet to provide all employees of the Office with log-ins to iTWIST that gives them read-only access to all iTWIST data.

COUNT II – DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF: By refusing to execute Section 102 of Senate Bill 48 and KRS 43.035(1), the Governor is violating Sections 69 and 81 of the Kentucky Constitution.

134. The APA and the Office incorporate all previous paragraphs by reference.

135. By obstructing the Office’s access to iTWIST, Governor Beshear is failing to abide by his constitutional duty as “Chief Magistrate” to “take care that the laws be faithfully executed.” Ky. Const. §§ 69, 81.

136. Governor Beshear should be doing everything in his power to carry out Section 102 of Senate Bill 48 and KRS 43.035(1). But he is instead doing the opposite and obstructing the Office from carrying out its own statutory duties.

137. The APA and Office, therefore, respectfully request that the Court issue a declaration that Governor Beshear is failing to fulfill his constitutional duties under Sections 69 and 81 of the Kentucky Constitution.

138. And pursuant to CR 65, the APA and Office respectfully request that the Court issue injunctive relief forcing Governor Beshear to instruct the Cabinet to give the Office full, direct, and real-time iTWIST access. More specifically, the APA and Office request that the Court issue injunctive relief forcing the Governor to instruct the Cabinet to provide all employees of the Office with log-ins to iTWIST that gives them read-only access to all iTWIST data.

COUNT III – DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF: The Cabinet and COT must preserve all iTWIST data and information for the Office’s Review.

139. The APA and the Office incorporate all previous paragraphs by reference.

140. On July 9, the APA and the Office sent anti-spoilation letters to the Cabinet and the Commonwealth Office of Technology to prevent them from destroying or altering iTWIST data in any way that would prevent the Office from rooting out and attempting to solve the Cabinet’s problems. Exhibit 4.

141. The Commonwealth Office of Technology manages the Cabinet’s databases and can ensure the Cabinet cannot do that. *See, e.g.*, KRS 42.726.

142. The Cabinet’s destruction or alteration of iTWIST data in any way that prevents the Office from rooting out and attempting to solve problems would be in direct violation of KRS 43.035(1) and Section 102 of Senate Bill 48.

143. The APA and Office, therefore, respectfully request that the Court issue a declaration that the Cabinet and COT ensure the preservation of all iTWIST data and information and that the Cabinet and COT are prohibited from destroying, altering, or otherwise obstructing the Office’s ability to access any and all iTWIST information that existed prior to, during, and after the transition.

144. And pursuant to CR 65, the APA and Office respectfully request that the Court issue injunctive relief prohibiting the Cabinet and COT from

destroying, altering, or otherwise obstructing the Office's ability to access any and all iTWIST information that existed prior to, during, and after the transition.

PRAYER FOR RELIEF

In accordance with everything discussed above, the Auditor of Public Accounts and the Commonwealth Office of the Ombudsman request the following relief:

- A. Expedited review under KRS 418.050 and CR 57;
- B. A declaration that the Commonwealth Office of the Ombudsman is entitled to full, direct, and real-time iTWIST access and that the Cabinet for Health and Family Services must provide it with such access, which means the issuance of log-ins to all Office employees that gives them read-only access to all iTWIST data.
- C. A declaration that Governor Andrew Graham Beshear is failing to abide by his constitutional duties in obstructing the Commonwealth Office of the Ombudsman's full, direct, and real-time access to iTWIST;
- D. A declaration that the Cabinet for Health and Family Services, the Commonwealth Office of Technology, and anyone else with the ability to destroy, alter, or otherwise obstruct the Commonwealth Office of the Ombudsman's access to iTWIST data and information refrain from doing so.
- E. Injunctive relief effectuating all of the aforementioned, namely, injunctive relief forcing the Cabinet to provide all Office employees with iTWIST

log-ins giving them read-only access to all iTWIST data and prohibiting the Cabinet and COT from destroying, altering, or otherwise interfering with the preservation of iTWIST data;

F. Any and all fees and costs associated with this lawsuit; and

G. Any other relief to which the Auditor of Public Accounts and Commonwealth Office of the Ombudsman are entitled.

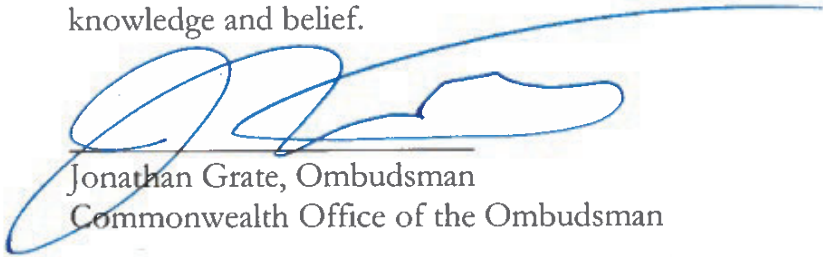
Respectfully submitted,

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VERIFICATION

I have read the foregoing Complaint for Declaratory and Injunctive Relief,
and the information contained therein is true and correct to the best of my
knowledge and belief.


Jonathan Grate, Ombudsman
Commonwealth Office of the Ombudsman

Subscribed and sworn to before me by Jonathan Grate on this the 26th
day of August 2024.

My commission expires: March 21, 2027.


NOTARY PUBLIC, STATE-AT-LARGE, KY

