UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Chelsey Nelson Photography LLC and **Chelsey Nelson,** Plaintiffs, **v.** **Louisville/Jefferson County Metro Government; Louisville Metro Human Relations Commission-Enforcement; Louisville Metro Human Relations Commission-Advocacy; Verná Goatley,** in her official capacity as Executive Director of the Louisville Metro Human Relations Commission-Enforcement; and **Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed,** and **Leonard Thomas,** in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement, Defendants.	**Case No. 3:19-cv-00851-BJB-CHL** **Plaintiffs' Motion to Compel Discovery**

Introduction

Plaintiffs, Chelsey Nelson and Chelsey Nelson Photography LLC (collectively "Chelsey") challenge Louisville's public accommodations law because it violates Chelsey's constitutional and statutory freedoms to speak and exercise her faith. Throughout this litigation, Louisville has defended its law on standing and merits grounds by citing past incidents, past applications of its law (dating back decades), an alleged compelling interest to enforce its law, and an alleged need to uniformly enforce its law. So Chelsey sought data about past enforcement, past case files involving discrimination complaints, and information about Louisville's interest in passing and uniformly applying its law. But Louisville balked, claiming these questions are irrelevant, overly burdensome, and confidential. Not so. Chelsey's requested information is (1) directly relevant to standing and the merits of her claims, (2) not overly burdensome because Louisville already relies on decades-old information to defend its law, and (3) can be produced without confidentiality concerns, especially after the parties entered into a confidentiality agreement. Chelsey brings this motion to compel production and responses to these requests.

Background

Chelsey's photography studio specializes in photographing, editing, blogging about, and participating in weddings consistent with her faith. Verified Complaint ("VC") ¶¶ 6-9, 54-74, ECF No. 1. But the Accommodations (§ 92.05(A)) and Publication (§ 92.05(B)) Provisions of Louisville's law compel Chelsey to create photographs, write blogs about, and participate in events that promote messages contrary to her faith and restrict her from communicating about her beliefs. *See id.* at ¶¶ 326-81. All of this violates Chelsey's freedoms under the First and Fourteenth Amendments and Kentucky's Religious Freedom Restoration Act ("KRFRA"). *Id.*

Chelsey moved to enjoin Louisville from enforcing these provisions against her. *See* Pls.' Br. in Supp. of Prelim. Inj. Mot. ("MPI"), ECF No. 3-1. Louisville opposed the motion and moved to dismiss this case based on standing. *See* Defs.' Mem. in Supp. of Mot. to Dismiss ("MTD"), ECF No. 14-1; Defs.' Reply to Pls.' Resp. to Mot. to Dismiss Pls.' Claims ("MTD Reply"), ECF No. 39. Louisville's standing argument relied heavily on its enforcement history of its law going back to 2002 and criticized Chelsey for not pointing to "a case similar to this one under the subject ordinance." MTD Reply at 8. *See also* MTD at 5, 11; Kendall Boyd Aff.¶¶ 2-4, ECF No. 14-2; MTD Reply at 6-8; Kendall Boyd Supp. Aff. ¶ 4, ECF No. 39-1.

Louisville also responded to the merits of Chelsey's motion. Defs.' Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. ("MPI Resp."), ECF No. 15-1. Among other things, Louisville argued that its law was "a valid and neutral law of general applicability," does not show "hostility" towards religion, and does not expose religion to "disfavored treatment." *Id.* at 20-21. Louisville also claimed that the Accommodations and Publication Provisions passed strict scrutiny because of Louisville's "compelling interest in ending discrimination based on sexual orientation in public accommodations." *Id.* at 21. And Louisville explained "that even a limited exemption permitting a single individual to discriminate would directly conflict with the state's interest in preventing discrimination." *Id.* at 25 (internal quotation marks omitted).

Amici opposed Chelsey's motion with similar free-exercise and strict-scrutiny arguments as Louisville. Like Louisville, amici claimed the law was "a valid and neutral law of general applicability." Br. of Amici Curiae Am. Civil Liberties Union of Ky. & Am. Civil Liberties Union Supp. Defs. ("ACLU") at 17-18, ECF No. 18-1; Br. of Faith Leaders & Religious and Civil-Rights Orgs. as Amici Curiae Supp. Defs.' Mot. to Dismiss ("AU") at 3, ECF No. 19-1 ("As the challenged ordinance easily meets the neutrality and general-applicability requirements" Chelsey's "free-

exercise claim thus fails as a matter of law."). Amici also argued the law required "uniform enforcement" permitting no "carve-out" exemptions. ACLU at 21-23.

Rejecting these arguments, this Court found standing and temporarily enjoined Louisville from enforcing its law against Chelsey. *See* Order, ECF No. 47.

Louisville's initial disclosures then continued to invoke history and an alleged compelling interest. Louisville pointed to several categories of information it may use to defend its law, including: (i) members of legislative bodies who passed versions of Louisville's law in 1999, 2001, and 2004; (ii) media reports "from the period in which Louisville's legislators were lobbied and ultimately passed the Fairness Ordinance"; (iii) "a binder" prepared "to pass the fairness ordinance in 1999"; and (iv) "citizen complaints of discrimination based on sexual orientation." Ex. 9 at 3-5.

Louisville links history and compelling interest in its responses to Chelsey's first set of interrogatories, too. For example, Louisville claims it has a compelling interest to force Chelsey to photograph same-sex weddings because of sexual-orientation discrimination complaints against employers, housing providers, and public accommodations from the early 1980's to the late 1990's. *Compare* Ex. 4 at 4 (referencing LOU METRO 00001-1166 to support compelling interest) *with* Ex 11. And Louisville produced dozens of news articles about its law (and the law's predecessors) from 1991-2000. Decl., ¶ 21; Ex. 13.

But now, Louisville declines to respond to two requests for production and three interrogatories that seek specific information about the history of Louisville's law, how Louisville enforces its law, how Louisville interprets and applies its law, and the evidentiary basis behind Louisville's claimed interest in applying its law to Chelsey. *See* Ex. 5 at 1-6; Exs. 6-7. Louisville should be compelled to answer these requests and interrogatories.

Certificate of Conferral

The parties' counsel made good faith efforts to resolve their disputes.

On November 24, 2020, Chelsey served her first set of requests for production, requests for admission, and interrogatories on Louisville. Decl., ¶ 3.

On January 13, 2021, the parties discussed a protective order for information about Chelsey's business and third parties. *Id.* at ¶ 4. During that discussion, Louisville raised concerns about Plaintiffs' First Set of Requests for Production to Defendants ("RFPs") 40-58. *Id.* Chelsey considered these concerns and modified her requests the next day. Ex. 1. The parties later agreed to a confidentiality agreement to protect sensitive information about Chelsey and third parties. Ex. 2.

On January 25, 2021, Louisville produced their responses to Chelsey's first set of discovery requests. Decl., ¶¶ 7-8; Exs. 3-4. On January 28, 2021, Chelsey sent Louisville a letter detailing seven areas of inadequate production and responses. Ex. 5. On February 2, 2021, the parties spoke to attempt to resolve the discovery issues. Decl., ¶ 10. The parties winnowed their disputes from seven to three, and Chelsey further modified RFPs 40-58. *Id.*; Ex. 6. Chelsey and Louisville exchanged more correspondence to resolve the three remaining disputes, but they could not do so. Ex. 7-8.

On February 23, 2021, the parties attended a telephonic status conference with Judge Lindsay. ECF No. 62. Judge Lindsay directed the parties to file discovery motions on the unresolved disputes. *Id.*

Argument

Chelsey moves to compel Louisville to produce responsive documents and to fully respond to three interrogatories. *See* Fed. R. Civ. P. 37(a); Local Rule 37.1; Scheduling Order, ECF No. 57. Specifically, Chelsey requests an order compelling Louisville to do four things.

First, produce all case files related to public-accommodations complaints as requested in RFPs 40-58.[1] *See* Exs. 1, 5-6, 8.

Second, produce all complaints related to housing and employment discrimination as requested in RFP 40. Then, after Chelsey reviews those complaints, produce case files related to those complaints that Chelsey requests as requested in RFPs 41-58.[2] *See id.*

Third, produce all "spreadsheets used by HRC to track open and closed cases" as responsive to RFPs 1-39. *See* Exs. 5-6.

Fourth, provide complete responses to Plaintiffs' First Set of Interrogatories to Defendants ("Interrogatories") 15-17. *See id.*

I. Louisville should be compelled to produce documents responsive to RFP numbers 40-58.

Louisville should produce all case files involving public accommodations and all complaints involving employment and housing discrimination. Louisville claims these documents are irrelevant, cannot be disclosed due to "confidentiality laws," and would be too burdensome to produce. Ex. 7. Louisville is wrong on all counts. These documents are (A) relevant to standing and the merits; (B) not protected by "confidentiality laws," which either do not apply or do not justify withholding

[1] "Case files" refers to the documents requested in RFPs 40-58. These documents include complaints, reasonable-cause determinations, petitions to reconsider, settlements, documents filed in circuit court, administrative records, and judicial opinions. *See* Ex. 3 at 14-17. Case files track Louisville's investigation and adjudication processes. *Compare id. with* Metro Ord. §§ 92.09, 92.10, 92.12, 92.13. "Complaints" refers to the documents requested in RFP 40.

[2] Chelsey tried to minimize any perceived discovery burdens by giving Louisville several options to respond to RFPs 40-58. These options included producing either all (1) employment and housing complaints; (2) such complaints since 2010; or (3) such complaints implicating §§ 92.04(A), (D) and 92.07(A), (B) (this option should also include § 92.06(E)). *See, e.g.*, Ex. 1; Ex. 8 at 2. Chelsey then offered to review the produced complaints and request specific case files based on her review. This Court could also order Louisville to produce all case files as originally requested.

relevant information; and (C) not overly burdensome to produce when Louisville has already agreed to look for some documents and raised decades-old records in its defenses. Ex. 7 at 2; Ex. 9 at 3-5.

A. The requested documents go to the heart of this case—standing and the merits.

Relevance is to be "construed broadly." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Relevant requests include those with "any possibility that the information sought" is "relevant to the claim or defense of any party in the action." *Scanlan v. Sunbeam Prod., Inc.*, 2018 WL 3463069, at *4 (W.D. Ky. Jan. 29, 2018) (cleaned-up). RFPs 40-58 exceed this lenient standard. This case is about how Louisville enforces and applies its law. Louisville has no written policies for enforcing or interpreting its law other than the law's text. *See* Ex. 3 at 17-20. So the documents requested in RFPs 40-58—which speak to how Louisville has enforced and applied its law in the past—provide critical information. These documents are relevant to standing and the merits.

1. The requested documents are relevant in proving Chelsey has standing and rebut Louisville's standing arguments.

RFPs 40-58 seek documents that are relevant to Chelsey's Article III standing.

In evaluating standing in a case like this, the Sixth Circuit considers factors like the "history of past enforcement [of the law] against the plaintiffs or others." *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016). Louisville has challenged standing because Chelsey did "not show[]" that Louisville "has a history of prosecuting these violations." MTD at 11. For example, Louisville claims it last "addressed a constitutional challenge to its public accommodations ordinance" "18 years" ago. *Id. See* Kendall Boyd Aff. ¶ 4. Louisville faulted Chelsey for not pointing to "a case similar to this one under the subject ordinance" and relying on "overly

generalize[d]" enforcement statistics. MTD Reply at 8. *See also id.* at 6-8; Kendall Boyd Supp. Aff. ¶ 4. But Louisville cannot attack Chelsey's standing because she cannot point to past similar cases and then turn around and argue that past cases are irrelevant. Louisville's standing argument necessarily assumes that complaints and case files *are* relevant.

Documents responsive to RFPs 40-58 are also relevant to Chelsey's standing because complaints filed against employers, housing providers, and public accommodations show another standing factor: anyone from the public can initiate an enforcement action against Chelsey. *See* Order at 9; *McKay*, 823 F.3d at 869. For example, a recent complaint against a restaurant appears to have been filed by the Fairness Campaign—an LGBT advocacy group that advocated for passing Louisville's law—after someone posted a photograph of the sign on Facebook. *See* Ex. 8. Dawn Wilson, a member of the Commission, also learned about the sign on the Fairness Campaign's Facebook page and alerted a Commission chairman. *Id.* at 9. Certainly, a single Facebook post leading to a complaint by an LGBT advocacy group "makes enforcement easier or more likely" against Chelsey. *McKay*, 823 F.3d at 869. Other complaints would likely reveal similar enforcement ease.

This is especially true because Louisville follows the same complaint procedure and uses the same complaint form regardless of the type of alleged discrimination (i.e., race or sexual orientation) or respondent status (i.e., employer, housing provider, or publication accommodation). *See* Metro Ord. § 92.09 (procedure); Ex. 12 (complaint form). So complaints filed against employers, housing providers, and public accommodations for any reason are relevant to standing.

2. The requested documents are relevant in proving Chelsey's constitutional and statutory claims.

Documents responsive to RFPs 40-58 are also relevant to Chelsey's claims that the Accommodations and Publication Provisions violate her freedoms under the First and Fourteenth Amendments and her rights under the KRFRA.

Starting with free speech and free exercise, courts often decide the merits of First Amendment claims like Chelsey's by comparing how governments treat the plaintiff's activities in comparison to others' activities. Chelsey claims that the Accommodations and Publication Provisions violate the First Amendment by compelling and restricting her speech based on her speech's content and viewpoint. VC ¶¶ 331-33. *See also* MPI at 16-19. Courts decide whether speech restrictions are unconstitutionally content- or viewpoint-based in part by comparing the kinds of speech that are and are not restricted. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299-2302 (2019) (comparing approved and disapproved trademarks to find law was viewpoint based).

Take Chelsey's desire to post statements explaining her religious reasons for why she can only promote marriages between one man and one woman. ECF Nos. 1-2, 1-3. Louisville bans these statements. VC ¶¶ 251-61. But Louisville allows employers to "indicate a preference" based on some characteristics if the preference is "a bona fide occupational qualification for employment." Metro Ord. § 92.06(E). So while Chelsey cannot explain her religious reasons for only photographing opposite-sex weddings, a construction company can explain its reasons for preferring a male worker (say, lifting requirements). Louisville's interpretation and application of this employer exemption is therefore relevant to show how the law is content and viewpoint based as applied to Chelsey.

Likewise, Chelsey claims Louisville's law violates her First Amendment free-exercise rights by "effectively requiring [Chelsey] to operate [her] expressive

business in violation of [her] religious beliefs" while not "forc[ing] nonreligious persons and businesses to choose between these same options when they are faced with a request to promote messages." VC ¶¶ 347-49. Louisville denies this claim because its law does not show "hostility" towards religion and does not single out religion for "disfavored treatment." MPI Resp. at 21. But courts evaluate religious hostility by comparing how governments handle "conscience-based objections" to providing a service with religious-based objections. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n* (*Masterpiece*), 138 S. Ct. 1719, 1730 (2018). These comparisons make Louisville's past complaints and enforcement actions against other public accommodations relevant. Indeed, these past actions are relevant regardless of the basis of the complaint. *See id.* at 1735 (Gorsuch, J., concurring) (noting customer filed discrimination complaint against three other bakeries who declined to create the requested cake based on his "religious beliefs").

Chelsey also claims that the Accommodations and Publication Provisions violate her First Amendment free-exercise rights in other ways. She claims the provisions are not neutral or generally applicable because the law contains categorial exemptions for some public accommodations, employers, and housing providers but not her. VC ¶¶ 261-68, 350-52. Louisville disagrees. MPI Resp. at 20 (citing "neutral law of general applicability"). So did amici who claimed that the provisions are neutral and generally applicable even though there are "categorial carve-outs in *other* antidiscrimination provisions in Metro's Ordinances." AU at 6.

But courts evaluate a law's generality by looking at how the law applies to comparable secular conduct "measured against the *interests* the State offers in support of its restrictions." *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't* (*Monclova*), 984 F.3d 477, 480 (6th Cir. 2020). Exemptions inform generality too—"the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Maryville Baptist Church, Inc. v. Beshear*, 957

F.3d 610, 614 (6th Cir. 2020). These comparisons and exemptions "transcend[] the bounds between particular ordinances, statutes, and decrees." *Monclova*, 984 F.3d 477 at 481. *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544-45 (1993) (comparing city law supposedly protecting public health with state law undermining that interest to find city law not generally applicable)

For example, the Sixth Circuit just held that a county's COVID-19 restriction violated religious schools' free exercise rights. *Monclova*, 984 F.3d 477 at 480-82. The court considered the interest at stake—stopping the spread of the virus. *Id.* at 479. With that interest, the restriction was not generally applicable because the restriction closed religious schools while secular entities posing the transmission risks ("gyms, tanning salons, office buildings, and the Hollywood Casino)" remained open. *Id.* at 482. The court emphasized that the result would be the same if the religious and secular activities were "regulated by different statutes or decrees." *Id.* at 481.

This analysis applies here. Louisville asserts an interest in "rooting out all forms of discrimination" through its law. Ex. 4 at 4. *See also* Metro Ord. § 92.01 (declaring interest in "safeguard[ing] all individuals" from discrimination). Yet Louisville allows all kinds of exemptions for private homeowners, single-room landlords, duplex owners, and bona fide occupational qualification advertisements. Metro Ord. §§ 92.04(A)(1), (2), (4), 92.06(E). These exemptions show the law is not generally applicable as applied to Chelsey. The requested documents are relevant to match concrete examples to these exceptions and reveal whether Louisville reads additional exemptions into its law. *See, e.g.*, *Masterpiece*, 138 S. Ct. at 1730-31 (allowing "conscience-based" objections in practice not provided in text of law).

These exemptions matter for Chelsey's KRFRA claim too. VC ¶¶ 373-81. Under this law, Louisville must show that applying its law to Chelsey is the "least restrictive means to further" a compelling interest. K.R.S. § 446.350. And a law does

not meet this test if it "treat[s] comparable religious and non-religious activities" differently, i.e. offers exceptions for secular activity but not religious activity. *Maryville Baptist Church*, 957 F.3d at 613. *Cf. Holt v. Hobbs*, 574 U.S. 352, 365 (2015) (prison regulation failed this standard when inmates with skin conditions could have 1/4-inch beard but Muslim inmates could not have 1/2-inch beard).

Lastly, Chelsey claims that the Unwelcome Clause is facially vague, overbroad, and gives Louisville unbridled discretion. VC ¶¶ 366-72. Louisville's enforcement of this clause against other public accommodations—regardless of the basis of the complaint—is therefore indicative of whether ordinary persons could understand the law (vagueness), whether the clause has many unconstitutional applications (overbreadth), and whether Louisville officials have too much leeway (unbridled discretion). *See* MPI at 24-25.

These examples are merely illustrative. When a civil-rights plaintiff challenges a law or policy as unconstitutional, the government's past interpretation and enforcement law is relevant in countless ways. *See, e.g., Goines v. Lee Mem'l Health Sys.*, 2018 WL 4383057, at *7 (M.D. Fla. Sept. 14, 2018) (past reports and disciplinary actions relevant to determining whether entity had policy or custom of failing to investigate sexual assault allegations). RFPs 40-58 seeks documents precisely tailored to obtain that vital information. Louisville should therefore produce these responsive documents.

3. The requested documents are relevant to disprove Louisville's asserted interest in applying its law to Chelsey.

The requested documents are also relevant so that Chelsey can rebut Louisville's alleged interest in applying its law to her.

Louisville's law must pass strict scrutiny because it violates Chelsey's constitutional rights—i.e., the law must be narrowly tailored to serve a compelling interest. *See* MPI at 21-23. Louisville declares a compelling interest in prohibiting

discrimination "because of race, color, religion, national origin, familial status, age, disability, sex, gender identity, [and] sexual orientation" in employment, housing, and public accommodations. Metro Ord. § 92.01. Throughout this litigation, Louisville has defended its need to apply its law to Chelsey to "end[] discrimination based on sexual orientation in public accommodations." MPI Resp. at 21. *See id.* at 21-25; Ex. 4 at 4-5 (asserting an interest in applying law to Chelsey because "[g]overnments have a compelling state interest in rooting out *all forms* of discrimination." (emphasis added)).

To support this theory, Louisville has disclosed information about members of legislative bodies who passed versions of Louisville's law in 1999, 2001, and 2004, "citizen complaints of discrimination based on sexual orientation," and other bits of history. Ex. 9 at 3-5. And in its interrogatory responses, Louisville contends it has "a compelling state interest in rooting out all forms of discrimination" by citing specific instances of sexual orientation discrimination against employers, housing providers, and public accommodations from the early 1980's to the late 1990's. *Compare* Ex. 4 at 4 (referencing LOU METRO 00001-1166 to support compelling interest) *with* Ex 11. This alone shows the relevance of the past complaints and case files related to employers, housing accommodations, and public accommodations. Louisville relies on these past complaints to support its compelling interest. Chelsey should have access to actual complaints filed to refute Louisville's claimed interest.

The requested documents are also relevant to prove that Louisville's law is underinclusive. A law cannot pass strict scrutiny if it is underinclusive. *Reed v. Town of Gilbert*, 576 U.S. 155, 171-72 (2015). A law can be underinclusive if it contains exemptions which undermine the government's alleged interests. *Id.* And—like in the free exercise context—courts look at exemptions beyond the particular specific provision challenged. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011) (failure to regulate booksellers, cartoonists, and movie

producers undermined interest for law that only regulated video games); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 544-45 (failure to regulate restaurant garbage disposal undermined interest for laws that only regulated killing animals).

Louisville prohibits "even a limited exemption permitting a single individual to discriminate" because that "would directly conflict with the state's interest in preventing discrimination." MPI Resp. at 25 (internal quotation marks omitted). But Louisville undermines its own alleged interests in other contexts. As noted, various housing providers are exempt from Louisville's law and may discriminate against anyone for any reason. *See* Metro Ord. § 92.04(A). Louisville also makes exceptions for employer advertising, bona fide occupational qualifications, and religious institutions. *See* Metro Ord. §§ 92.06(E), 92.07(A)(1), (B). And public accommodations can engage in blatant sex discrimination. *See* Metro Ord. §§ 92.05(A), (C) (limiting sex-discrimination prohibition to restaurants, hotels, motels, and government-funded facilities).

All of these exemptions are relevant in showing the under-inclusivity of the Accommodations and Publication Provisions as applied to Chelsey. And the specific ways that Louisville interprets and enforces these exemptions—as shown through the complaints and case files requested in RFPs 40-58—are also relevant in providing real examples of the exemptions Louisville permits. Relevance cannot be limited to complaints or case files based on particular characteristics or to employers, housing providers, or public accommodations either. Louisville claims the same interest in ending sexual-orientation discrimination in public accommodations as it does for ending "race, color, religion, national origin, familial status, age, disability, sex, [and] gender identity" discrimination in employment, housing, and public accommodations. Metro Ord. § 92.01. So any exemptions Louisville makes for any reason is relevant to the law's under-inclusivity.

B. Louisville cannot hide behind inapplicable or insignificant confidentiality concerns.

Louisville says it cannot produce many documents Chelsey requests because they are "confidential." Louisville applies that reasoning indiscriminately to vast swaths of documents, including publicly filed documents that cannot be confidential. *See* Ex. 3 at 15-17. Louisville invokes three types of "confidentiality laws" but they either do not apply at all or do not justify withholding any documents responsive to RFPs 40-58. *See* Ex. 7.

Louisville first seeks cover under 5 U.S.C. section 552a. *Id.* at 2. But this section "only applies to federal agencies." *Ervin v. S. Cent. Ky. Cmty. Coll.*, 2013 WL 5522670, at *3 (W.D. Ky. Oct. 3, 2013) (citing *Schmitt v. City of Detroit*, 395 F.3d 327, 331 (6th Cir. 2005)). And records subject to section 552a can be disclosed under "the order of a court." 5 U.S.C. § 552a(b)(11).

Louisville next cites Equal Employment Opportunity Commission ("EEOC") laws and regulations that do not apply. Ex. 7 at 2. They govern the EEOC, not Louisville. *See* 42 U.S.C. § 2000e-5(b) ("[c]harges shall not be made public by the Commission"); 42 U.S.C. § 2000e-8(e) (prohibiting EEOC "officer[s] or employee[s]" from publicizing "information obtained by the Commission"); 29 C.F.R. § 1601.22 (prohibiting "the Commission" from publicizing certain information). *Cf.* 42 U.S.C. § 12117(a) (incorporating the "powers, remedies, and procedures" in 42 U.S.C. § 2000e-5(b) and -8(e)). They only prohibit the EEOC from disclosing documents "prior to the institution of any proceeding," not afterwards. 42 U.S.C. § 2000e-8(e); 29 C.F.R. § 1601.22. But RFPs 46-49 and 52-58 request documents generated after Louisville began a proceeding. *See* Ex. 3 at 15-17. The EEOC has not (until recently) had jurisdiction over claims of gender identity or sexual orientation discrimination so its rules and regulations would not apply to these types of employment complaints. *Cf.* Metro Ord. § 92.06 (prohibiting these types of employment

discrimination). And EEOC laws and regulations cannot restrict access to housing and public accommodations case files.

Finally, Louisville tries to hide behind Metro Ordinance section 92.08(B)(7). Ex. 7 at 2. But federal law—not municipal law—"govern[s] discoverability and confidentiality in federal civil rights actions." *King v. Conde*, 121 F.R.D. 180, 187 (E.D.N.Y. 1988). *See Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992); *ACLU of Miss. v. Finch*, 638 F.2d 1336, 1342 (5th Cir. 1981). This principle is especially important in constitutional cases against municipal defendants. Otherwise, municipalities "could effectively insulate themselves" from the constitution "by developing privilege doctrines that ma[k]e it virtually impossible for plaintiffs to develop the kind of information they need to prosecute their federal claims." *King*, 121 F.R.D. at 187-88.

Rather than defer to local confidentiality rules, courts "weigh[] … federal interests in disclosure" against "the chilling effect" on and "possible interference with important governmental interests." *Grummons v. Williamson Cnty. Bd. of Educ.*, 2014 WL 1491092, at *3 (M.D. Tenn. Apr. 15, 2014). "[M]ost courts" weighing these interests agree local "law must yield to the federal interest in full disclosure of all facts bearing upon the denial of federally-guaranteed rights." *Farley v. Farley*, 952 F. Supp. 1232, 1236 (M.D. Tenn. 1997). This balance favors Chelsey here too.

On one side, Chelsey needs the documents requested in RFPs 40-58 for her standing and merits arguments. *Supra* § I.A. Courts compel disclosure in these types of "federal civil rights actions where the vindication of constitutional rights is … at stake" because of the "paramount importance that litigants be accorded the authority to seek out relevant evidence." *Farley*, 952 F. Supp, at 1239.

On the other side, disclosure would not disrupt Louisville's ability to receive complaints because individuals who file complaints do not have an expectation of privacy. Louisville publishes complainants' first and last names and settlement

terms in online annual reports. Ex. 10. *See also* Metro Ord. § 92.08(B)(7). Louisville law mandates "[a]ll hearings … shall be open to the public." *Id.* at § 92.09(I). And under Kentucky law, complaint dismissals, conciliation agreements, hearing transcripts, hearing complaints, and final decisions (like those requested by Chelsey) are all "subject to public inspection." Ky. Op. Att'y Gen. OAG 85-5 (1985), 1985 WL 193264, at *2. Because most of these records are already publicly available, "[a]ny claim … that confidentiality is necessary to ensure the integrity of the investigative process is wholly illusory." *Hansen v. Allen Mem'l Hosp.*, 141 F.R.D. 115, 123-24 (S.D. Iowa 1992) (granting access to state civil rights commission's tape recordings).

A protective order or confidentiality agreement (as Chelsey proposes) could also cure Louisville's confidentiality concerns. *See* Ex. 5 at 3 (offering to enter into confidentiality agreement). The parties already have a confidentiality agreement that protects complainant information. Ex. 2 at 2 (limiting disclosure of "non-parties' personal and/or private information and other personally identifiable information that could jeopardize such persons' safety or privacy"). And courts compel document production—even documents with information as sensitive as child abuse reports—under protective orders all the time. *See Grummons*, 2014 WL 1491092, at *3 (entering protective order for production of documents related to child abuse investigation); *Farley*, 952 F. Supp. at 1243 (same).

For these reasons, nothing stops Louisville from producing documents responsive to RFPs 40-58. But to appease any concerns, Chelsey does not object to a reasonable protective order or confidentiality agreement to provide complainants with even more privacy than they can expect when they file a complaint with Louisville.

C. Producing the requested documents is not an undue burden.

Louisville waived any objection that the requested documents pose an unreasonable burden by offering a "boilerplate" objection that RFPs 40-58 were "overly broad" and "unduly burdensome" without explanation. Ex. 3 at 14. *See Durbin v. C&L Tiling Inc.*, 2019 WL 4615409, at *5-7 (W.D. Ky. Sept. 23, 2019) (Lindsay, J.) (finding party waived undue burden objection through "boilerplate objections"); *Troutman v. Louisville Metro Dep't of Corr.*, 2018 WL 3041079, at *3 (W.D. Ky. June 19, 2018) (Lindsay, J.) (finding objections to interrogatory as "overly broad and unduly burdensome" were "boilerplate objections"). These types of "[u]nexplained and unsupported 'boilerplate' objections clearly are improper." *Janko Enters., Inc. v. Long John Silver's, Inc.*, 2013 WL 5308802, at *7 (W.D. Ky. Aug. 19, 2013). Courts across the country agree.[3]

But even if Louisville did not waive this objection, Louisville should still be compelled to produce the responsive documents. The "large volume[s] of the files requested" and "the age of the files" are at least partly a result of Louisville's defenses. Ex. 7 at 2. As noted, Louisville time-traveled to 2002 to challenge Chelsey's standing. *See* MTD at 11; MTD Reply at 6, 8. According to Executive Director Boyd's affidavit supporting Louisville's motion to dismiss, Louisville

[3] *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) ("[B]oilerplate objections" in "a response to a Rule 34 request for production of documents are insufficient to assert a privilege."); *McLeod, Alexander, Powell & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) ("overly broad, burdensome, and oppressive" objections were insufficient); *Wesley Corp. v. Zoom T.V. Prod., LLC*, 2018 WL 372700, at *4 (E.D. Mich. Jan. 11, 2018) ("When objections lack specificity, they lack effect: an objection that does not explain its grounds (and the harm that would result from responding) is forfeited."); *State Farm Fire & Cas. Co. v. Admiral Ins. Co.*, 225 F. Supp. 3d 474, 485 (D.S.C. 2016) ("Boilerplate, general objections standing alone waive any actual, specific objections.").

"received a total of 173 complaints based on sexual orientation discrimination" since "January 1, 2002." Kendall Boyd Supp. Aff. ¶ 4. And Louisville justifies its compelling interest to regulate Chelsey by citing cases of discrimination from the 1980's and legislative history from the 1990's. Exs. 11. Louisville has also produced dozens of news articles detailing efforts to pass the law from the 1990's. Decl. ¶ 21; Ex. 13. Louisville cannot rely on almost forty-year-old information for its affirmative defense and complain when Chelsey asks for documents half that age.

Chelsey still offered to limit any perceived burden on Louisville by agreeing to reduce production to all public accommodations case files and employment and housing complaints. *Supra* n.2. Then Chelsey would follow up to request specific employment and housing case files.

Louisville also says RFPs 40-58 are burdensome because "most of these files have been moved to archives that are not reasonably accessible." Ex. 7 at 2. But Louisville has already agreed to hunt for two specific case files from 2012 and 2014. *Id.* It should be less burdensome to produce all case files than look for two of them. In any event, a party cannot avoid discovery responsibilities "simply because its chosen means of recordkeeping make searches cumbersome." *Adamov v. U.S. Bank Nat'l Ass'n*, 2015 WL 4512193, at *4, *7 (W.D. Ky. July 24, 2015) (Lindsay, J.) (compelling document production when defendant claimed doing so would require reviewing more than 10,000 terminations).

Louisville also asserts that "confidentiality laws" impose a burden because they require Louisville to review responsive documents for confidential information. Ex. 7 at 2. Louisville misplaces this concern because these laws do not apply, this Court could enter a protective order, or the parties could agree to another confidentiality agreement. *See supra* § I.B.

II. Louisville should be compelled to produce "spreadsheets" used to track cases because they contain missing and relevant data responsive to RFP numbers 1-39.

Chelsey requested documents sufficient to show statistics about Louisville's enforcement of the law. Ex. 7 at 2. Louisville produced publicly available reports on its website, but withheld "spreadsheets used by HRC to track open and closed cases" based on "confidentiality laws." Ex. 3 at 3.

But the public reports Louisville produced do not have all of the information requested by Chelsey. Ex. 5 at 3-5. The spreadsheets do. For example, the spreadsheets contain information for the years 2010, 2017, 2018, 2019, and 2020, which are not fully accounted for in Louisville's current production. *Compare* Ex. 7 at 2 *with* Ex. 5 at 3-5. The spreadsheets also include hearing outcomes, bases for the hearings, and later actions. Ex. 7 at 2. This information is relevant for the same reasons that the complaints and case files are relevant. *See supra* § I.A. And though Louisville withholds these spreadsheets for confidentiality reasons, those concerns are either mistaken or solvable. They are mistaken because the "confidentiality laws" do not apply. *See supra* § I.B. And they are solvable because this Court could enter a protective order, the parties could enter a confidentiality agreement (as they have already done for sensitive third-party information), or Louisville could redact sensitive information, *see* 29 C.F.R. § 1601.22 (regulation "does not apply" to "the publication of data … in a form which does not reveal the identity of the charging parties, respondents, or persons supplying the information").

III. Louisville should be compelled to respond to Interrogatories 15-17 because its responses shape strict scrutiny and the KRFRA claim.

Interrogatories 15-17 pose questions about whether Louisville contends that applying its law to Chelsey is "the least restrictive means to achieve any government interest." Ex. 4 at 5-6. Louisville answered "Yes." *Id.* But

Interrogatories 15-17 go further and ask Louisville to identify "all material facts that support your contention." *Id.* Louisville did not respond to the second part of this question, but it should be compelled to do so.

Strict scrutiny review—which applies to Chelsey's constitutional claims, MPI at 21-23—requires Louisville to use an alternative besides applying its law to Chelsey's photography, editing, and blogging "[i]f a less restrictive alternative would serve" Louisville's interests. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). And Louisville has the burden to prove that "it considered different methods." *McCullen v. Coakley*, 573 U.S. 494-96 (2014). *See Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020) ("[T]he government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest.").

The KRFRA uses the same criteria. Louisville cannot substantially burden Chelsey's religious expression unless it "has used the least restrictive means to" further a compelling interest. K.R.S. § 446.350. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728-32 (2014) (federal RFRA requires government to show "that it lacks other means of achieving its desired goal").

Louisville claims its law is the least restrictive alternative—"[t]here simply is no less restrictive way to ensure equal access to public accommodations than to require businesses to provide such access." MPI Resp. at 23. Amici did too. When Chelsey proposed less restrictive alternatives in her preliminary-injunction motion (MPI at 22-23), amici tried to shoot these proposals down (ACLU at 22-23).

So Louisville's full answer to Interrogatories 15-17 is critical to strict scrutiny and Chelsey's KRFRA claim because the interrogatories explore a central issue here—whether Louisville considered and rejected less restrictive alternatives besides applying its law to businesses like Chelsey's. Chelsey should have a chance

to know this. If Louisville did not consider other alternatives, then it should be compelled to say so.

Conclusion

Plaintiffs respectfully move this Court for an order compelling Defendants to produce (1) all complaints and case files related to public accommodations complaints as requested in RFPs 40-58; (2) all complaints of housing and employment discrimination complaints as requested in RFP 40 and then all specific case files requested by Plaintiffs as requested in RFPs 41-58; (3) the spreadsheet as requested in RFPs 1-39; and (4) complete responses to Interrogatories 15-17.

Respectfully submitted this 5th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, I electronically filed the foregoing document with the Clerk of Court and that the foregoing document will be served via the CM/ECF system on all counsel of record.

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