

# How "Revenge FOIA" lawsuits against the press highlight the need for openness in sexual harassment records



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We all know the way open-government disputes normally play out: The person requesting records gets a lawyer and goes to court if the agency's response is unsatisfactory. But then there's what's going on in Kentucky, part of a larger national trend of agencies aggressively taking requesters to court in an attempt to block disclosure of unflattering information.

Two Kentucky state agencies have filed separate lawsuits against the nonprofit Kentucky Center for Investigative Reporting (KyCIR) in attempts to avoid responding to public records requests for details related to accusations of sexual harassment. In what might be called "Revenge FOIA" lawsuits, both agencies are fighting to reverse Kentucky Attorney General opinions, which say sexual harassment issues—including the names of accused individuals—are matters of public importance subject to the state's open-records law.

In November 2017, reporters from KyCIR sent records requests to more than 30 state agencies, seeking information about sexual harassment complaints since 2012. The reporters sought records showing how the complaints were investigated and resolved.

Two agencies, the Finance and Administration Cabinet and Labor Cabinet, resisted complying with the requests, but were told by the state's attorney general, Andy Beshear, that the documents are public. "In weighing the right of individual privacy against the right of the public to monitor the conduct of its servants," one attorney general opinion says, "complaints of sexual harassment and consequent disciplinary action, or the decision to take no action, are matters of legitimate public concern which outweigh the privacy rights of the public servant."

Kentucky law requires any entity appealing an open records decision by the attorney general to sue the original requester, so each agency has sued KyCIR to prevent the requested release of documents.

The Finance case involves whether the agency violated state law by refusing to cooperate with the attorney general by providing complete copies of the disputed records so the AG's office could make an independent assessment of them.

The Labor case challenges Beshear's opinion that the agency violated the Open Records Act when it refused to release the names of people accused in "unsubstantiated" claims of sexual harassment. The opinion states that the names are discoverable public records, even when the agency has determined that the complaint can't be substantiated.

"It is only through full disclosure of complaints, both substantiated and unsubstantiated, that the public can effectively monitor public agency action, and insure that the agency is promptly, responsibly, and thoroughly investigating and acting upon allegations of employee misconduct," the attorney general opinion says. "An individual who is impelled to file a complaint against a public agency employee is more likely to act responsibly, and less likely to make false accusations, if the entire process is exposed to the light of public scrutiny."

It's not novel for a requester to be forced to defend a lawsuit by a government agency; *Columbia Journalism Review* reported in 2015 on a wave of such cases from New Jersey to Montana to Texas. These cases

are worrisome for several reasons. Knowing that the response to a freedom-of-information request may be a lawsuit can deter people from filing requests. And a government agency with taxpayer-subsidized lawyers may be able to exhaust a poorly funded requester.

What's new is that this battle over access is taking place against the backdrop of the nationwide #metoo awareness movement. It's difficult in the year 2018 for a government agency to say that the way sexual harassment complaints are investigated, and violators punished, is none of the public's business.

As shown by Portland reporter Bethany Barnes' award-winning investigative reporting on sexual abuse by teachers, even a string of "unsubstantiated" complaints can turn out to signal trouble. The opacity of sexual misconduct cases has proven to embolden repeat offenders. How well a state agency deals with reports of harassment—and whether they're being written off as "unsubstantiated" without a thorough investigation—is plainly the public's concern.