Entered 17-CI-01137 Amy Feldman, Franklin Circuit Clerk

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

COMMONWEALTH OF KENTUCKY, CABINET FOR ECONOMIC DEVELOPMENT — **PLAINTIFF/APPELLANT**

v.

OPINION & ORDER

THE COURIER-JOURNAL, INC. — **DEFENDANT/APPELLEE**

This matter is before the Court on Cross-Motions for Summary Judgment. The parties appeared before the Court on March 15, 2018 to argue the matter. Jessica Burk and Reid Glass appeared on behalf of the Plaintiff, Cabinet for Economic Development ("Cabinet"), and John Fleischaker, Michael Abate, and Heather Harrell appeared on behalf of the Defendant, Courier-Journal, Inc. ("Courier-Journal"). Braidy Industries, Inc. ("Braidy"), a non-party to this suit, was not present for the hearing but filed an amicus curiae brief in support of Plaintiff's Motion for Summary Judgment. Accordingly, having considered the briefs and argument of counsel, and otherwise being sufficiently advised, the Court hereby **DENIES** Plaintiff's Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment, for the reasons set forth below.

BACKGROUND

The material facts of this case are essentially undisputed. Braidy is a "start-up" corporation founded by Craig T. Bouchard. On April 26, 2017, Bouchard and Governor Matthew Bevin announced that the company would build a $1.3 billion aluminum rolling mill and offices in Greenup and Boyd counties. The next day, April 27, 2017, the Kentucky Economic Development Finance Authority ("KEDFA") transferred $15 million in bond funds from the High Tech Investment Pool to the Kentucky Economic Development Partnership ("KEDP"). KEDP then

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authorized a $15 million capital contribution into Commonwealth Seed Capital, LLC ("CSC").[1] CSC used the $15 million to purchase an equity stake in Braidy and, as a result, Braidy issued stock to CSC. In other words, CSC used these public funds to purchase approximately twenty percent (20%) ownership of Braidy.

On June 30, 2017, Tom Loftus, acting on behalf of the Courier-Journal, sent a request to the Cabinet under the Kentucky Open Records Act, KRS 61.871, *et seq*. He specifically requested "copies of any and all documents that list the stockholders or investors in Braidy Industries, Inc." and "all documents the cabinet has received that show the names of stockholders/investor [sic] in Braidy Industries, Inc., including any original list plus any subsequent lists that may reflect additions or changes in the names of those investors."

On July 6, 2017, the Cabinet responded to the Courier-Journal's request, providing two KEDFA board reports that had previously been disclosed during KEDFA's publicly held meetings. These two reports identify Bouchard and CSC as possessing a "20% or more" ownership interest in Braidy. However, the Cabinet did not provide the identify of any other stockholders, citing the Open Records Act's (1) personal privacy exemption under KRS 61.878(1)(a); (2) confidential disclosures exemptions under KRS 61.878(1)(c)(1) and (2)(b); and (3) preliminary documents exemption under KRS 61.878(1)(i) and (ii).

The Courier-Journal appealed to the Attorney General. On October 3, 2017, the Attorney General issued Decision 17-ORD-198, which ruled that, under the circumstances of this case involving a substantial investment of state funds into a private corporation, (1) public disclosure of the identities of that corporation's individual shareholders did not constitute a clearly unwarranted invasion of privacy under KRS 61.878(1)(a); (2) those identities did not qualify as

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[1] At the March 15, 2018 hearing, the parties represented to the Court that CSC is a limited liability company, with KEDP as its only member.

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confidentially disclosed proprietary information under KRS 61.878(1)(c)(1); (3) shareholder names are not generally recognized as confidential or proprietary under KRS 61.878(1)(c)(2)(b); and (4) those names were no longer considered "preliminary" under KRS 61.878(1)(i) and (j).

The Cabinet thereafter filed this appeal, seeking reversal of the Attorney General's decision and a determination that the records containing the shareholder and investor identities are exempt under the Kentucky Open Records Act. Soon after, on December 25, 2017, Braidy issued a press release, in which it announced plans to establish a scholarship. *See* Am. Cur. Br. 9. In that press release, Braidy voluntarily revealed the names of its then-current shareholders. *Id.* However, at the March 15, 2018 hearing, the parties agreed that the issue remained unresolved and should not be considered moot, as additional shareholders may join or leave Braidy in the future, or may have purchased or transferred stock in Braidy prior to this voluntary disclosure. In addition, the Courier-Journal sought "any original list plus any subsequent lists that may reflect additions or changes in the names of those investors." In other words, it sought current *and* prior lists of shareholders, but the list released on December 25, 2017 listed only the shareholders as of that date.

Both the Cabinet and Courier-Journal filed motions for summary judgment. In addition, Braidy, through counsel, filed an amicus curiae brief in support of Plaintiff. Accordingly, this matter has been fully briefed and is ripe for decision.

STANDARD OF REVIEW

Pursuant to KRS 61.882(3), this Court reviews the decision of the Attorney General de novo. Thus, this Court may grant summary judgment only if it first concludes that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See* CR 56.03. However, the Court notes that an Attorney General's opinion, while non-binding, is "highly persuasive." *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991) (citation

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omitted). Regardless, the Court ultimately must decide Open Records Act disclosure issues on a case-by-case basis. *See, e.g.*, *Kentucky Bd. of Exam'rs. of Psychologists v. Courier Journal & Louisville Times Co.,* 826 S.W.2d 324, 327–28 (Ky.1992).

ANALYSIS

As our Supreme Court has explained, Kentucky's Open Records Act "seeks to ensure the free and open examination of public records." *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818, 821 (Ky. 2008). Thus, the Act provides that "[a]ll public records shall be open for inspection by any person," unless otherwise expressly exempt from disclosure. *See* KRS 61.872(1). This reflects the "basic policy" of the Kentucky Open Records Act "that free and open examination of public records is in the public interest." KRS 61.871. The Supreme Court of Kentucky has elaborated further, stating, "The public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions." *Kentucky Bd. of Exam'rs.,* 826 S.W.2d at 328. Thus, "inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good." *Id.*

However, the Act "is not without its limits." *Cape Publications, Inc.*, 260 S.W.3d at 821. In creating the Act, the General Assembly noted that "while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access." KRS 61.8715. For example, KRS 61.878 enumerates various exemptions, thereby protecting certain types of documents from public inspection in the absence of an appropriate court order. From these exemptions, one "must conclude that with respect to certain records, the General Assembly has determined that the public's right to know is subservient to statutory rights of personal privacy and the need for governmental confidentiality." *Hoy v.*

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Kentucky Indus. Revitalization Authority, 907 S.W.2d 766, 768 (Ky. 1995) (quoting *Beckham v. Bd. of Educ. Of Jefferson Cty., Ky.*, 873 S.W.2d 575, 578 (Ky. 1994)) (internal quotation marks omitted).

Nevertheless, the Supreme Court of Kentucky has stated that the Act "exhibits a general bias favoring disclosure." *Kentucky Bd. of Exam'rs.*, 826 S.W.2d at 327. Its exemptions must therefore be strictly construed, even though disclosure of the documents "may cause inconvenience or embarrassment to public officials or others." KRS 61.871. Accordingly, the agency seeking to deny public access bears the heavy burden of proving the applicability of an exception. *See* KRS 61.882(3). When considering whether the agency has satisfied this burden, courts must take into consideration the basic policy of the Act, noted above, "that free and open examination of public records is in the public interest." KRS 61.882(4). Stated another way, the courts must take notice that "[a]t its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing." *Zink v. Dep't of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994)

I. The Identities of Braidy's Shareholders Do Not Fall Within the Personal Privacy Exemption of KRS 61.878(1)(a).

a. The Requested Information is Not Information of a Personal Nature.

Under KRS 61.878(1)(a), a public agency may withhold "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Thus, the Court must first consider whether the information sought is "of a personal nature." In doing so, the Court should "take into account 'the nature of the information which is the subject of the requested disclosure; whether it is the type of information about which the public would have little or no legitimate interest but which would

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likely cause serious personal embarrassment or humiliation.'" *Cape Publications, Inc.*, 260 S.W.3d at 821 (quoting *Palmer v. Driggers*, 60 S.W.3d 591, 598 (Ky. App. 2001)). Typically, courts "look for an indication that the information 'touches upon the personal features of private lives.'" *Id.* at 822 (quoting *Zink*, 902 S.W.2d at 828). For example, "[i]t is a widely held societal belief that matters of personal finances are intensely private and closely guarded." *Id.* (citing *Zink*, 902 S.W.2d at 829). Other examples of "intensely private information" might include one's personal income or medical history. *Id.* at 823.

It is important to note that in the current case, Defendants seek only the *names* of Braidy's shareholders. That information does not reveal the specific amount or timing of the investments, nor does it indicate the percentage of ownership. It does not disclose the manufacturing process or any information that could possibly be considered a trade secret. It does not reveal the private financial information of Braidy or its investors, such as financial history, stability, productivity, or efficiency. Furthermore, the requested information does not reveal the individual shareholders' personal information, like home address, telephone number, marital status, number of dependents, or social security number, and is in this way distinguishable from the Workers' Compensation Act claim forms at issue in *Zink v. Department of Workers' Claims*, 902 S.W.2d 825 (Ky. App. 1994). In addition, Braidy released the names of its shareholders as of December 25, 2017. One can safely assume that Braidy would not have released such information if doing so would cause harm to its own investors. Accordingly, this Court finds that the information sought by Defendants—the *names* of Braidy's shareholders—is not information of a personal nature as contemplated by the Open Records Act.

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b. The Disclosure of the Shareholders' Identities Would Not Constitute a Clearly Unwarranted Invasion of Privacy.

Even if the information at issue could be considered so intensely private that it qualifies as information of a personal nature, the Court finds that disclosure of that information would *not* constitute a clearly unwarranted invasion of personal privacy. When considering this second prong, the Court must "weigh[] the public interest in disclosure against the privacy interests involved." *Zink* 902 S.W.2d at 828. As noted above, the public interest in disclosure is, "[a]t its most basic level . . . the right to be informed as to what [the] government is doing." *Id.* at 829. In other words, the public has a right "to expect its agencies properly to execute their statutory functions" and "inspection of records may reveal whether the public servants are indeed serving the public." *Kentucky Bd. of Exam'rs.*, 826 S.W.2d at 328.

In the current case, the public interest in disclosure is heightened by the CSC's use of public funds to purchase equity in Braidy. Kentucky law has long disfavored the direct investment of public funds into private enterprises, as evidenced by Section 177 of the Kentucky Constitution. That Section reads,

> The credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association, municipality, or political subdivision of the State; nor shall the Commonwealth become an owner or stockholder in, nor make donation to, any company, association or corporation; nor shall the Commonwealth construct a railroad or other highway.

Thus, it "wisely prohibits" the state from investing public funds into private corporations. *Hayes v. State Property and Bldgs. Com'n*, 731 S.W.2d 797, 799 (Ky. 1987). When the state wishes to do so, it must demonstrate that the expenditure of public funds serves a valid public purpose. *See id.* (citations omitted).

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Here, large sums of taxpayer dollars have been directly invested in a private corporation for the purpose of economic development. Without knowing what other entities or individuals have invested in this corporation, it is impossible to determine whether any shareholders, past or present, influenced the state's decision, for better or worse. The Court finds that these circumstances raise a "legitimate question of influence." *Cape Publications, Inc.*, 260 S.W.3d 818 at 823. The public has a right to investigate this question and determine whether the state's investment serves a valid public purpose. As noted above, the "inspection of records may reveal whether the public servants are indeed serving the public." *Kentucky Bd. of Exam'rs.*, 826 S.W.2d at 328. This public interest in determining whether the state is "indeed serving the public," when combined with the constitutional prohibition against the private investment of public funds, weighs heavily in favor of disclosure.[2]

Plaintiff argues that there also exists a public interest in attracting companies like Braidy, which, ideally, promote the economy of the Commonwealth in ways that benefit the public. According to Plaintiff, disclosure of the shareholder names will rob the Commonwealth of similar economic development opportunities in the future because shareholders will not want their confidential information released. The Court finds no merit in this argument. As noted above, Defendant seeks only the *names* of Braidy's investors—not the private financial information of any shareholder, nor anything that might potentially reveal such personal information. In other words, the shareholders' confidential information is *not* at issue. Any potential investor in a private enterprise that is dependent on equity purchased with tax dollars should be willing to be subject to some public scrutiny.

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[2] In referencing Section 177, the Court does not make any determination as to the constitutionality of the state's decision to invest in Braidy. Rather, the Court references Section 177 to demonstrate that the state may only do so if that investment serves a valid public purpose. The public, in turn, has an interest in investigating the validity of that public purpose.

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The interest in keeping these names private is further minimized by the fact that the shareholders knowingly invested in a corporation already owned in part by the Commonwealth (through CSC). It is not uncommon for state-affiliated or state-owned organizations to be subjected to public scrutiny, particularly due to the use of taxpayer funds. *See generally Courier-Journal & Louisville Times Co. v. Peers*, 747 S.W.2d 125 (Ky. 1988) (finding that disclosure of civil court file was warranted because the settlement of the case may involve the expenditure of public funds). Thus, Braidy's investors knew, or should have known, that such information—which, again, consists only of their identities—might be subject to disclosure.

In this way, Braidy's shareholders are not unlike the charitable donors in *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818 (Ky. 2009). In that case, a newspaper filed an Open Records Act request, seeking certain information regarding donations made to the University of Louisville Foundation, Inc. ("Foundation"). The Foundation invoked the personal privacy exemption, and the newspaper filed suit in circuit court. The circuit court held that the Foundation was a public entity, and ultimately ruled for the newspaper. On discretionary review, the Supreme Court of Kentucky held that the privacy expectations were strongest for those donors who expressly requested anonymity and made their donations prior to the Foundation being labeled as a public entity. Those donors reasonably believed that they made their donations to a private entity that could honor their requests for anonymity. This heightened expectation of privacy outweighed the public interest in disclosure. However, once it was determined that the Foundation was public, donors were on notice that they were donating to a public institution. Accordingly, their low—if not nonexistent—expectation of privacy did not outweigh the public interests involved in that case, and their names were subject to release.

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In the current case, the Commonwealth of Kentucky owned at least one-fifth (20%), and possibly more, of Braidy as of April 27, 2017. As a result, Braidy can best be described as a quasi-public entity. In addition, the parties acknowledged at the March 15, 2018 hearing that the state had committed public funds to the project prior to the investments of other shareholders. Thus, each of Braidy's investors knew or should have known that they were investing in a quasi-public corporation. As a result, these investors were on notice that, at the very least, their identities would be subject to public disclosure. In other words, the investors could not have reasonably expected that such information would remain private. This low expectation of privacy—when balanced against the strong presumption of public access and the public's "right to be informed as to what [the] government is doing" with taxpayer dollars—weighs in favor of disclosure.

In sum, there is a heightened need for public disclosure in this case because of the direct investment of tax dollars in the business. Likewise, there is a diminished expectation of privacy for shareholders who invest in a business in which a public entity has a twenty percent (20%) ownership stake funded by tax dollars. The public has a right to know if political supporters, campaign contributors, or business associates of the Governor will directly or indirectly benefit from this investment of tax dollars. If the investment of public dollars was made for sound public policy reasons and is supported by a good business plan, Braidy's investors should have nothing to hide. But if the investment of public dollars was unduly influenced by personal, business, or political considerations, the public has a right to know. As the U.S. Court of Appeals for the Sixth Circuit has explained, "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165, 1179 (6th Cir. 1983). For those reasons, the Kentucky Open Records

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Act requires disclosure of this information, so that the public can fully evaluate the actions and conduct of its elected officials.

For the reasons stated above, the Court finds that the private interests in nondisclosure do little to outweigh the significant public interests involved in this case. Thus, the disclosure of the identities of Braidy's shareholders would not constitute a clearly unwarranted invasion of privacy, and Plaintiff cannot hide that information under the shield of the Open Records Act's personal privacy exception.

II. The Identities of Braidy's Shareholders Do Not Qualify for Exemption as Confidentially Disclosed Records Under KRS 61.878(1)(c)(1), (2)(a), or (2)(b).[3]

KRS 61.878(1)(c)(1) provides an exemption for "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." As noted above, Defendant requests only the names of Braidy's investors, which would not reveal any information that might conceivably lend an unfair commercial advantage to the competitors of Braidy or its investors. Accordingly, this exception does not apply.

KRS 61.878(1)(c)(2)(a) and (b) are similar and provide exemptions for confidentially disclosed records that are generally recognized as confidential and proprietary, if they are "compiled and maintained" "[i]n conjunction with an application for or the administration of a loan or grant," or "[i]n conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154." The current case,

[3] The Cabinet did not raise KRS 61.878(1)(c)(2)(a) before the Attorney General. However, it argues the exception in its brief, and the Court will therefore address it.

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however, involves the purchase of direct equity in Braidy. Neither exemption refers to such transactions, and accordingly, neither of these exemptions applies in this case.

In addition, the Court notes that the information at issue is not generally recognized as confidential and proprietary. As explained above, the names of the investors reveal nothing more than their identities. Names do not disclose financial history or other highly personal information, nor do they reveal business strategy, manufacturing processes, or trade secrets. In this way, the requested information differs from that requested in *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766 (Ky. 1995). In that case, the plaintiff sought access to General Electric Company's application for investment tax credits related to its manufacturing facility in Louisville. Hoy requested the entire completed application, which included the company's financial history, the projected cost of the facility, the amount and timing of capital investment, copies of financial statements, and a detailed description of the corporation's productivity, efficiency, and financial stability. The *Hoy* Court stated, "It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is 'generally recognized as confidential or proprietary' and falls within the wording of KRS 61.878(1)(c)(2)." 907 S.W.2d at 768. Here, however, the requested information does *not* reveal the inner workings of the corporation, or any other confidential or proprietary information. For this reason, as well as the reasons stated above, the exceptions under KRS 61.878(1)(c)(1), (2)(a), and (2)(b) are inapplicable to this case.

III. The Identities of Brady's Shareholders Are Not "Preliminary" Documents Under KRS 61.878(1)(i) and (j).

KRS 61.878(1)(i) exempts from disclosure "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action

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of a public agency." Similarly, KRS 61.878(1)(j) provides an exemption for "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." Until the agency takes final action or decides to take no action, this "preliminary" information remains protected from disclosure under these exemptions. *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). However, "materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." *Id.* (citations omitted).

In the current case, the Cabinet explains that it gathered the documents related to Braidy's shareholders during the negotiation process. The final proposed incentive report did not include these documents. Thus, the Cabinet argues, the agency did not adopt these documents as part of its final action, namely, its decision to transfer $15 million of public funds to CSC. However, as the Attorney General explained in its October 3, 2017 Opinion, "It is not necessary that the record be explicitly adopted or incorporated by reference, so long as it constitutes the basis for the final agency action." In other words, if the information constituted a part of the basis for the underlying agency decision, it loses its protected "preliminary" status. *See City of Louisville v. Courier-Journal & Louisville Times Co.*, 637 S.W.2d 658, 659–60 (Ky. App. 1982) ("Inasmuch as whatever final actions are taken necessarily stem from [the requested documents], they must be deemed incorporated as a part of those final determinations."). Here, only the names of the shareholders are at issue, and the Cabinet admitted that the agency communicated with potential shareholders prior to authorizing the $15 million transfer. *See* 17-ORD-198, p. 14. From this, the Court finds that these communications and the identities of those potential investors affected the agency's decision. Thus, this information formed the basis, at least in part, for the agency's final

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action. As a result, the Cabinet cannot rely on KRS 61.878(1)(i) and (j) to shield the identity of Braidy's shareholders from public disclosure.

CONCLUSION

It is important to note that this case involved the use of approximately $15 million in taxpayer funds to purchase direct equity in a start-up corporation, and the Open Records Act request seeks only the names of other shareholders. The Court's analysis is limited to this particular factual scenario. Under these circumstances, for the reasons stated above, Plaintiff cannot shield the requested information under the Open Records Act's personal privacy exception (KRS 61.878(1)(a)), confidential records exceptions (KRS 61.878(1)(c)(1), (2)(a), (2)(b)), or preliminary documents exception (KRS 61.878(1)(i) and (j)).

However, the Court's decision does not alter the effectiveness of KRS 61.878(1)(c)(2)(b) when properly applied to confidentially disclosed records compiled and maintained "[i]n conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154." In other words, there is an important distinction between this case—which involves the direct investment of a significant amount of public funds into a private enterprise—and those more-common cases involving tax incentives and inducements for similar economic development projects. In incentive cases, the Open Records Act provides an express exemption for confidential information, as detailed in KRS 61.878(1)(c)(2)(b). In direct-investment cases, however, there is no express exemption, and certainly no exemption that would keep the *names* of shareholders confidential. Instead, the public retains the "right to be informed as to what [the] government is doing" with taxpayer dollars.

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Thus, for the reasons set forth in this Opinion, the Court hereby **DENIES** Plaintiff's Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment. Accordingly, this Court **AFFIRMS** the decision of the Attorney General in 17-ORD-198 and **ORDERS** that the requested information be released to Defendant within ten (10) days of the entry of this Order. As noted above, the requested information goes no further than the *names* of Braidy's shareholders. However, the Court is aware that the specific documents at issue may contain additional information otherwise exempted from disclosure by the Open Records Act. Though the names do not fall within the scope of any such exception, other properly exempted information may be redacted from the documents.

SO ORDERED this 29th day of March, 2018.

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

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

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

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

Hon. Timothy J. Eifler

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

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