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20-ORD-008

January 17, 2020

In re: Vincent F. Heuser, Jr./Louisville Metro Human Relations Commission

*Summary:* Louisville Metro Human Relations Commission ("Commission") failed to provide a detailed explanation of the cause for delay in its initial responses under KRS 61.872(5). The Commission did not meet its burden of proof by clear and convincing evidence to show that requests for policies and member speeches were unreasonably burdensome. The Commission met its burden of proof by clear and convincing evidence to show that broadly framed requests for discrimination case files were unreasonably burdensome.

*Open Records Decision*

The issue presented in this appeal is whether the Commission violated the Open Records Act ("Act") in the disposition of requests for records from Vincent F. Heuser, Jr. ("Appellant"). For the reasons stated below, this Office finds that the Commission did not meet its burden of proof regarding requests 3, 4, and 6. This Office finds request 7 to be a request for information that the Commission properly denied. This Office finds that the Commission met its burden of proof and properly denied requests 8 through 21.

On August 30, 2019, Louisville Metro Government ("LMG") received Appellant's requests for 21 groups of Commission records. Requests 3 and 4 sought copies of "[a]ll documents relating to the meaning, scope, application, or interpretation of" Louisville/Jefferson County Metro Government Ordinances §§

92.01, 92.05, 92.40, and 92.41. Request 6 sought copies of “[a]ll documents reflecting, mentioning, or relating to” public speeches and presentations of former or current members of the Commission relating to religion, sexual orientation, gender identity, sex. Request 7 sought “all documents reflecting, mentioning, or relating to statements, considerations, views or thoughts” of Commission members relating to 2013 KY H.B. 279. Requests 8-21 sought copies of “[a]ll documents relating to” complaints of discrimination based on “religion, sexual orientation, gender identity, or sex.” Appellant did not appeal requests 1, 2 and 5.

On September 5, 2019, LMG delayed Appellant’s access to records, stating, “extension is required due to files that need to be retrieved from Metro Archives. You can expect to receive your record on or before October 11, 2019.” Appellant acknowledged the delay, but asked LMG to send responsive records as they became available. On September 25, 2019, the Commission denied the requests as unreasonably burdensome. Appellant replied, stating that his requests were specific enough to allow the Commission to identify records in archives and delay his access.

On October 11, 2019, the Commission clarified the denial, stating that the requests are, “so broadly and vaguely framed,” that they require the agency “to conduct a search of every single record created or in its possession[.]” The Commission stated that requests 8-21 related to discrimination complaints containing records confidential and exempt under KRS Chapter 344, “[t]hus, your requests need to be tailored to identify the actual documents you seek and from which cases.”

On October 24, 2019, Appellant appealed, stating that the Commission’s delay was misleading and unreasonable. Appellant argued that each request “only asks for documents on a narrow subject and describes that subject with particularity.”

On November 19, 2019, this Office requested additional documentation from the Commission under KRS 61.880(2)(c) and 40 KAR 1:030, Section 3. On January 3, 2020, the Commission supplemented the record stating, “it is impossible to determine how to conduct a search for responsive records as it is unknown what records are even being sought, especially as it pertains to

requests 3, 4, 6, and 7.” Regarding requests 8 through 21, the Commission stated that the requests implicated 2,153 discrimination case files from 1999 to present, including 882 housing discrimination complaints based on “race, religion, gender, national origin, color, and ethnicity,” 398 discrimination complaints based on sexual orientation and gender identity, and 61 housing complaints based on sexual orientation and gender identity. The Commission stated that each case file contained records confidential under KRS Chapter 344, including complaints, investigations, evidence, conciliation agreements, and administrative orders. The Commission stated provisions of KRS Chapter 344 apply differently to each record, requiring its three employees to review every record in each case file to separate the exempt and non-exempt material.

**The Commission’s Delayed Response Violated the Act.**

The Commission issued a written response to the requests within three business days. However, KRS 61.872(5) provides:

If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.

In its original response to Appellant’s request, the Commission stated the files were maintained in storage and would not be available until October 11, 2019, approximately three weeks following the date of the original request. However, on September 25, 2019, the Commission denied Appellant’s request. On appeal, the Commission provided a legitimate and detailed explanation of the cause of the delay in providing access to records, referencing broadly framed requests that implicated numerous responsive case files and records. Given the broad scope of the requests, a reasonable delay would have been justified. However, the Commission is required to provide the justification for this delay within its initial response under KRS 61.872(5). Therefore, the Commission violated the Act.

**The Commission Failed to Meet its Burden of Proof for Requests 3, 4, and 6.**

The Commission argued that requests 3, 4, 6, and 7 were not stated with particularity to enable the Commission to search for responsive records. This Office agrees that request 7 was a request for information and not stated in manner that would allow a reasonable person to determine which documents Appellant was seeking. Request 7 sought "all documents reflecting, mentioning, or relating to statements, considerations, views, or thoughts" of Commission members. Because request 7 does not specify any category of documents, it is a request for information that the Commission has no duty to honor. 16-ORD-068.

However, unlike request 7, requests 3, 4, and 6 all direct the Commission to specific categories of documents such as policies, procedures, guidelines, and speeches. These requests did provide the Commission with enough information to ascertain the substance of Appellant's request. Therefore, this Office disagrees with the Commission's position that requests 3, 4, and 6 were not stated with particularity. This Office turns next to the Commission's argument that a search for these documents would be unduly burdensome.

The Commission did not provide clear and convincing evidence to support its claim that honoring requests 3, 4, and 6 created an unreasonable burden, as required by KRS 61.872(6). A public agency "faces a high proof threshold [in denying a request based on KRS 61.872(6)] since the agency must show the existence of the unreasonable burden 'by clear and convincing evidence.'" *Commonwealth v. Chestnut*, 205 S.W.3d 655, 664 (Ky. 2008). "The obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Id.* at 665; 18-ORD-071. The public agency must support its claim with the facts and evidence, such as the volume of responsive records, the difficulty in locating or accessing the records, the amount of time that complying with the request would require, or any other specific and relevant facts indicating that compliance with the request would actually impose an unreasonable burden. 18-ORD-071, p. 6; 08-ORD-167.

The Commission failed to state any facts evidencing that requests 3, 4, and 6 created an unreasonable burden in the initial responses, and merely addressed the difficulty in searching for responsive records on appeal. Insufficient evidence

exists in the record that retrieving responsive records pertaining to the statements of past or present Commission members, or copies of responsive policies of the agency, would create an unreasonable burden for the agency. Accordingly, this Office finds that the Commission failed to provide clear and convincing evidence that honoring requests 3, 4, 6, and 7 would be unreasonably burdensome.

**The Commission Met its Burden of Proof for Requests 8 through 21.**

The Commission provided clear and convincing evidence on appeal that responding to the broadly framed requests in items 8 through 21 would create an unreasonable burden for the agency. Clear and convincing evidence exists in the record that Appellant's requests implicated 2,153 discrimination case file, each containing responsive records protected under the mandatory confidentiality provisions of KRS Chapter 344, incorporated into the Act by operation of KRS 61.878(1)(l), and that processing the requests would create an unreasonable burden for the agency.

The Commission correctly observed that this Office has recognized the records exemption contained in KRS 344.250(6)<sup>1</sup>, which provides:

It is unlawful for a commissioner or employee of the commission to make public with respect to a particular person without his consent information obtained by the commission pursuant to its authority under this section except as reasonably necessary to the conduct of a proceeding under this chapter.

In OAG 85-5, this Office analyzed the provision and found that, "what is available for public inspection is dependent upon the level at which the proceeding has progressed." In that opinion, this Office observed:

If the proceeding is at the level dealt with in KRS 344.200 [relating to allegations of an unlawful practice other than a discriminatory housing practice], and results in a dismissal of the complaint or the entering of a conciliation agreement, then only the order of

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<sup>1</sup> Incorporated into the Act pursuant to KRS 61.878(1)(l).

dismissal or the terms of the conciliation agreement are subject to public inspection. KRS 344.200(4) deals with a conciliation agreement and limits the information available to the "terms of the conciliation agreement."

If the proceeding has progressed to the point of a hearing under KRS 344.210 [relating to allegations of a discriminatory housing practice], then the hearing transcript which is required by KRS 344.210(7), evidence introduced at the hearing, the complaint which would normally be introduced at the hearing and the subsequent decision of the Commission would all be subject to public inspection under the Open Records Law.

*Id.* at p. 3. "It is within the discretion of the Commission to determine when disclosure is 'reasonably necessary to the conduct of the proceeding....'" Absent a clear abuse of this discretion, the Attorney General must defer to the Commission's interpretation and application of this provision." 99-ORD-20, p. 3.

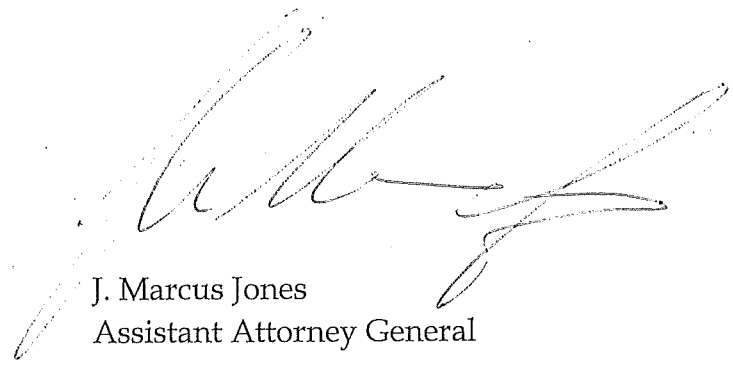
To respond to Appellant's broad request would have required the Commission's three employees to review potentially responsive records within the 2,153 case files, determine the nature of the discrimination alleged in the complaint, ascertain the stage of the proceedings, and apply the relevant provisions of KRS Chapter 344 to each record individually. This Office agrees that this undertaking would require an unduly burdensome dedication of staff and resources. Accordingly, the Commission met its burden of proof relating to requests 8 through 21 by clear and convincing evidence.

A party aggrieved by this decision shall appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

Daniel J. Cameron  
Attorney General

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A handwritten signature in black ink, appearing to read 'J. Marcus Jones', is written over a faint, larger version of the same signature.

J. Marcus Jones

Assistant Attorney General

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Distributed to:

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