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In re: Kevin Dohn/Louisville Metro Government

Summary: Louisville Metro Government ("Metro") violated the Open Records Act ("the Act") when it failed to issue a timely written response to a request to inspect records. Metro also violated the Act when it failed to conduct a search for responsive records. However, Metro did not violate the Act when it withheld records containing certain confidential and proprietary information under KRS 61.878(1)(c)1.

Open Records Decision

On September 2, 2020, Kevin Dohn ("Appellant") requested to inspect all applications and permits that Metro had received relating to the installation of the 5G wireless network within Louisville.[1] He also requested records within seven specific categories of documents, which he believed would be included with those applications and permits. Having received no response by September 20, 2020, Appellant initiated this appeal.

On appeal, Metro admits that it failed to issue any response due to an internal miscommunication. Metro claims, however, that the records sought contain highly technical information, that the records contain confidential and proprietary information, and that the release of some records could pose a threat to public safety as contemplated under KRS 61.878(1)(m)1. As such, Metro claims

[1] Appellant refers to this technology as "small cell antennas" or "cantennas."

that the necessary redactions would take approximately 90 hours for employees to complete and that a delay under KRS 61.872(5) would have been justified.

Regardless of the amount of time required to redact these records or whether a delay would have been appropriate under KRS 61.872(5), Metro failed to issue a timely response explaining the reason for delay or to provide Appellant with the earliest date on which the records would be available for his inspection. [2] For that reason, Metro violated the Act.

On appeal, Metro explains that the records that Appellant seeks include applications that wireless network providers have submitted in their bid to obtain the exclusive right to build a 5G network infrastructure on Metro-owned utility poles. Accordingly, Metro relies upon the "confidential and proprietary information" exemption under KRS 61.878(1)(c)1. Under that exemption, agencies may exempt from inspection "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." *Id*.

Generally, KRS 61.878(1)(c)1. applies to financial information that, if disclosed, might permit a competitor to ascertain the economic status of the company. *See Marina Management Service, Inc. v. Com. of Ky., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995). Such information may be withheld under the Act. Trade secrets may also be withheld under KRS 61.878(1)(c)1. *See Cabinet for Economic Development v. Courier-journal, Inc.*, No. 2018-CA-001131, 2019 WL 2147510 *9 (Ky. App. May 17, 2019) (unpublished) (finding that the records at issue were "not in the nature of trade secrets, investment strategies, economic status, or business structures" and thus could not be withheld). "[I]f it is established that a document is confidential or proprietary, and that disclosure to competitors would give them substantially more than a trivial unfair advantage, the document should be protected from disclosure[.]" *Southeastern United Medigroup, Inc. v. Hughes*, 952

[2] Alternatively, Metro argues that the request places an unreasonable burden on it and that Appellant's request should be denied under KRS 61.872(6). However, Kentucky courts have held that an agency's duty to separate exempt from nonexempt material cannot serve as the basis for a claim that redaction creates an unreasonable burden. *See Commonwealth v. Chestnut,* 250 S.W.3d 655, 664-65 (Ky. 2008). Metro has failed to carry its burden, by clear and convincing evidence, that 90 hours of employee-labor poses such an unreasonable burden on Metro that the request can be denied in its entirety. KRS 61.872(6).

S.W.2d 195, 199 (Ky. 1997) (overruled on other grounds by *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2005)).

To carry its burden on appeal, Metro provides statements and documents from various wireless network providers whose applications and permits are at issue. For example, Metro provides a Non-Disclosure Agreement it has executed with Verizon Wireless ("Verizon"), dated March 18, 2020. In that agreement, Metro agreed not to disclose confidential information.[3] Metro also provides a statement from AT&T, asserting that the telecommunications industry is highly competitive[4] and that AT&T treats "this information about its network configuration and specific technology deployed as confidential and proprietary both for network security purposes and for competitive purposes." A similar statement from Crown Castle Fiber LLC ("Crown Castle") claims that "the particular equipment installed and the design and configuration of telecommunication facilities is 'confidential and proprietary' and 'if openly disclosed would permit an unfair commercial advantage to competitors' of Crown Castle and [its] customers."

In addition to these statements from wireless network providers, Metro further explains how release of the information could give a business competitor an unfair commercial advantage. Specifically, Metro explains that wireless network providers invest significant resources to research which utility poles in Louisville will provide the most comprehensive network coverage. From their research, the wireless network providers may estimate which utility poles will provide greater coverage to residents at the lowest cost to the provider. The result is that some utility poles are more valuable to the wireless network providers than others, and the process used in making this determination is the wireless network providers' proprietary research.[5]

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[3] The agreement defined "Confidential Information" as "information not generally known to the public, and which is maintained by [Verizon] as confidential, whether of a technical, business or other nature that relates to the infrastructure and network deployment or a potential agreement between" Metro and Verizon.

[4] This Office has frequently noted that the existence of a highly competitive market is a relevant factor in favor of nondisclosure under KRS 61.878(1)(c). *See, e.g.,* 17-ORD-002; 12-ORD-076; 09-ORD-031; 08-ORD-083.

[5] For example, the wireless networks hire engineers and surveyors to draw detailed technical maps that depict the geographic area of the potential wireless network upgrade. Such maps, and the drawings associated with them, represent a wireless network provider's unique plan, which identifies the number and location of potential consumers, as well as how the provider will deliver its services.

Metro further explains that its application process includes two steps. As part of that two-part application, each provider submits an application at each step. As part of the first step, the wireless network providers submit a "preliminary application" and confidentially disclose their technical plans for utilizing Metro utility poles to build the proposed 5G network. Once this preliminary application is approved, the wireless network providers submit a second application to obtain the right to close public streets during the installation. This second application, similar to a zoning application, does not contain the technical aspects of the wireless network provider's plans. On appeal, Metro agreed to provide Appellant with copies of four applications submitted as part of the second part of the process. That is, Metro agreed to disclose the four applications made by providers to close the public streets. Metro did so because those applications do not contain confidential proprietary information belonging to the wireless network providers.

Thus, at issue in this appeal are the records submitted as part of the first step in the process. For the reasons that follow, Metro has carried its burden that the "preliminary applications" contain confidential proprietary information that would give competitors an unfair advantage.

To submit a preliminary application, a wireless network provider must expend significant resources. The completion of the application requires hiring engineers and surveyors, and the result is a unique plan, developed at considerable expense, which is then submitted to Metro for preliminary approval. According to Metro, that is what the providers did here. Because the wireless network providers are engaged in a highly competitive process relating to the design and implementation of a new 5G network, the information in such an application would provide a competitive advantage to competing providers. For example, if a competing wireless network provider obtained this information, it would be able to design a competing 5G network plan without expending its own resources. On these facts, Metro appropriately invoked KRS 61.878(1)(c)1. to deny inspection of the "preliminary applications."

In addition to the applications themselves, Appellant also sought to inspect records within seven categories of documents he believed would have been included with the applications. For different reasons, Metro has denied

Appellant's request to inspect the records within each of those seven categories. Each request, therefore, will be discussed below.

Request No. 1. First, Appellant sought the "[p]lans for each individual antenna pole, . . . detailing design, exact height, GPS location, nearest or newly-occupied address, and distances (in feet) from the next nearest extant or proposed facilities." Metro explains that these records contain confidential and proprietary information relating to the creation of proposed 5G networks. Each provider submits such plans as part of the "preliminary application" phase, explained above, and no wireless network provider has access to the information submitted by a competitor. After a "preliminary application" is approved, the locations of the antennas become public information. That is because, as explained above, the second application is to obtain the right to close the public streets while the network is being constructed. Metro was justified in withholding or redacting any records within this category that do not relate to the geo-location of antennas that Metro has already approved. In other words, once the wireless network providers publicly disclosed the location of the approved antennas in each of the providers' corresponding applications to close public streets, the location of the approved antennas could no longer be deemed "confidential."

Request No. 2. Second, Metro denied Appellant's request for "[a]ny and all supplemental documents submitted to Public Works in support of these applications." Metro did so because, it claims, any documents within this category of records are exempt due to their "proprietary nature," under KRS 61.878(1)(c)1. AT&T has asserted that "information about network configuration and specific technology deployed" is regarded as confidential and proprietary and would give an unfair advantage to competitors if disclosed. To the extent that the supplemental records contain such information, that information may be segregated and withheld or redacted under KRS 61.878(1)(c)1 for the reasons that have already been articulated.[6]

[6] Metro also claims, without explanation, that the release of this information could be a threat to public safety because it would reveal vulnerabilities in the telecommunications network. *See* KRS 61.878(1)(m). However, this Office need not consider this claim because it is satisfied that the records contain confidential and proprietary information, which is exempt under KRS 61.878(1)(c)1.

Request No. 3. Third, Appellant sought "[b]lueprints and full specifications for all antennae and related equipment, including the operating frequenc[ies], energy specifications including maximum permissible effective radiated power in watts or joules, and make and model of the antennas." According to Metro, the records responsive to this request include the proprietary information that is the most valuable to each wireless network provider, and it forms the basis of Metro's claim that the "preliminary applications" and accompanying documents are exempt under KRS 61.878(1)(c)1. For all the reasons stated above, Metro appropriately denied inspection of these records under KRS 61.878(1)(c)1.[7]

Request No. 4. Fourth, Metro denied Appellant's request for records containing "[s]hot-clock timelines for every such permit-pending and permitted facility." Metro explains that Appellant's request sought "federal deadlines by which state and local authorities must act on permits for wireless communications facilities." Metro explains, however, that it has no records responsive to this request.

Once a public agency states that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, then "the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling,* 172 S.W.3d at 341).

Here, Appellant has not established a *prima facie* case that Metro possesses or should possess any records responsive to his request. Therefore, Metro did not violate the Act when it denied this portion of Appellant's request.

Request No. 5. Fifth, Metro denied Appellant's request for "[p]lans and maps (Lojic or otherwise) for all fiber-optic infrastructure associated with the facilities, including overarching wireless facility plans for the entire Metro Louisville area." Metro asserts that it has no comprehensive maps responsive to

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[7] Alternatively, Metro claims these records should be withheld under KRS 61.878(1)(m)1. However, because this Office finds that the records sought contain confidential and proprietary information that may be withheld, it is unnecessary to consider the application of KRS 61.878(1)(m)(1).

the request, and Appellant has presented no *prima facie* case that such maps exist or should exist within Metro's possession. Therefore, for the reasons previously discussed in section 4 above, Metro did not violate the Act when it denied Appellant's fifth request.

Request No. 6. Appellant next sought, "NEPA/NHPA review or other NEPA- or NHPA-related documents; and documents detailing any tree-trimming requirements [im]posed by the facilities and any other related equipment or infrastructure." According to Metro, "NEPA" and "NHPA" refer, respectively, to the National Environmental Policy Act and to the National Historic Preservation Act. Furthermore, Metro claims that such records, if any, would be in the custody of two agencies, Metro's Division of Community Forestry and the Kentucky Heritage Council, within the Kentucky Tourism, Arts and Heritage Cabinet.

Although Metro properly referred Appellant to the Kentucky Heritage Council to request any records that may be in its possession, *see* KRS 61.872(4), Metro failed to conduct a comprehensive search of its own records. Appellant submitted his request to Metro using Metro's online portal, which acts as a general clearing house for requests made on Metro's divisions and departments. Metro employs a general "Open Records Specialist" who directs submissions made through the portal to Metro's various agencies to search for records. Here, Metro forwarded Appellant's request to its Department of Public Works. However, it did not direct Appellant's request for tree-trimming records to its Division of Community Forestry. Metro provides no explanation for its disparate actions. Therefore, Metro violated the Act when it failed to search for the requested records related to the referenced tree-trimming requirements and to state whether any such records exist.

Request No. 7. Finally, Appellant sought records, including emails, drawings, and meeting minutes "justifying the decisions related to Louisville Metro Public Works & Assets Right Of Way Guide And Utility Policy 10/28/2019 Section 11." That referenced policy specifically relates to the placement of 5G technology on utility poles abutting residential properties.

In response, Metro admits that it did not conduct a search for records responsive to this request. Rather, it claims on appeal that it is unaware of any records that "justify" the policy established in Section 11 of the guide. If such

records exist, Metro claims, they would be exempt as "preliminary recommendations" under KRS 61.878(1)(j). That is not, however, an appropriate response to a request to inspect records.

In response to a request, a public agency must conduct a search for responsive records, in good faith, to discharge its duty under the Act. *See, e.g.*, 19-ORD-205 (finding "no general rule" that excuses a public agency from searching for responsive records and that a denial "based on what a hypothetical [set of records] might contain" is inadequate). Of course, without having identified any responsive records, Metro is unable to assert that KRS 61.878(1)(j) applies to deny inspection. Having failed to conduct a search for records responsive to this request, Metro violated the Act.

A party aggrieved by this decision may 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.

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