



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

22-ORD-267

December 13, 2022

In re: Tabitha Cox/City of Frankfort

Summary: The City of Frankfort (“the City”) subverted the intent of the Open Records Act (“the Act”) within the meaning of KRS 61.880(4) when it would not allow a requester to make copies or take pictures of records upon inspection.

Open Records Decision

On February 9, 2022, Tabitha Cox (“Appellant”) made a request to the City for a copy of the Frankfort Police Department’s records concerning a death investigation. After receiving the records, the Appellant observed that the file did not contain certain documents she believed to exist and that several discs containing interviews were mislabeled or were duplicates of other interviews. On May 10, 2022, the Appellant asked the City if she could conduct an on-site inspection of the file to verify whether she had received all existing records. The City informed her that if she inspected the records she would be subject to certain conditions, including that she would be supervised while viewing the records and she would not be allowed to ask questions or “take pictures or make copies of the file.” This appeal followed.

The Appellant claims the City failed to provide all of the records that exist, or should exist, in the Police Department’s file. The City, however, maintains the Appellant received copies of everything in the file. Once a public agency states affirmatively that no further records exist, the burden shifts to the requester to present a *prima facie* case that additional records exist or should exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant merely asserts that other records should exist. The Appellant’s assertion, without more, is insufficient to establish a *prima facie* case that additional records should be contained in the file. *See, e.g.*, 22-ORD-141; 19-ORD-171.

Although the Appellant has not made a *prima facie* case that additional records should exist, this fact alone does not mean the City complied with the Act in all of its particulars. Ordinarily, a person may verify whether additional records exist by inspecting the file in person. Here, however, the Appellant complains the City attempted to dissuade her from exercising her right of on-site inspection by imposing unlawful conditions on her. Under KRS 61.880(4), a person may petition the Attorney General to review an agency's action if the "person feels the intent of [the Act] is being subverted by an agency short of denial of inspection." With regard to the conditions the City imposed, the Act does not expressly grant a requester the right to inspect records while unsupervised, or to ask questions and receive answers about the contents of public records. However, the Act does provide that "[u]pon inspection, the applicant shall have the right . . . to obtain copies of all public records not exempted by the terms of KRS 61.878." KRS 61.874(1). Thus, this Office has recognized "that the right to obtain copies is correlative to the right to inspect records." 07-ORD-252 n.1.

Furthermore, with regard to photographing records, only county clerks have been granted statutory authority to "establish procedures . . . restricting the use of devices" to copy public records. KRS 64.019(1). In the absence of such express authority, a public agency subverts the intent of the Act when it prohibits a requester from photographing its records with a personal device, unless the agency offers "proof that the condition of the records . . . was so poor that [the use of the device] risked damage or alteration to the records." 20-ORD-013 (quoting 11-ORD-166). On appeal, the City claims its police files "often contain sensitive originals which must be protected," but does not explain whether this means the originals are easily damaged or that they contain "sensitive" information. Because the City provides no evidence the records in the police file in question are physically fragile, the City is presumably arguing that the records contain sensitive information it does not want disseminated.

In an internal email dated May 11, 2022, a City employee indicated that, if the Appellant were to review the investigative file, "she can't take pictures or record anything since it won't be redacted." However, the City claims to have provided the Appellant a complete copy of the requested records. Under KRS 61.880(1), "[a]n agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." Thus, if a public agency redacts any portion of a public record, it must state what it redacted and explain its legal basis for doing so. *See, e.g.,* 22-ORD-260. Here, however, the City did not note any redactions in its response dated February 15, 2022, nor has it explained on appeal why it made any redactions. On the contrary, the City claims to

have fully provided the Appellant with all the requested records.¹ Accordingly, the City has given no valid reason why the Appellant should be forbidden to copy or photograph the records upon inspection.

A public agency has the burden of proof in an appeal under the Act. KRS 61.880(2)(c). Here, the City has failed to justify the conditions it attempted to impose with respect to the Appellant obtaining copies or taking photographs of records. Thus, the City subverted the intent of the Act, within the meaning of KRS 61.880(4), by imposing those conditions on the Appellant's inspection of the requested records.

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 within 30 days from the date of this decision. 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 proceedings. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ James M. Herrick
James M. Herrick
Assistant Attorney General

#444

Distributed to:

Ms. Tabitha Cox
Laura Milam Ross, Esq.
Chermie Maxwell, Clerk

¹ Furthermore, if the City actually needed to redact material from the records, the proper course of action would be to prepare a redacted copy for the Appellant to inspect on the premises. *See* 22-ORD-170 n.1.