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23-ORD-039

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In re: Phillip Hamm/McCracken County Sheriff's Office

Summary: The McCracken County Sheriff's Office (the "Sheriff's Office") did not violate the Open Records Act ("the Act") when it denied a request for records that do not exist. However, the Sheriff's Office violated the Act when it denied part of the request under KRS 61.872(6) without clear and convincing evidence that the request was unreasonably burdensome or intended to disrupt its other essential functions.

Open Records Decision

Phillip Hamm ("Appellant") submitted a request for records to the Sheriff's Office containing five subparts. In subpart one, the Appellant sought "the internal approval process for record destruction." In subpart two, he sought a copy of the records retention schedule the Sheriff's Office used in 2022. In subpart three, he sought "the completed Records Destruction Certificate for the photos used" to identify a person during a specific police interview conducted in 2022. In subpart four, he sought photographs taken at a specific residence during an investigation. And, in subpart five, he sought copies of all "search warrants applied for, denied, issued, executed and not executed by employees of the McCracken County Sheriff's Office" in 2022.

In a timely response, the Sheriff's Office provided photographs responsive to subpart four of the request.[1] However, the Sheriff's Office denied subparts one, two,

[1] The Appellant does not appeal the Sheriff's Office's response to subpart four of his request.

and three because the records requested "never existed or no longer exist." The Sheriff's Office also stated it "follows the Kentucky Library & Archives retention schedule" and provided the contact information for the records custodian for the Kentucky Department of Libraries and Archives ("the Department") so the Appellant could obtain the requested retention schedule. Finally, the Sheriff's Office fully denied subpart five because "pursing [*sic*] through each search warrant" to determine which were exempt from inspection and which could be inspected subject to redactions "would be a burdensome task." The Sheriff's Office explained that many of the warrants contain personal information, are being used in an active criminal investigation, or are protected from disclosure by federal law. It therefore denied the request as unreasonably burdensome under KRS 61.872(6). The Sheriff's Office also claimed the Appellant's request was intended to disrupt its other essential functions. This appeal followed.

The Sheriff's Office denied subparts one, two, and three of the Appellant's request by stating affirmatively, both initially and on appeal, that the records responsive to those subparts do not exist. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, to make a *prima facie* case, the Appellant states "[i]t is not possible for something to have both 'never existed' and 'no longer exist.'" He requests the Sheriff's Office specify whether the records were never created or whether they were created but later destroyed. The Appellant also claims the Sheriff's Office should not follow the Department's retention schedule because the Sheriff's Office is a "local agency." However, KRS 171.530 requires a division of the Department, the State Library, Archives, and Records Commission ("the Commission"), to promulgate standards for state *and* local records retention schedules. Although each local agency is responsible for its own records management system, the Commission has promulgated "general retention schedules" for many local agencies, including county sheriffs.[2] The Commission has also promulgated a policy for destroying public records. *See*

[2] *See* Records Retention Schedule: County Sheriff's, available at https://kdla.ky.gov/records/RetentionSchedules/Documents/Local%20Records%20Schedules/CountySheriffRecordsRetentionSchedule.pdf (last accessed Feb. 20, 2023).

725 KAR 1:030 § 2 ("State and local agencies shall follow the procedures for disposing of eligible public records described in Destruction of Public Records: A Procedural Guide"). The Appellant does not cite a statute or regulation requiring the Sheriff's Office to adopt policies separate from these general policies established by the Commission. Moreover, the Commission is the custodian of these policies, and the Sheriff's Office directed the Appellant to the Commission's record custodian when it claimed to not possess a copy of the retention schedule. *See* KRS 61.872(4). Thus, the Sheriff's Office did not violate the Act by denying subparts one and two because it did not possess any responsive records.

With respect to subpart three, the Appellant argues the Sheriff's Office was required to complete a Records Destruction Certificate[3] when it allegedly destroyed a photograph allegedly shown to a person during an interview. He states he previously requested to inspect the photograph, but in response to that request the Sheriff's Office advised the photograph "was not retained." Thus, the Appellant argues the photograph existed at one time but no longer does, and the Sheriff's Office was required to complete a Records Destruction Certificate documenting the photographs destruction. On appeal, the Sheriff's Office states it showed the interviewee a photograph that was "publicly available" and not catalogued as evidence. It therefore claims it was not required to complete a Records Destruction Certificate when it did not retain the requested photograph.

Regardless of whether the Sheriff's Office should have completed a destruction certificate for the photograph, it has explained on appeal that it did not. Thus, it has explained why no responsive records exist. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011). Accordingly, the Office cannot find that the Sheriff's Office violated the Act by denying inspection of a record that does not exist.

The Sheriff's Office also denied subpart five, which sought all search warrants from 2022 regardless of whether they were served, because the request placed an unreasonable burden on it. The Sheriff's Office also claimed this request was intended to disrupt its other essential functions. Under KRS 61.872(6), "[i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection

[3] As stated previously, 725 KAR 1:030 § 2 incorporates by reference the Commission's policy for destroying public records. The policy requires agencies to document the destruction of public records using a Records Destruction Certificate, a copy of which is available at https://kdla.ky.gov/records/Documents/kyrecordsdestruction.pdf (last accessed Feb. 20, 2023).

of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence."

KRS 61.872(6) contains two separate but interrelated grounds to deny a request. The more common of the two applies when "*the application* places an unreasonable burden in producing records." *Id.* (emphasis added). This portion of KRS 61.872(6) is specific to the request, or "application," if it alone places an unreasonable burden on the agency. In making such a determination, the Office considers the number of records the request implicates, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction. *See, e.g.,* 97-ORD088 (a request implicating thousands of physical files stored in several locations throughout the state and each file needed to be reviewed for redactions pursuant to state and federal law was unreasonably burdensome). An agency can also establish an unreasonable burden if it does not catalog its records in such a manner that they can be searched using a keyword. *See, e.g.,* 96-ORD-042 (unreasonable burden found where the agency thousands of files needed to be reviewed to determine if the records were responsive to the keywords in the request).

In support of its claimed exemption, the Sheriff's Office states that subpart five seeks a "large volume of records" and "would require an extensive amount of research." In its initial response to the Appellant, the Sheriff's Office advised it had served "over 100" search warrants in 2022, but many warrants were not served, making the overall number of warrants "much higher." The Sheriff's Office states it does not have a "centralized depository of search warrants" and that the warrants "are kept in each respective [open or closed] criminal case file." Thus, to comply with the request, the Sheriff's Office would have to review individual criminal case files, the number of which has not been disclosed but exceeds 100, to determine which are active and which are closed. Those warrants in active cases would likely be exempt under KRS 61.878(1)(h) or KRS 17.150, and those in closed cases would likely be subject to inspection with personal information redacted under KRS 61.878(1)(a).

Such a task is not an unreasonable burden under KRS 61.872(6). Although the number of records at issue is not the only factor the Office considers, it is the most important one. *See e.g.*, 22-ORD-182. The Office has previously found that searching and sorting through 5,000 emails to separate exempt emails from nonexempt emails was not an unreasonable burden, when it was not clear the emails contained information that was required to remain confidential by law. *See, e.g.*, 22-ORD-255. Although the Sheriff's Office cited 08-ORD-060 in its response to the Appellant to

support its denial, the Office in that decision agreed with the agency that sorting through 42,500 dispatch calls would be an unreasonable burden because various confidentiality laws applied to the records withheld. In contrast, here the Sheriff's Office has not provided a specific number of criminal cases through which it has to search because it claimed the search itself would be burdensome. It stated only that "more than 100" warrants were served, and the number of those that had not been served is "much higher." The agency must provide clear and convincing evidence of the burden, which requires it to search for records in the first instance to quantify, or in good faith estimate, the number of potentially responsive records. *See, e.g.*, 23-ORD-024. A number "much higher" than 100 is not clear and convincing evidence that the request places an unreasonable burden on the Sheriff's Office.

The Sheriff's Office also claims subpart five is intended to disrupt its other essential functions, which is the second basis on which an agency may invoke KRS 61.872(6). To determine whether a request is "intended" to disrupt the essential functions of an agency, the Office considers different factors than those described above. This exemption requires the agency to provide evidence of factors separate from the request itself, because the official custodian must have "reason to believe" the requester's "intent" is not to inspect records, but to cause disruption. *Id*. Instead of considering the number of records implicated, the Office will consider the number of requests the requester has made in close proximity to each other. More requests made over a shorter period of time may constitute *some* evidence of an intent to disrupt, but it alone is not clear and convincing evidence of such intent. *See, e.g.*, 15-ORD-015; 96-ORD-193. The agency must also provide other evidence to support its belief of the requester's intent, such as proof the requester has failed to retrieve or pay for copies of records, or statements from the requester indicating malicious intent. For example, the requester in 15-ORD-015 offered to stop making requests for records in exchange for money. Evidence a requester stated he intends to disrupt an agency's functions because of some other grievance with the agency would also constitute appropriate evidence to support denial under KRS 61.872(6).

Here, the Sheriff's Office states the Appellant has submitted "at least 20" requests, but it is not clear over what period of time those 20 requests were submitted. The Sheriff's Office also states the request is "excessively broad" since "it would include a vast majority of files that have nothing to do with [the Appellant]." Ordinarily, the purpose for which the requester intends to use the records is irrelevant, unless the purpose is for commercial use. *See* KRS 61.874(4). But given the "intent" element of KRS 61.872(6) as used in this context, there may be instances in which repeated requests submitted over a short period of time, seeking broad

swaths of records, may be sufficient proof of intent to disrupt the agency's essential functions. This is not such an instance, however, because it is not clear from this record how many of the Appellant's previous 20 requests sought broad swaths of records. Nor is there any other evidence in this record of malicious intent by the Appellant, such as a pattern of failing to retrieve records, a history of making unreasonable and extraneous demands in exchange for ceasing requests, or statements he has made demonstrating a specific intent to cause disruption. Accordingly, the Sheriff's Office has not provided clear and convincing evidence to support its denial under KRS 61.872(6).

In sum, the Sheriff's Office did not violate the Act when it denied subparts one, two, and three of the request because records responsive to those subparts either never existed or do not currently exist within its possession. However, the Sheriff's Office did violate the Act when it denied subpart five under KRS 61.872(6) without providing clear and convincing evidence in support of its denial.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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