



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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23-ORD-111

May 22, 2023

In re: Lawrence Trageser/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (“the Penitentiary”) did not subvert the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when it agreed to charge a fee for electronic records that reflected its actual costs of reproduction, as required under KRS 61.874(3). The Penitentiary violated the Act when it withheld the names appearing on a visitor log, but it did not violate the Act when it withheld other personal identifying information under KRS 61.878(1)(a).

Open Records Decision

On January 9, 2023, Lawrence Trageser (“Appellant”) asked the Department of Corrections (“the Department”) to provide an electronic copy “in a PDF or similar file, if possible,” of a named individual’s inmate file and his visitor log. Although the Appellant’s request was addressed to the Department, the Penitentiary responded as custodian of the requested records. The Penitentiary denied the Appellant’s request for the visitor log as “an unwarranted invasion of personal privacy” under KRS 61.878(1)(a). In response to the remainder of the request, the Penitentiary stated it would provide 92 pages of records at the copying fee rate of 10 cents per page plus \$24.60 for priority certified mail, for a total of \$33.80. This appeal followed.

Under KRS 61.874(2)(a), “[n]onexempt public records used for noncommercial purposes shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format.” According to the Appellant, the Penitentiary informed him by telephone that it maintains the requested records in electronic format but would nevertheless charge him for paper copies, contrary to the provisions of KRS 61.874(2)(a).

The Appellant further claims the Penitentiary has subverted the intent of the Act by imposing excessive fees for copies and postage. Under KRS 61.880(4), a person requesting records may appeal to the Attorney General if he believes “the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees.” The Act provides that a “public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required.” KRS 61.874(3).

On appeal, the Penitentiary has agreed to provide the inmate file to the Appellant in electronic form on a compact disc by regular first-class mail. In response to an inquiry from this Office, the Penitentiary identified its actual costs as \$ 0.08 for a CD, \$0.28 for packaging, and \$1.28 for first class postage. The Penitentiary states it will provide the records to the Appellant for actual cost. Thus, although the original quoted fees were excessive, the Penitentiary has corrected its error and therefore has not subverted the intent of the Act within the meaning of KRS 61.880(4). *See, e.g.*, 19-ORD-197; 05-ORD-214.

With regard to the inmate’s visitor log, the Penitentiary argues on appeal the record is deemed a security threat because it “contains information that could cause harm and/or potential discord with inmates or harm and discord to the institution and/or could lead to discovery of confidential security matters that could threaten the security [of] inmates and/or the institution.” Under KRS 197.025(1), “no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.” Although this Office accords substantial deference to the Department under KRS 197.025(1) in determining which records would constitute a security threat if released, such deference is not absolute. Under KRS 61.880(2)(c), the agency bears the ultimate burden of proof in an open records appeal. Here, when asked by this Office to substantiate the nature of the security threat posed by disclosing the names on the visitor log, the Penitentiary declined to do so.¹ Instead, the Penitentiary agreed to disclose the names to the Appellant, “once the [Office] rules on this appeal,” while redacting other personal information on the visitor log. However, the issue is not moot because the names have not yet been “made available to the complaining party.” *See*

¹ The Penitentiary stated it would only provide further substantiating information to this Office if it could do so confidentially. Under KRS 61.880(2)(c), the Attorney General may “request a copy of the records, but they shall not be disclosed.” That subsection also authorizes the Attorney General to “request additional documentation from the agency for substantiation,” but contains no similar clause restricting the disclosure of such additional documentation.

40 KAR 1:030 § 6. Accordingly, due to the Penitentiary's failure to meet its burden of proof, this Office must find that the Penitentiary violated the Act in withholding the names on the visitor log.²

The Penitentiary states it will continue to withhold other personal identifying information of private individuals on the visitor log under KRS 61.878(1)(a) as "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." In most cases, information of this nature may be routinely redacted, as it implicates a substantial privacy interest but ordinarily reveals nothing about the conduct of the agency's business. *See Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013). Therefore, the Penitentiary did not violate the Act when it withheld personal identifying information, other than names, from the visitor log. *See* 22-ORD-249 n.3; 06-ORD-120.

A party aggrieved by this decision may appeal it by initiating an 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

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

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Distributed to:

Mr. Lawrence Trageser
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² Although the Penitentiary no longer relies on KRS 61.878(1)(a) as a basis for withholding the names, prior decisions of this Office have found the disclosure of names on a visitor log was not a clearly unwarranted invasion of personal privacy. *See* 22-ORD-249; 93-ORD-102.