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23-ORD-180

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In re: Willdarien Jones/Green River Correctional Complex

Summary: The Green River Correctional Complex ("the Complex") violated the Open Records Act ("the Act") when it failed to carry its burden that an inmate's duplicative request for a record was unreasonably burdensome or intended to disrupt the Complex's essential functions. The Complex also violated the Act when it failed to explain the adequacy of its search.

Open Records Decision

On April 19, 2023, Willdarien Jones ("Appellant") submitted a request to the Complex for one "copy of the property sheet from when [he] arrived on" April 6 or 7, 2023. The Complex received the April 19 request on April 25 and issued a timely response granting it on May 2, 2023. On May 1, 2023, the day before the Complex responded to the Appellant's first request, he submitted a second request seeking "one copy of [his] inventory property sheet when [he] arrived at GRCC on April 6, 2023 or April 7, 2023" and a copy of the "lost and stolen property sheet" he submitted in April 2023. On May 3, 2023, the Complex denied the Appellant's second request for the inventory property sheet because it was duplicative of his first request. The Complex also denied the Appellant's request for the "lost and stolen property sheet" because the record does not exist. On May 8, 2023, the Appellant initiated this appeal.

On appeal, the Complex cites a line of the Office's decisions dating to 1995 to assert it properly denied the Appellant's second request because it was identical to the Appellant's April 19 request. Before turning to the Office's prior decisions, however, it is first necessary to review the actual text of the Act, which controls over those decisions. The concept that an agency may deny duplicative requests is rooted in KRS 61.872(6), which states:

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

The "clear and convincing" evidentiary standard is a high bar, but not an insurmountable one. It does not require "uncontradicted proof," but rather, "proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Commonwealth, Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).

In 95-ORD-047, the Office held that an agency properly denied a second request for records that was identical to a previous one because "[c]ommon sense dictates . . . that repeated requests for the same records may become unreasonably burdensome or disrupt the agency's essential functions." In reaching this conclusion, the Office cited OAG 92-91, which had involved multiple requests for several of the same documents over time. Noticeably, the Office concluded in the 1992 case that the requester *did not* intend to disrupt the essential functions of the agency. *Id.* at 5. Nevertheless, due to the volume of the requested records and the appellant's repeated requests for them, the Office concluded that the duplicative requests placed an unreasonable burden on the agency. *Id.* at 6. In so holding, the Office concluded, "To produce these records once entails some inconvenience to the agency; to produce them *three and four times* requires a level of 'patience and long-suffering' that the legislature could not have intended." *Id.* (emphasis added).

Although OAG 92-91 found "three and four" duplicative requests to be unreasonably burdensome, in part due to the volume of records, the Office created a new rule in 95-ORD-047 that an agency may deny a *second* request, simply for the reason that it was the second time the same records were requested. While common sense may indeed dictate that three or four requests for the same records looks more like the intentional disruption of an agency, it is not "clear and convincing" that a *second* request reflects the same malicious intent in the absence of any other evidence. Moreover, the Office then added a qualifier to its new rule—that an agency nevertheless must comply with a second request for the same records if there was some "necessity" for doing so, "such as loss or destruction of the records." That qualifier is unusual, because the courts and the Office have held in other contexts that the reason for requesting records is irrelevant. *See, e.g., Zink v. Commonwealth, Dep't of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994); *see also* 10-ORD-229

("holding that all open records requesters stand in the same shoes").[1] Regardless, the question is not whether the Complex properly relied on the Office's decisions. The question is whether the Complex properly denied the Appellant's second request as duplicative under one of the Act's exemptions, here, KRS 61.872(6). That requires the Complex to prove by clear and convincing evidence that the Appellant intended to disrupt its essential functions by making repeated requests, or whether the request on its face is unreasonably burdensome.

While the Office recognizes that the statutory basis for the "rule" in 95-ORD-047 concerning a request made for the *second* time may be questionable, it declines to overrule that line of decisions here. That is because the Complex violated not only KRS 61.872(6), but also the Office's extra-textual rule interpreting it. Recall that the Appellant submitted his first request on April 19, but the Complex did not respond to it until May 2. To its credit, the Complex did not receive the first request until April 25, and therefore, its May 2 response was timely issued within five business days. *See* KRS 61.880(1); KRS 197.025(7). Thus, while the Complex's response was timely, the Appellant still had not received it by the time he submitted his second request on May 1. It is reasonable to conclude that the Appellant submitted a second request not with the intent to disrupt the Complex's essential functions, but because he had not received a response to his first request for almost two weeks. Moreover, it is not clear how producing one page of responsive records is unreasonably burdensome, even if it must be produced a second time, given that the Appellant may be charged the actual cost for reproducing the record. *See* KRS 61.874(3). Because there was a "necessity" for the Appellant's second request, 95-ORD-047, *i.e.*, the delay in receiving a response and his resubmission of the request before learning it had been granted, the Complex failed to carry its burden by clear and convincing evidence that the second request was either unreasonably burdensome or intended to disrupt its essential functions, KRS 61.872(6). Accordingly, it violated the Act.

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[1] Of course, in the context of requests made by inmates, another statute applies to duplicative requests. Under KRS 197.025(3), "all persons confined in a penal facility shall challenge any denial of an open record [request] with the Attorney General by mailing or otherwise sending the appropriate documents to the Attorney General within twenty (20) days of the denial[.]" By enacting KRS 197.025(3), the General Assembly has established a deadline by which an inmate must seek review of a request that has been denied. An inmate cannot extend the statutory deadline for review by submitting a duplicative request and appealing the duplicative denial. *See, e.g.*, 20-ORD-046. However, KRS 197.025(3) serves as a jurisdictional limitation on the Office's administrative review, not as an exception to the statutory right of inspection. A correctional facility cannot rely on KRS 197.025(3) as an independent basis for denying a request. Rather, if the correctional facility denies the duplicative request for the same reason as the first, then the inmate cannot invoke the Office's jurisdiction because he would have failed to timely appeal the first denial. Here, however, KRS 197.025(3) does not apply because the Appellant has timely provided copies of *both* of the Complex's dispositions of his requests, so there is no evidence in this record that the Appellant is attempting to end-run the statutory deadline to file an appeal under KRS 197.025(3).

With respect to the second part of the Appellant's request, the Complex states it does not possess the "lost and stolen property sheet." 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 that the lost and stolen property sheet exists, the Appellant provides a copy of a grievance he submitted to the Complex and a Complex employee's note stating that another Complex employee completed a theft report related to missing property. By producing evidence indicating the Complex created a theft report, the Appellant has presented sufficient evidence to suggest that the lost and stolen property sheet exists because it allegedly led to the creation of a theft report. As such, the burden shifts to the Complex to explain the adequacy of its search.

An adequate search for records is one using methods reasonably designed to find responsive records. *See, e.g.*, 95-ORD-096. Reasonable search methods include reviewing the files pertaining to the general subject matter of the request, and the files of employees either specifically mentioned in the request or whose job duties are related to the subject matter of the request. *See, e.g.*, 19-ORD-198. To carry its burden that its search was adequate, an agency must, at a minimum, specifically describe the types of files or identify the employees' whose files were searched. *See id*. But here, the Complex states only that an additional "search was made where the record would normally be maintained and it could not be located." The Complex did not describe the files it searched or identify which employees' files were searched. Just as a requester cannot make a *prima facie* case that records do or should exist merely by asserting they do, an agency cannot meet its burden that its search was adequate merely by asserting it was.

At bottom, the Office cannot find that the requested lost and stolen property sheet does, in fact, exist. Adjudicating such factual questions is beyond the Office's purview under KRS 61.880(2). The Office can, however, determine whether a requester has made a *prima facie* case that a record should exist. And once such a showing is made, the agency is called upon to explain the adequacy of its search. *City of Fort Thomas*, 406 S.W.3d at 848 n.3. Because the Appellant presented evidence the lost and stolen property sheet should exist, the Complex was required to describe the methods it used to search for it. By merely asserting it searched "where the record would normally be maintained," the Complex has not carried its burden that its search was adequate. For that reason, it 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 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.

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s/ Zachary M. Zimmerer
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