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23-ORD-201

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In re: Saeid Shafizadeh/Shelbyville Police Department

Summary: In the face of competing factual claims, the Office cannot find that the Shelbyville Police Department (the “Department”) “required” the use of a specific form to submit a request to inspect records in violation of the Open Records Act (“the Act”). However, the Department subverted the intent of the Act, within the meaning of KRS 61.880(4), when it failed to substantiate the fees it imposed for copies of video footage as representing its actual cost of reproducing the records.

Open Records Decision

Saeid Shafizadeh (“Appellant”) emailed a request to the Department for all records related to a criminal case. The Appellant specified that the scope of his request included any photographs and video recordings. On the same day, the Department called the Appellant and asked him to resubmit his request using the Attorney General’s standardized open records request form. *See* KRS 61.876(4); 40 KAR 1:040. The Appellant complied and resubmitted his request using the form. In a timely response, the Department granted the Appellant’s request and provided two responsive records. The Department also informed the Appellant that it possessed responsive body worn camera footage, but it could not transmit the video files electronically due to their size.¹ The Department stated it would charge a fee of

¹ The Department also stated it has pictures related to the incident that it would provide, but it does not have any movable video system or dash camera footage related to the case. The Appellant does not contest these claims.

\$31.00 to copy the body worn camera footage onto DVDs and mail them.² This appeal followed.

Although KRS 61.876(5) requires every agency to accept requests made using the Attorney General's standardized form, under KRS 61.872(2)(c), "[a] public agency shall not require the use of any particular form for the submission of an open records request." The Appellant claims the Department violated the Act when it asked him to resubmit his request using the Attorney General's standardized form for requesting public records. In response, the Department does not dispute that it "requested" the Appellant to submit his request on the Attorney General's form. However, it claims it did not deny the Appellant's request for failure to use a specific form and it had already begun processing the Appellant's request before he resubmitted it.

While the Appellant is correct that it would be a violation if the Department required him to use the Attorney General's form, the parties dispute whether the Department actually imposed such a requirement. The Appellant ultimately resubmitted his request the same day, well before the Department's deadline to determine whether it would grant or deny the request and notify the Appellant in writing of its decision.³ See KRS 61.880(1) (requiring a public agency to determine whether to grant or deny a request within five business days of receiving it). Given the competing factual claims, and because the Department received both of the Appellant's requests on the same day and granted them four business days later, the Office cannot conclude that the Department "required" his use of a specific form in violation of the Act.

The Appellant claims that the Department also violated the Act when it charged an excessive fee to copy the body worn camera footage. Under KRS 61.880(4), a person 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

² The \$31.00 fee consisted of \$30.00 for DVDs and \$1.00 for postage.

³ If the Department's phone call to the Appellant had been its only communication with him regarding the request, and five business days elapsed without the Department issuing a written response, the Office could then clearly conclude that the Department had violated KRS 61.872(2)(c) by requiring the use of a particular form.

incurred by the public agency, but not including the cost of staff required.” KRS 61.874(3). Under KRS 61.880(2)(c), a public agency bears the burden of proof of sustaining its action, including that its copying fees reflect the actual cost of reproduction.

Here, the Department prescribed a fee of \$31.00 to copy and mail the requested body worn camera footage. On appeal, the Department claims the fee is permitted because the Appellant’s request is a “special production request,” but it does not explain what it means by that term. The Act makes no reference to “special production requests.”⁴ With respect to the actual costs the Department incurred to reproduce the records, it claims to have used three DVDs due to the size of the files and postage cost \$1.00. In other words, it has charged \$10.00 per DVD. Although the Department claims “the amount per disk is not unreasonable in comparison to what other cities” charge, it does not state its actual cost to reproduce the records or provide proof of the amount it paid for the DVDs. In contrast, the Appellant provides proof that a package of 50 DVDs can be purchased for less than \$20.00, and thus, each DVD costs less than \$0.50. The Office has previously found that an agency may only charge the cost of each disk in a package, and thus, a charge of \$5.00 per disk was unreasonable. *See, e.g.*, 10-ORD-022. Because the Department has failed to carry its burden under KRS 61.880(2)(c) that its actual cost to reproduce the records was \$31.00, it subverted the intent of the Act within the meaning of KRS 61.880(4) by imposing an excessive fee.

A party aggrieved by this decision may appeal it by initiating an 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.

⁴ To the extent the Department intended to claim the request was for a commercial purpose, and therefore it could charge an increased fee, the Act excludes from the definition of “commercial purpose” the “[u]se of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties.” KRS 61.870(4)(b)3. Here, the Appellant is an attorney seeking records on behalf of his client, and therefore, the request is not for a commercial purpose.

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Distributed to:

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