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23-ORD-293

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In re: Joseph Mayo/City of Newport

Summary: The City of Newport (“the City”) violated the Open Records Act (“the Act”) when it failed to issue a final written response to a request for records within five business days. The City subverted the intent of the Act, within the meaning of KRS 61.880(4), when it attempted to charge a fee for staff costs associated with processing a noncommercial request.

Open Records Decision

On September 12, 2023, Joseph Mayo (“Appellant”) requested copies of “public records of all the code violations such as trash and tall weeds, missing gutters and downspouts, standing water, broken sanitary waste systems, unsafe trees, brick/mortar deficiencies, paint/protective treatments, door in disrepair, etc.” from August 1 to September 10, 2023. The Appellant expressly stated his request was not for a commercial purpose. In a telephone conversation on September 19, 2023, the City advised the Appellant he would be charged for staff time at a rate of \$50 per hour to locate, copy, and redact the records, in addition to the standard copying charge of 10 cents per page. However, the City did not issue a final written response to the Appellant’s request. This appeal followed.

Under KRS 61.880(1), a public agency must issue a final written response to a request for records within five business days after the date it receives the request. Here, the City undisputedly failed to do so. Thus, the City violated the Act.

Further, 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).

Under KRS 61.880(2)(c), the burden is on the public agency to sustain its actions. In this appeal, the City cannot substantiate its charge of \$50 per hour staff costs unless it proves the Appellant’s request was for a commercial purpose, as KRS 61.874(3) expressly prohibits an agency from charging for staff costs to fulfill a noncommercial request for records. On appeal, the City claims it is entitled to charge staff costs because the Appellant’s request is “obvious[ly]” for a commercial purpose. But no commercial purpose is apparent on the face of the request, which expressly states the purpose is not commercial. Thus, the City has not met its burden of proving a commercial purpose.

The City further claims the Appellant admitted in a “conversation with City staff” that “the request was not for a public purpose.” However, it is immaterial whether the purpose is public or private. The Act only permits a public agency to charge for staff costs if the purpose of the request is *commercial*. Therefore, the City subverted the intent of the Act, short of denial of inspection, by charging an hourly rate for staff costs, which is disallowed under KRS 61.874(3) and is thus an excessive fee within the meaning of KRS 61.880(4).¹

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.

¹ The Appellant argues the fee of 10 cents per page is also excessive because the agency could provide the records in electronic form instead of hard copy form. However, the record on appeal does not indicate the Appellant specifically sought electronic copies of the records. On this record, it is unclear whether the requested records exist in electronic form or only in hard copy form. See KRS 61.874(2)(a) (“Nonexempt 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. . . . Agencies are not required to convert hard copy format records to electronic formats.”). Ten cents per page is a reasonable fee for hard copies under the Act. See *Friend v. Rees*, 696 S.W.2d 325, 226 (Ky. App. 1985); 21-ORD-243. Thus, the City did not subvert the intent of the Act by charging a fee of 10 cents per page.

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s/ James M. Herrick
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Distributed to:

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