



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

23-ORD-315

November 30, 2023

In re: Shari Morris/Barren County Detention Center

Summary: The Barren County Detention Center (“Center”) did not violate the Open Records Act (“the Act”) when it denied a portion of the request that sought information without describing public records to be inspected. However, the Center violated the Act when it denied part of the request under KRS 61.872(6) without clear and convincing evidence that the request was intended to disrupt its essential functions. The Center also violated the Act when it failed to post on its website its rules and regulations for submitting requests to inspect records and the contact information of its official records custodian.

Open Records Decision

On September 19, 2023, Shari Morris (“Appellant”) submitted a request containing 26 subparts to the Center, seeking records and information related to various aspects of the Center’s operations from February 1, 2023, through September 12, 2023.¹ On September 29, 2023, the Appellant contacted the Center again and stated it had violated the Act by failing to respond to her request. The same day, the Center stated it had previously responded to the Appellant on September 22, 2023, and stated it was denying her request under KRS 61.872(6) because “much of what [she] request[s] is for information and not actual records” and because the Center “has reason to believe that [her] multiple requests are intended to disrupt essential functions of” the Center. In response, the Appellant disputed the Center’s claim that her request was intended to disrupt its essential functions and further complained

¹ Specifically, the first 18 subparts of the request sought information about various aspects of the Center’s operations. The next 7 subparts sought copies of contracts, purchase orders, invoices, and inspection reports related to food provided by the Center. The last subpart sought a copy of “requests by detainees for toxicology tests.”

that the Center had not posted on its website its rules and regulations for submitting requests or the contact information of its official records custodian. After receiving no further response from the Center, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” However, the Office has consistently found it is unable to resolve factual disputes between a requester and a public agency, such as whether a requester received an agency’s response to a request. *See, e.g.*, 21-ORD-233 (the agency claimed it issued a response, but the requester claimed he did not receive it); *see also* 22-ORD-125 (the agency claimed it did not receive the request).

On appeal, the Center states it sent a response to the Appellant on September 22, 2023. However, unbeknownst to the Center, it had misspelled the Appellant’s email address. Despite its mistake, the Center states it never received a rejected delivery email, and therefore, assumed its response had been delivered to the Appellant. The Office cannot resolve the factual dispute between the parties about whether the Center knew its response had failed to be delivered. Therefore, the Office cannot find that the Center violated the Act by failing to issue a timely response.

Moreover, the Center did not violate the Act by denying most of the Appellant’s requests for information rather than describing records to be inspected. The first 18 subparts of the Appellant’s request each ask for “the number of” different items or actions related of the Center’s operations. These requests do not describe public records to be inspected, but rather, seek information. *See, e.g.*, 21-ORD-014 (holding an agency properly denied a request seeking “the total number” of unemployment claims filed). The Act does not require public agencies to fulfill requests for information, but only requests for describable public records. KRS 61.872; *Dep’t of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) (“The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.”).

Although the Center properly denied most of the Appellant’s request as one seeking information, it failed to carry its burden of showing it properly denied the remainder of the request as one intending to disrupt its essential functions. Under KRS 61.872(6), “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.” 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.* However, the mere fact that a requester has submitted multiple requests in a short period is insufficient, standing alone, to demonstrate by clear and convincing evidence the requester’s intent to disrupt the agency’s essential functions. *See, e.g.*, 15-ORD-015; 96-ORD-193. Rather, the agency must provide other evidence to support its belief of the requester’s intent, such as proof the requester has previously 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 Center explains that, since August 27, 2023, it has been inundated with requests from a second requestor—not the Appellant. These requests are often lengthy and contain several subparts that are a mix of requests for information and requests for records, like the Appellant’s request here. The Center states numerous requests were submitted on eight different days between August 27 and September 16. Further, these requests and the emails that followed often turned to subjects unrelated to the Center’s records such as the requestor’s status as a “sovereign citizen” or the applicability of the “Law of Merchants.”

When the Appellant submitted her request on September 19, the Center reasonably believed she was associated with the second requester because of the similarities between her request and those it had received from the other requester. Even if the Center’s evidence could support a finding that the other requester intended to disrupt its essential functions, the Center puts forth no evidence of the *Appellant’s* intent to do so.² Rather, the Center attempts to impute the intent of a different requester onto the Appellant under a “guilt by association” theory. While there are sufficient similarities between the Appellant’s request and those submitted by another to suggest the two know each other and may even have similar interests in various types of records to be inspected, the Center has not established by clear and convincing evidence that the *Appellant* intends to disrupt its functions or has conspired with another to do so. Accordingly, the Center has not provided clear and convincing evidence to support its denial under KRS 61.872(6).

² The requests of the second requestor and the Center’s responses to those requests are not the subject of this appeal. Thus, the Office declines to determine whether the Center has provided clear and convincing evidence to support its denial of those requests under KRS 61.872(6).

Finally, the Appellant alleges the Center violated the Act when it failed to publish on its website its rules and regulation for submitting a request to inspect records, as well as the contact information of its official records custodian. “Each public agency shall display in a prominent location accessible to the public, including on its Web site,” the agency’s “rules and regulations pertaining to public records,” “[t]he mailing address, e-mail address, and phone number of the official custodian of the records or his or her designee to which all requests for public records shall be made,” and “[t]he form developed by the Attorney General under [KRS 61.876(4)] that may be used to request public records.” KRS 61.876(2).

On appeal, the Center states it has updated its website to identify the official custodian of records and provide his contact information.³ However, the Center’s website still does not publish its rules and regulations or the form developed by the Attorney General. Thus, although the Center has corrected its violation for failing to publish its official custodian’s contact information, it is still in violation of the Act for not publishing its rules and regulations or the form developed by the Attorney General.

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.

Daniel Cameron
Attorney General

s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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³ The Center also claims the Appellant did not complain about its website prior to bringing this appeal. However, the Appellant submitted an email to the Center on September 29, 2023, which she styled as an “APPEAL for Violations of the Open Records Act” and asserted the Center’s website failed to comply with KRS 61.876(2).

Shari Morris
Aaron Shirley
Mike Richardson