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24-ORD-049

February 28, 2024

In re: Zachary Kirk/Covington Police Department

Summary: The Covington Police Department (“the Department”) violated the Open Records Act (“the Act”) when it denied a request for public records because it believed the requester would use records for a commercial purpose notwithstanding his statement to the contrary. If a requester misleads an agency about his or her intent to use records for a commercial purpose, then the agency’s remedy is to seek damages in circuit court under KRS 61.8745, not to deny the request before the requester actually uses the records for a commercial purpose.

Open Records Decision

On January 31, 2024, Zachary Kirk (“Appellant”) submitted a request to the Department for the “written report, Narrative, Body camera and Dash camera footage associated with the arrest of” a named individual on February 14, 2023. In accordance with KRS 61.876(4)(c), the Appellant stated his request was not for a commercial purpose. In a timely response, the Department initially denied the request because it did not certify a commercial purpose under KRS 61.874(4)(b). In a supplemental response, which was also timely, the Department explained it had deemed the Appellant’s purpose to be commercial under KRS 61.870(4) because he intended to post the requested video on a monetized YouTube channel.¹ This appeal followed.

According to records filed with the Kentucky Secretary of State, the Appellant is the organizer and registered agent of KY Blue Cam LLC, a Kentucky for-profit

¹ YouTube, a popular video hosting website, offers a monetization program that enables its users “to earn money directly on [its] platform in a variety of different ways, including through placed advertising, merchandise sales, and subscriptions.” See <https://www.youtube.com/howyoutubeworks/product-features/monetization/> (last accessed Feb. 28, 2024).

company with its principal office in Owingsville, Kentucky.² KY Blue Cam is also the name of the Appellant's YouTube channel, which posts video footage from police cameras for public viewing. The Appellant included the name of his company when he submitted his request, and on appeal, he admits his company receives revenue from channel subscriptions and advertising on YouTube.

Under KRS 61.874(4), if public records are requested for a commercial purpose, the public agency may impose certain requirements, including a reasonable fee including staff costs, a certified statement of the purpose for which the records will be used, and the establishment of a contract. Accordingly, KRS 61.876(4)(c) permits the agency to inquire “[w]hether the request is for a commercial purpose.” The Act defines “commercial purpose” as “the direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease of a service, *or any use by which the user expects a profit* either through commission, salary, or fee.” KRS 61.870(4)(a) (emphasis added).

Here, because the Appellant's company derives revenue from posting public records on YouTube, the Department argues his request is for a commercial purpose. The Appellant, however, claims his purpose is noncommercial under KRS 61.870(4)(b)2., which excludes from the definition of “commercial purpose” the “[u]se of a public record by a radio or television station in its news or other informational programs.”³ He argues KY Blue Cam is merely “broadcasting” on YouTube and obtaining revenue in the same manner as a radio or television station. Under KRS 446.080(4), “[a]ll words and phrases” used in Kentucky statutes “shall be construed according to the common and approved usage of language,” with the exception of “technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law.” The common meaning of “radio or television station” does not include a YouTube channel. *See, e.g.*, 14-ORD-125

² *See* <https://web.sos.ky.gov/BusSearchNProfile/Profile.aspx/?ctr=1342157> (last accessed Feb. 28, 2024).

³ The Appellant also claims his company is a “news-gathering organization” under KRS 189.635(8)(b). That provision, however, relates to obtaining vehicle accident reports from the Kentucky State Police, which the Appellant did not request. Qualifying as one of the news-gathering organizations described in KRS 189.635(8)(b)1.a. to e. is also a way for nonresidents of the Commonwealth to claim they are residents so they may exercise the statutory right of inspection. *See* KRS 61.870(10)(g); KRS 61.872(2)(a) (“Any resident of the Commonwealth shall have the right to inspect public records”). However, the Appellant already qualifies as a resident of the Commonwealth because he resides in the Commonwealth and owns a business in the Commonwealth that is registered with the Kentucky Secretary of State. Unlike the definition of “resident of the Commonwealth” under KRS 61.870(10)(g), KRS 61.870(4)(b)2. does not incorporate by reference the definition of a “news-gathering organization” under KRS 189.635(8)(b), and thus, that provision is irrelevant to the Act's definition of “commercial purpose.”

(concluding that a website describing itself as a “news organization” is not a “radio or television station” under KRS 61.870(4)(b)).⁴

However, it is not necessary in this appeal to determine whether the Appellant’s intended use for the records is commercial because the question presented is whether the Department properly denied the Appellant’s request. KRS 61.876(4)(c) allows a public agency to ask the requester whether the requested records will be used for a commercial purpose, and a public agency can deny the request if the requester refuses or fails to answer the question. *See, e.g.*, 24-ORD-021. However, nothing in the Act allows an agency to deny a request, after the requester states the records will not be used for a commercial purpose, simply because the agency disagrees with the requester’s answer to the question. Rather, under KRS 61.874(5)(c), it is “unlawful for a person to obtain a copy of any part of a public record for a [n]oncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose.” As a remedy for a violation of that provision, the public agency may bring a civil action to obtain treble damages, costs, and attorney’s fees under KRS 61.8745, along with any other penalty established by law. This is the only remedy the Act provides an agency that disagrees with the requester’s assessment that his use of public records is noncommercial.

Here, the Appellant stated his request was not for a commercial purpose. The Department disagrees, and claims it merely sought “to avoid unnecessary litigation” by denying the request and inviting the Appellant to submit “a new request certifying that it is for a commercial purpose.” While the Department’s motive is understandable, and it may be correct in its legal conclusion that posting public records on YouTube for profit amounts to a commercial purpose, “nothing in the Act authorizes a public agency to simply designate a request as one for a commercial purpose and demand a certified statement” to that effect. 20-ORD-099.⁵ Accordingly, the Department violated the Act when it denied the Appellant’s request.

⁴ Indeed, YouTube did not exist in 1994, when the Act was amended to include the definition of “commercial purpose” and excluded from the definition “a radio or television station.” *See* 1994 Ky. Acts ch. 262 § 2. Further, the Federal Communications Commission (“FCC”) regulates radio and television stations in the United States. *See generally Federal Comm’n Comm’n v. Prometheus Radio Project*, 592 U.S. 414, 418–21 (2021) (explaining the history of the Telecommunications Act of 1996 and the FCC’s regulatory history with respect to ownership of radio and television stations). As of the date of this decision, the FCC does not regulate YouTube or other video-streaming services, despite a recent request from 20 United States Senators for the FCC to begin doing so. *See* Letter from Senator B. Lujan, *et al.* to Chairwoman Rosenworcel, Chairwoman of the FCC (Oct. 18, 2023) available at <https://www.lujan.senate.gov/wp-content/uploads/2023/10/20231018-FCC-Letter-on-Video-Marketplace.pdf> (last accessed Feb. 28, 2024). Thus, because YouTube is not currently regulated by the FCC in the same manner as radio and television stations, it is doubtful YouTube could be considered “a radio or television station” under KRS 61.870(4)(b)2.

⁵ *See* 20-ORD-116 (finding an agency was “not authorized to treat [a] request as one for commercial purposes after [the requester] affirmed in writing that it was not”).

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.

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/s/ James M. Herrick
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