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24-ORD-084

March 22, 2024

In re: David Borum/Kentucky Board of Cosmetology

**Summary:** The Kentucky Board of Cosmetology (“the Board”) violated the Open Records Act (“the Act”) when it denied part of a request to inspect records under KRS 61.872(6) without clear and convincing evidence that the request was intended to disrupt its essential functions.

***Open Records Decision***

David Borum (“Appellant”), an attorney, submitted two requests to the Board seeking records related to disciplinary actions concerning his client. The Board denied the requests under KRS 61.872(6) because it had previously received and responded to six materially identical requests that were submitted by the Appellant’s client herself. According to the Board, “continued responses to identical requests for the same documents is unduly burdensome on this agency” and the “repeated requests are intended to disrupt other essential functions of this agency.” The Board also stated that no additional responsive documents “have been created or located since responding” to the previous requests. This appeal followed.

On appeal, the Board maintains that it properly denied the Appellant’s “requests as attempts to disrupt the proper conduct of agency business.” 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 time 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 Board explains that the Appellant's client has submitted six requests in the past three months and seven since 2022. Aside from some minor stylistic changes in his phrasing of the requests, the Appellant sought the same records about the same topics that his client previously requested. The Board also explains that the Appellant's client "used abusive language, made threats, and leveled unfounded accusations at Board staff" while it attempted to respond to her previous requests. The Board also states that, on two occasions, the Appellant's client demanded the Board "make no further attempts to contact her." In response, the Appellant argues the Act "requires the [Board] to honor [his request] without regard to previous conduct of [his] client." The Appellant is correct.

The Office has previously held that an agency did not show by clear and convincing evidence that a requester intended to disrupt its essential functions when the agency put forward evidence that a second requester intended to disrupt its essential functions and may have had a relationship with the first. *See* 23-ORD-315. There, the Office declined to "impute the intent of a different requester onto the Appellant under a 'guilt by association' theory." *Id.* Here too, the Board has not shown by clear and convincing evidence that the *Appellant* intends to disrupt its functions or has conspired with another to do so. Accordingly, the Board has not provided clear and convincing evidence to support its denial under KRS 61.872(6).<sup>1</sup>

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

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<sup>1</sup> On appeal, the Board also states it has provided the Appellant's client with "full and complete responses to her requests." The Appellant maintains that the Board "has provided some but not all of the requested documents to his client[.]" However, whether the Board fully complied with the requests by the Appellant's client is not properly before the Office because the Appellant has not provided copies of those requests or the Board's responses to them. *See* KRS 61.880(2)(a).

any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to [OAGAppeals@ky.gov](mailto:OAGAppeals@ky.gov).

**Russell Coleman**  
**Attorney General**

/s/ Zachary M. Zimmerer  
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Distributed to:

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