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26-ORD-007

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In re: Jacob Garmon/City of Edmonton

**Summary:** The City of Edmonton (“the City”) violated the Open Records Act (“the Act”) when it imposed staff costs under KRS 61.874(4)(c) without a statement from the requester that his request was for a commercial purpose. Under KRS 61.872(2)(c), a public agency may not require the use of a particular form to submit an open records request.

***Open Records Decision***

Jacob Garmon (“the Appellant”) submitted a request by email for a copy of the City’s investment policy adopted pursuant to KRS 66.480; previous versions of that policy for the last five years; “documents, policy sections, or internal records showing how the City confirms and enforces these statutory investment restrictions”; “all records maintained to document compliance” with KRS 66.480 during the last three years; and “any ordinances, resolutions, or internal administrative policies adopted pursuant to” KRS 66.480. The Appellant did not state whether his request was for a commercial purpose. In a timely response, the City declared it had deemed the Appellant’s request to be for a commercial purpose, and therefore demanded advance payment of \$90.00, which it said represents the estimated cost of staff time to fulfill the request. This appeal followed.

Under KRS 61.874(4), if public records are requested for a commercial purpose, the public agency may impose certain requirements on the person making the request. One of those requirements is a reasonable fee that may include the “[c]ost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records.” KRS 61.874(4)(c)1. Because commercial requests are treated differently than noncommercial requests, the Act permits a public agency to inquire “[w]hether the request is for a commercial purpose.” KRS 61.876(4)(c). If the requester fails or refuses to answer that question, the agency may deny the request. *See, e.g.*, 24-ORD-021.

The City, however, neither denied the Appellant's request nor inquired whether it was being made for a commercial purpose. Instead, the City attempted to make that determination for itself. On appeal, the City points out that the Appellant's company, The Garmon Organization LLC, is registered with the Kentucky Secretary of State as a for-profit business and sometimes solicits donations in its social media posts. But those facts are not determinative of whether a particular request is for a commercial purpose. *See, e.g.*, 24-ORD-049 (finding a request from an individual whose for-profit company derived revenue from subscriptions and advertising on YouTube was not necessarily for a commercial purpose). Rather, 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). Moreover, for purposes of fulfilling the request, the requester's statement as to the purpose of his request is conclusive. *See, e.g.*, 19-ORD-180 (finding a public agency may not require "a sworn certification of noncommercial purpose"); 20-ORD-116 (finding a public agency may not treat a request as commercial when the requester states it is noncommercial).

On appeal, the Appellant asserts his request was not made for a commercial purpose. In response, the City claims his assertion is "untimely" because he did not include it in his request. However, the absence of a statement that a request is noncommercial does not permit the agency to treat it as automatically and irrevocably commercial. "[N]othing in the Act authorizes a public agency to simply designate a request as one for a commercial purpose." 20-ORD-099.

The City further argues the Appellant is foreclosed from asserting a noncommercial purpose because he failed to comply with the City's policy requiring all requests to be submitted on the City's own "Request to Inspect Public Records Form," which includes a checkbox for whether the request is or is not for a commercial purpose. But the City's policy violates KRS 61.872(2)(c), which provides that "[a] public agency shall not require the use of any particular form for the submission of an open records request. . . ." Although the City may require a requester to state whether his purpose is commercial, it may not require the use of a particular form to do so. Accordingly, the City violated the Act when it unilaterally deemed the Appellant's request to have been made for a commercial purpose and imposed fees in the form of staff costs under KRS 61.874(4)(c)1.<sup>1</sup>

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<sup>1</sup> If the City believes the Appellant is falsely claiming a noncommercial purpose, it is not without recourse. 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, a 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.

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.

**Russell Coleman**  
Attorney General

/s/ James M. Herrick  
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Assistant Attorney General

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Distributed to:

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