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**20-ORD-030**

February 28, 2020

In re: Vincent F. Heuser, Jr./Louisville Metro Human Relations Commission

**Summary:** Louisville Metro Human Relations Commission (“Commission”) failed to issue a timely written response, per KRS 61.880(1), but its delay in producing records was justified under KRS 61.872(5). The Commission met its burden of proof that some requests were improperly framed and created an unreasonable burden.

***Open Records Decision***

On October 28, 2019, the Louisville Metro Human Relations Commission (“Commission”) received 10 requests for copies of groups of records from Vincent F. Heuser, Jr., Esq. (“Appellant”). Request 1 was for copies of all written and email correspondences of past and present Commission members, from 2015 to present, regarding a number of issues. Request 4 sought “[a]ll documents” from seven public events hosted by different organizations from 2013 through 2017. Request 6 sought “[a]ll documents mentioning 2013 KY H.B. 279” from 2013 through 2014. Requests 7 through 10 sought all documents relating to Commission cases regarding discrimination “on the grounds of religion, sexual orientation, gender identity, or sex[.]”<sup>1</sup>

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<sup>1</sup> The Commission stated that no records exist responsive to requests 2, 3, and 5, and Appellant does not appeal that disposition.

On November 8, 2019, Louisville Metro Government (“LMG”) responded on behalf of the Commission. It acknowledged that the response was untimely, but explained that LMG was experiencing technical issues with email that impeded its ability to retrieve requests. The Commission delayed providing records, stating generally that it needed “additional time to gather and review” responsive records, but advised Appellant to “expect a response to your request on or before Friday, January 31, 20[20] close of business.” On November 27, 2019, Appellant appealed the untimely response and argued that the Commission had improperly invoked KRS 61.872(5) to delay its response.

On November 19, 2019, this Office requested additional documentation regarding the delay, per KRS 61.880(2)(c). The Commission responded, explaining that the delay was necessary because requests 1 and 6 implicated emails of present and past members located in electronic archives. The Commission stated that it was necessary to have LMG’s Information Technology (“IT”) department search the email archives, and the date offered for inspection was based on their estimate of the time it would take IT to complete the task. On February 13, 2020, the Commission described how it searched for records responsive to requests 1 and 6, and stated that it provided Appellant all existing responsive records.

The Commission denied some requests as unreasonably burdensome. The Commission stated that request 4 was improperly framed, seeking “all documents” from events spanning from 2013 through 2017 without reasonably describing a specific record. The Commission stated that the request would require a review of every existing record to determine if it “may have come from those events.” The Commission stated that requests 7 through 10 were voluminous requests identical to those made in a prior appeal,<sup>2</sup> and it incorporated its prior response. The Commission identified 2,153 discrimination case files from 1999 to present, each containing responsive records required to be kept confidential under KRS Chapter 344. The Commission stated that provisions of KRS Chapter 344 apply differently to each record, requiring its three employees to review every record in each case file to separate the exempt and non-exempt material.

### **The Commission’s Initial Response was Untimely.**

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<sup>2</sup> The Commission and Appellant were the parties to decision 20-ORD-008. That appeal related to 21 requests for groups of records from discrimination case files.

The Commission concedes that its initial written response was untimely under KRS 61.880(1), which provides, in relevant part, that upon receipt of a request, a public agency “shall determine within three (3) [business] days ... whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision.” The Attorney General has consistently recognized that the procedural requirements of the Open Records Act “are not mere formalities, but are an essential part of the prompt and orderly processing of an open records request.” 93-ORD-125. Thus, a written response was required within three business days.

**The Commission’s Delay was Justified Under KRS 61.872(5).**

The Commission delayed Appellant’s access to records responsive to requests 1 and 6, stating that additional time was needed to gather and review records. KRS 61.872(5) provides:

If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, *unless a detailed explanation of the cause is given for further delay* and the place, time, and earliest date on which the public record will be available for inspection.

(emphasis added). The Commission’s initial written response failed to provide a detailed explanation, because it set forth “neither the volume of records involved nor explain[ed], in detail, the problems associated with retrieving the records implicated by the request.” 02-ORD-217. The Commission corrected the error during the appeal by explaining in detail the need for additional time to search email archives. Given the broad scope of the requests, the mixture of exempt and nonexempt records, and the difficulties in locating and retrieving records, this Office finds that the delay was reasonable under the circumstances. Further, the

record shows that the Commission continued to search in good faith for records responsive to requests 1 and 6.<sup>3</sup> Accordingly, this Office finds no violation.

**The Commission Met its Burden of Proof in Denying Request 4.**

KRS 61.872(3)(b) requires a public agency to mail copies of records only “after [the requester] precisely describes the public records which are readily available within the public agency.” A description is precise “if it describes the records in definite, specific, and unequivocal terms.” 98-ORD-17 (internal quotation marks omitted). “[O]pen-ended any-and-all-records-that-relate type of request(s),” such as the one made here, are not “precise” within the meaning of KRS 61.872(3)(b). *See* 08-ORD-058. Such a request places an unreasonable burden on the agency to produce often incalculable numbers of widely dispersed and ill-defined public records. 99-ORD-14. Further, the request failed to describe an existing record in the Commission’s possession, requiring the Commission to review all records to locate any document remotely related to the public presentations the Appellant listed. Accordingly, the request was properly denied.

**The Commission Met its Burden of Proof in Denying Requests 7 through 10.**

The Commission provided clear and convincing evidence to support its claim that honoring requests 7 through 10 created an unreasonable burden, as required by KRS 61.872(6). To meet its burden of proof for denying a request for causing an unreasonable burden an “agency must show the existence of the unreasonable burden ‘by clear and convincing evidence.’” *Commonwealth v. Chestnut*, 205 S.W.3d 655, 664 (Ky. 2008). The public agency must support its claim with facts and evidence, such as the volume of responsive records, the difficulty in locating or accessing the records, the amount of time that complying with the request would require, or any other specific and relevant facts indicating that compliance with the request would actually impose an unreasonable burden.

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<sup>3</sup> A public agency is required to make “a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested.” 95-ORD-96, p. 4 (citation omitted). The Commission appears to have used methods that would produce all existing responsive emails. Absent proof that the Commission failed to conduct a reasonable search expected to produce the records requested, this Office has no basis upon which to question its good faith search.

The record shows that Appellant's requests implicated 2,153 discrimination case files, each case file consisting of boxes of records, with each record protected under confidentiality provisions of KRS Chapter 344. To respond to the requests, the Commission would have to manually review every record within each case file, ascertain the stage of the proceedings, and apply the relevant provisions of KRS Chapter 344 to each record. As in 96-ORD-69, "[w]here a request for records involves numerous records in which confidential information is commingled with information that might be releasable, the difficulty of separation ... constitutes an unreasonable burden upon an agency within the meaning of KRS 61.872(6)." Accordingly, the Commission met its burden of proof in denying requests 7 through 10.

A party aggrieved by this decision shall appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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 proceeding.

Daniel J. Cameron  
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/s/ John Marcus Jones

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Distributed to:

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