



COMMONWEALTH OF KENTUCKY
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20-ORD-116

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In re: Bret Walker/Louisville Metro Government

Summary: Louisville Metro Government (“Metro”) subverted the intent of the Open Records Act (“the Act”) by requiring a certification of commercial purpose despite the fact that the requestor had stated that his purpose was noncommercial.

Open Records Decision

On March 2, 2020, Bret Walker (“Appellant”) requested that Metro provide copies of certain waivers issued between January 1 and June 30, 2019, by the Division of Community Forestry. In his request, Appellant stated, “this request is not being made for commercial purposes.” The twist in this appeal is that Appellant made his request to Metro using the services of MuckRock Foundation, Inc. (“MuckRock”), which is a nonprofit organization.¹ Ordinarily, any person may make an open records request upon any public agency and may only incur minor copying fees. However, MuckRock will submit open records requests on a person’s behalf for a fee and then post the public records it receives, if any, to its public website for public access at no cost.

Rather than grant the request, Metro determined that the request was for a commercial purpose because of the fee MuckRock charges. Thus, Metro intended to charge a \$25 per hour fee to fulfill the request and sought a notarized form certifying the purpose of the commercial request. This appeal followed.

¹ See <https://www.muckrock.com/financial/> (last accessed 6/30/20).

KRS 61.870(4)(a) 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 61.874(4)(b) provides:

The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

Metro does not claim that Appellant intends to sell or profit from its records. Instead, Metro argues that MuckRock’s fee to transmit the request “makes MuckRock the actual requestor, and makes any response to MuckRock’s request subject to [Metro’s] commercial fee.” As evidence of MuckRock’s “inherently commercial” nature, Metro points out that MuckRock offers for sale on its online store a hard drive containing “all [of its] public FOIA data.”

Appellant, however, contends that he is a “concerned citizen” of Louisville seeking the records for his own noncommercial purposes, which he told to Metro. Appellant likens MuckRock’s services to that of an attorney, who might charge a fee to submit an open records request for a client,² and he points out that MuckRock is paid its fee whether or not any records are actually produced.

Under the Act, a request is made for a commercial purpose when a person intends to use “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 [person] expects [to make] a profit.” KRS 61.870(4)(a) (emphasis added). The record before this Office demonstrates that MuckRock functioned as a third-party service to facilitate Appellant’s open records request for a fee. But the record before this Office does not indicate that Appellant, as opposed to MuckRock, expects a profit from the use of these records. Accordingly, Appellant’s request was not made for a commercial purpose within the meaning of KRS 61.870(4)(a).

² KRS 61.870(4)(b)³ expressly excludes from the definition of “commercial purpose” the “[u]se of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties.”

Metro argues that Appellant's request through MuckRock is an attempt to violate KRS 61.874(5). But even if Appellant had some undisclosed commercial purpose, or knowingly allowed MuckRock to use the records for an undisclosed commercial purpose, Metro is not authorized to treat his request as one for commercial purposes after Appellant affirmed in writing that it was not. Because Appellant affirmed in writing his purpose was not commercial, Metro must provide him the records at "the actual cost of reproduction." KRS 61.874(3). For these reasons, Metro's response, although sort of denial, subverted the intent of the Act. KRS 61.880(4).

Admittedly, Metro's arguments as to MuckRock are not frivolous. On this record, this Office is unable to make a determination as to whether MuckRock's request is for a commercial purpose. Although MuckRock is a nonprofit organization, MuckRock is not a party to this appeal, and it has not provided any brief or otherwise participated in these summary proceedings. Thus, this Office expresses no opinion as to whether MuckRock's request is for a commercial purpose. But Metro is not without recourse or assurances here: it is unlawful for Appellant to obtain Metro's records for a noncommercial purpose and to use or allow the use of those records for an undisclosed commercial purpose, KRS 61.874(5)(c), and the Act provides a mechanism for Metro to address such concerns. *See generally* KRS 61.8745 (providing agencies a cause of action for the violation of KRS 61.874(2) to (6)).

A party aggrieved by this decision may 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 proceedings.

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/s/ James M. Herrick

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