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22-ORD-150

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In re: Lawrence Trageser/City of Pioneer Village

Summary: The City of Pioneer Village ("the City") subverted the intent of the Open Records Act ("the Act"), within the meaning of KRS 61.880(4), when it charged 15 cents per page to e-mail responsive records without substantiating the actual cost to reproduce the records, as required by KRS 61.874(3).

Open Records Decision

On June 3, 2022, Lawrence Trageser ("Appellant") requested the personnel file of a City police officer and certain records supplied by the officer at the time he was hired. The Appellant asked that the "records be returned via e-mail . . . in a PDF or similar format." He added that "[i]f this is not possible, [he] invokes KRS 61.872(3) upon agencies [*sic*] response." In a timely response, the City stated that 28 pages of records were available at the rate of 15 cents per page, which the City would e-mail to the Appellant upon payment of $4.20. The Appellant then asked the City why it was charging 15 cents per page for electronic records, but the City did not respond to his question. This appeal followed.

Under KRS 61.880(4), a person requesting records may appeal to the Attorney General if he believes "the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees." The Act provides that a "public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required." KRS 61.874(3).

Under KRS 61.880(2)(c), the burden is on the public agency to sustain its action. To meet its burden here, the City must substantiate the costs it actually incurred to make copies of the requested records. On appeal, the City asserts for the first time that the requested records were not maintained in electronic form and that the City chose to create electronic records in PDF format. Thus, the City relies on KRS 61.874(3), which states that "[i]f a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred."[1] The City claims that it exercised its discretion under KRS 61.874(3) to create electronic copies of the records for the Appellant, and therefore the City can charge 15 cents per page for the electronic records.

However, there are multiple flaws in the City's argument. First, the Appellant did not ask the City to create electronic copies of records, or to tailor the format of its paper records to PDF. Specifically, the Appellant stated in his request that if it was "not possible" to provide electronic copies of records, the Appellant "invokes KRS 61.872(3)." Under KRS 61.872(3), there are two ways to inspect records: "[d]uring the regular office hours of the public agency" or "[b]y receiving copies of the public records from the public agency through the mail."[2] Thus, the Appellant has offered to inspect the records in person or by receiving physical copies in the mail if electronic copies of the records did not exist. Here, the City did not inform the Appellant that the records were not maintained electronically. Additionally, the City did not afford him the opportunity to elect either to inspect the records in person or to receive physical copies in the mail. Instead, the City converted its physical copies of records into electronic copies of records, and then imposed a fee of 15 cents per page.

Second, the City does not attempt to substantiate its fee on the basis of "actual costs" or "staff costs," as required under KRS 61.874(3). Instead, the City argues that 15 cents is not excessive because it would be a reasonable rate for paper copies. In *Friend v. Rees,* 696 S.W.2d 325 (Ky. App. 1985), the Kentucky Court of Appeals held that ten cents per page was a reasonable fee for physical copies under the Act. *Id*. at

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[1] Under KRS 61.874(2)(a), "[a]gencies are not required to convert hard copy format records to electronic formats." Additionally, KRS 61.874(2)(b) defines standard electronic format as "a flat file electronic American Standard Code for Information Interchange (ASCII) format."

[2] The City claims that under KRS 61.872(3), if the requester resides in a different county from where the records are located, inspection of public records "shall be through the mail" only. But KRS 61.872(3) contains no such restriction on an out-of-county requester's right to inspect records in person during regular office hours. *See* KRS 61.872(1) ("All public records shall be open for inspection by any resident of the Commonwealth, except as otherwise provided by KRS 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of that right."). While this Office has previously held that an agency may require a resident of the county to inspect records in-person in lieu of receiving copies in the mail, *see e.g.*, 17-ORD-010, the Office has not held that an out-of-county resident must accept copies by mail, which the City now proposes.

326. This Office has consistently found that any copying charge above 10 cents per page is excessive unless the agency can substantiate that its actual cost is greater than that amount, or that the agency has specific statutory authority to charge a higher copying fee. *See, e.g.,* 21-ORD-243; 19-ORD-062; 08-ORD-021; 01-ORD-136; 94-ORD-77.

The City, however, argues that that 10 cents per page is an outdated rate because, according to the Bureau of Labor Statistics consumer price index, there has been a cumulative consumer price increase of 171.65% since 1985, when *Friend* was decided. In other words, the City claims that inflation has caused the 10-cent rate to become outdated and a 15-cent rate is now reasonable. This argument fails for multiple reasons.

First, although the *Friend* court found that a 10-cent rate per page was reasonable, the Finance and Administration Cabinet ("Cabinet") has also determined that 10 cents per page is reasonable. *See* 200 KAR 1:020 § 3(1) ("Copies of any written material shall be furnished . . . on payment of fee of ten (10) cents a page for each record copies.") Although the Cabinet only has authority to promulgate regulations that bind state agencies, KRS 61.876(3), the Cabinet's determination that a 10-cent rate is the actual cost for state agencies to make paper copies is persuasive. Second, the reasonableness of any fee must be substantiated by the *actual* cost incurred by the agency. KRS 61.874(3). While the consumer price index may show that the average cost for a basket of goods has risen, the City does not show that the cost of paper or ink has risen in tandem with all other prices captured by the index. KRS 61.874(3) requires the City to make that showing, since the burden is on the City to prove the actual cost of reproducing records.

Finally, the City has not shown that it used any physical resources to reproduce the requested records. The City does not explain how it converted the physical copies of records into electronic copies. Presumably, the City scanned its physical copies to create PDF file formats. But the City did not claim that it first copied these records, or printed them out, thus using physical resources to reproduce the records prior to converting them into electronic form. The act of scanning a record that already exists does not require paper or ink. It is for this reason that the Office has previously found that a fee of 10 cents per page is excessive for records already maintained in electronic format when the agency did not substantiate its actual costs in reproducing the records. *See, e.g.,* 14-ORD-078 (the agency subverted the Act when it charged a fee in excess of $16,000, at a rate of 10 cents per page, for electronic records delivered on a CD that cost less than $8.00). Here, the City has not shown that it incurred actual costs of even 10 cents per page, let alone 15 cents per page. Accordingly, this Office finds that the City subverted the intent of the Act by imposing an excessive fee.

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 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 e-mailed to OAGAppeals@ky.gov.

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s/James M. Herrick
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