



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-128

May 24, 2024

In re: Clarence Hixson/City of Thornhill

Summary: Because the issues presented in this appeal are currently before the Jefferson Circuit Court, this Office declines to render a decision on the merits of the appeal. However, the City of Thornhill (the “City”) violated the Open Records Act (“the Act”) when it denied the request as unreasonably burdensome.

Open Records Decision

Clarence Hixson (“Appellant”) submitted a request to the City for ten categories of records related to ongoing litigation between his client and the City. In response, the City denied the request because it was unduly burdensome under KRS 61.872(6) and because it sought records protected by the attorney-client privilege and work product doctrine. The City also denied the request because it was duplicative of records sought in litigation, the discoverability of which is currently at issue before the Jefferson Circuit Court. This appeal followed.

On appeal, the City maintains that the request is unduly burdensome. The City also maintains that the request sought records that implicate the attorney-client privilege and work product doctrine, which are issues currently pending in Jefferson Circuit Court as part of the parties’ discovery dispute.

Regarding the City’s claim that the request sought records exempt under the attorney-client privilege and work product doctrine, the Office has previously declined to render a decision on the merits where the issues presented on appeal are also currently before a court of competent jurisdiction. *See, e.g., 23-ORD-129; 17-ORD-096.* KRS 61.878(1) establishes the categories of public records that are exempt from inspection, and states they “shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the

inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.” Thus, when questions regarding the availability of the same records are pending before both a court of competent jurisdiction in the context of a litigated case and the Office in an appeal under KRS 61.880(2), then there is no issue for the Office to decide. If the court holds the records are discoverable, then they would have to be provided and the appeal before the Office would be moot. *See* 40 KAR 1:030 § 6. If, on the other hand, the court holds the records are not discoverable, then the Office is precluded from holding otherwise. KRS 61.878(1).

Here, whether the requested records are shielded by the attorney-client privilege and the work product doctrine is currently before the Jefferson Circuit Court. Accordingly, the Office declines to adjudicate the merits of this portion of the Appellant’s appeal.

However, the City also declined the Appellant’s request as unduly burdensome under KRS 61.872(6). Under that statute, if a request for records “places an unreasonable burden in producing public records” on an agency, then “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.” KRS 61.872(6). Whether the Appellant’s request is unduly burdensome under KRS 61.872(6) is not currently before the Jefferson Circuit Court. Accordingly, the Office can adjudicate whether the City’s reliance on this exception complied with the Act.

Here, the City refers to subparts 5 and 8 of the Appellant’s request as examples of the unreasonable scope of the request.¹ The City claims its current and former employees’ personal communications are implicated by the request and it does not have access to such communications. The City further claims it does not have access to its attorney’s communications with third parties. Last, the City claims that some subparts of the request are not temporally limited and would require “an unreasonable amount of [the City’s] time and resources” to review and produce. However, clear and convincing evidence is “a high proof threshold.” *Commonwealth v. Chestnut*, 205 S.W.3d 655, 664 (Ky. 2008). “The obvious fact that complying with

¹ Subpart 5 requested emails between City officers, staff, or representatives and a specific individual or two specific private companies sent from January 2018 to [the date of the request]. Subpart 8 requested emails between the City’s officers, commissioner, city attorney, or staff and the Louisville Metropolitan Sewer District, contractors, or representatives discussing “the flooding in [the] City of Thornhill [and] the Ballard Regional Detention Basin, from July 2015 to [the date of the request].”

an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden.” *Id.* at 665. Rather, an agency relying on KRS 61.872(6) “must support its claim with the 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.” 20-ORD-008.

The City has not articulated with “facts and evidence” how subparts 5 and 8 of the Appellant’s request would impose an unreasonable burden on it. Rather, the City asserts only that to the extent the request seeks personal communications or communications between its attorneys and third parties, *those* records would be difficult to obtain. The City has not described an unreasonable burden imposed by gathering responsive records that are in its possession. Finally, while the City has asserted that it would require “an unreasonable amount of [its] time” to review records implicated by other subparts of the request, the City has not described the volume of records implicated by the request nor has it described the amount of time that complying with the request would require. Therefore, the City has not sustained its denial of the Appellant’s request under KRS 61.872(6).

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 any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

#224

Distributed to:

Clarence H. Hixson

W. Andrew Pierce

W. Scott Croft

Michael Bailey