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22-ORD-048

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In re: Gerald T. Kemper/City of Owenton

Summary: Under these narrow facts, the City of Owenton ("the City") did not violate the Open Records Act ("the Act") when it denied a request under KRS 61.872(6) because it has sustained that denial by clear and convincing evidence that the request was intended to disrupt the essential functions of the City.

Open Records Decision

On February 8, 2022, Gerald T. Kemper ("the Appellant") submitted a request to the City for a copy of the "Complete Municipal Ordinances of the City." In his request, the Appellant claimed that the local library had agreed to archive the City's ordinances, and that he was therefore requesting the ordinances on its behalf.[1] In a timely response, the City denied the Appellant's request "at this time" under KRS 61.872(6). The City explained that the ordinances were being digitally archived so that they could be uploaded to the City's website for direct public access. The City further explained that the digitization process was "close to completion" and if the Appellant sought a specific ordinance, the City could provide a copy of that ordinance. The City explained, however, that to provide all of the City's ordinances would require pausing the digitization process and result in the City copying thousands of pages. This appeal followed.

Under KRS 61.872(6), a public agency may deny a request if the request places an unreasonable burden, or if the public agency "has reason to believe

[1] The City has submitted an affidavit from the local library disputing this fact. The local library claims to have never authorized the Appellant to request the City's ordinances on the library's behalf.

that repeated requests are intended to disrupt other essential functions of the public agency." A public agency must sustain its refusal under KRS 61.872(6) by clear and convincing evidence. That is a heavy burden, and this Office has rarely found that a public agency has sustained its refusal by "clear and convincing evidence." *See*, *e.g.*, 17-ORD-268; 10-ORD-030; 05-ORD-152.

On appeal, the City explains that a third party is currently in possession of the City's complete code of ordinances for the purpose of digitizing them and making them available on the City's website. The City started this project to make its ordinances more easily available to the public free of charge. To comply with the request, the City would have to stop the digitization process, retrieve all of the ordinances, and then copy them. Such action would result in copying thousands of pages, when the same material will soon be available digitally and free of charge. The City had already informed the Appellant, by letter dated January 7, 2022, that the ordinances would be digitized.[2] Yet he still requested copies of all the ordinances approximately one month after receiving this notice from the City.

Moreover, the City has provided actual evidence, in the form of a timeline and supporting documentation regarding several previous requests submitted by the Appellant, where he has failed to pick up the records that he requested, or where has had waited several months before picking up the records. *See, e.g.*, 15-ORD-015 (finding that a requester's history of repeatedly failing to retrieve requested records constituted evidence of the requester's intent to disrupt the agency). For one example, the City provides proof that the Appellant previously requested records in November 2016, failed to pick them up, and then submitted a duplicative request approximately nine months later. In a previous appeal between these two parties, this Office held that the City could require the Appellant to come to its headquarters to pick up requested records because the Appellant's principal place of business is in the City. *See* 17-ORD-001. Yet after this Office's decision, the Appellant has continued to submit requests to the City and failed to retrieve the requested records, leaving

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[2] Although the Appellant claims he has been attempting to obtain these ordinances since "January 2022," the only request he submitted as part of his appeal was dated February 8, 2022. The City's January 7, 2022 letter was delivered a month before the Appellant's February 8, 2022 request. The Appellant did not attach previously submitted requests for these ordinances, and therefore any issues regarding those previous requests are not before this Office. *See* KRS 61.880(2)(a) (requiring the requester to submit a copy of the request being appealed, and the agency's response). Instead, the City provides the January 7, 2022 letter in which it informed the Appellant about the digitization process, as evidence in support of its denial.

the City to shoulder the copying expenses. In yet another example, this Office found in a previous appeal that the City had not violated the Act when it denied one of the Appellant's requests for records that did not exist in the City's possession. *See* 17-ORD-226. But just one month after that decision, the Appellant submitted the same request to the City for the same records—records that he knew did not exist in the City's possession. More recently, the City provides proof that in August 2020, and again in April 2021, the Appellant failed to pick up requested records for eight to nine months.[3]

The Appellant's pattern of failing to retrieve records is only one factor to consider. These records are in the process of being digitized and made available to the public for free electronically—a fact that the Appellant knew at the time of the request. The Appellant's requests have caused the City to incur the prepaid expenses of copying thousands of pages, yet he has a history of failing to retrieve the records. Accordingly, the City has met its burden with clear and convincing evidence that this request is intended to disrupt the City's important work of digitizing its ordinances.

As stated previously, this Office rarely finds that an agency has sustained its burden under KRS 61.872(6). However, these are unique facts. Had the City failed to sustain its refusal by clear and convincing evidence, including a recitation of the specific history relevant here, the City would not have carried its burden under the Act.[4] But the City has done so, and this Office finds that the City properly invoked KRS 61.872(6) to deny the Appellant's request.

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[3] Although some of these events happened several years ago, the City provides proof that the Appellant has made requests more recently and failed to retrieve the requested records or waited several months before retrieving them. A requester's failure to pick up records once several years ago may not serve as clear and convincing evidence that he is intending to disrupt the daily functions of the agency today. But a pattern of such conduct is relevant, even if that pattern began several years ago.

[4] The Office pauses here to note that while the City did not invoke KRS 61.872(5), it probably could have. Under KRS 61.872(5), a public agency may delay the requester's inspection if the requested records are in "active use." In that case, the agency must invoke the statutory provisions, state the specific cause of delay, provide an explanation, and state the earliest date on which the records will be available for inspection. If a public agency cannot provide requested records because they are in "active use" as they are being digitized, the public agency could justifiably invoke KRS 61.872(5) to delay access to the records so long as the agency explains how the digitization process will be disrupted, and provides the earliest date on which the specifically requested records would be available.

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.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
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Distributed to:

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