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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000152-MR

CITY OF TAYLORSVILLE ETHICS COMMISSION;
LYNN MCINTOSH, ETHICS COMMISSION ADMINISTRATOR;
CITY OF TAYLORSVILLE; AND CITY OF TAYLORSVILLE,
CITY CLERK, STEVE BIVEN APPELLANTS

v. APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 17-CI-00100

LAWRENCE TRAGESER

APPELLEE

OPINION
AFFIRMING AND REMANDING

** ** * * * * *

BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

JONES, JUDGE: The Appellants, the City of Taylorsville Ethics Commission;

Lynne McIntosh,¹ the Ethics Commission Administrator for the City of

¹ There is a discrepancy in the spelling of the appellant's name. "Lynn" appears on the Notice of Appeal, but the circuit court pleadings, including her own signature, show the correct spelling to be "Lynne." Throughout the body of this opinion, we shall refer to the appellant as "Lynne."

Taylorsville; Steve Biven, the Clerk for the City of Taylorsville; and the City of Taylorsville (collectively referred to herein as “the City”), appeal the circuit court’s dismissal of the City’s complaint against Lawrence Trageser and its award of statutory penalties and attorney’s fees to Trageser for willfully withholding documents responsive to Trageser’s Open Records Act (“ORA”) request in bad faith. Having reviewed the record and being otherwise sufficiently advised, we affirm. Additionally, at the request of Trageser, we remand this matter for entry of a supplemental award of attorney’s fees representing the fees incurred as part of this appeal. *See Commonwealth, Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875, 884 (Ky. App. 2012).

I. BACKGROUND

For many years, Trageser has maintained a website on which he posts news and commentary, primarily focused on issues relating to Spencer County, the City, and local government officials. Trageser often employs Kentucky’s ORA to obtain documents from the City for use on his website. The instant dispute arose due to Trageser’s efforts to obtain documents related to a 2016 ethics complaint involving the City and three of its Commissioners, and his subsequent use of some additional documents he obtained outside the ORA process.

In 2016, City Clerk Biven submitted an ethics complaint to the City’s Ethics Commission against three City Commissioners: Ellen Redman, Kathy

Spears, and Beverly Ingram. The City Commissioners submitted written responses to Lynne McIntosh, the City's Ethics Administrator. On December 28 and 29, 2016, Administrator McIntosh sent separate letters to the three Commissioners concluding the ethics inquiries. The text of the letters made clear that the Ethics Commission based its decisions, in part, on the substance of the Commissioners' individual written responses to Administrator McIntosh. The City made Clerk Biven's complaint as well as the Ethics Commission's final decisions public. However, the Commissioners' individual written responses to Administrator McIntosh were not among the documents the City made public.

On February 9, 2017, Trageser submitted an ORA request to the Ethics Commission seeking copies of the Commissioners' written responses to Administrator McIntosh. The Ethics Commission, through the City Attorney, denied the request by letter dated February 14, 2017. Without additional explanation, the Ethics Commission claimed the records were exempt because they contained personal information and were preliminary drafts. Trageser appealed the denial of his ORA request to the Attorney General. On May 16, 2017, the Attorney General issued an opinion concluding that the documents should have been disclosed to Trageser.

On June 14, 2017, the City filed suit against Trageser in Spencer Circuit Court.² In addition to appealing the Attorney General's decision, the City sought compensatory and punitive damages against Trageser on the ground that he violated the City's rights by obtaining and publishing on his website a copy of an August 29, 2016 interoffice memorandum from Clerk Biven to the City Commissioners. While it is unclear exactly how Trageser obtained the document, it is undisputed that it was not obtained through the ORA.

Trageser moved for summary judgment as to the Attorney General appeal, and for dismissal for failure to state a claim on the City's direct claims against him for money damages. Trageser also requested the circuit court award him attorney's fees based on the City's willful violations of the ORA in objecting to his requests and failing to timely turn over the requested documents to him. The City maintained that it properly withheld the documents under the ORA and was entitled to relief for Trageser's publication of the memorandum he obtained outside of the ORA process. The City also moved to strike Trageser's memorandum in support of his motion for summary judgment on the ground that Trageser improperly cited to and relied on the OAG opinion. The circuit court denied the

² The City did not serve Trageser with its complaint until December 4, 2017. The reason for the delay is not apparent from the face of the record.

City's motion to strike and entered an opinion and order in Trageser's favor on August 10, 2018.

As to the appeal of the Attorney General opinion, the circuit court concluded the requested documents were not exempt from disclosure. The circuit court then took up the City's claim against Trageser for obtaining and publishing the August 29, 2016 interoffice memorandum outside the ORA process. The circuit court concluded that the City failed to state a claim upon which relief could be granted because the ORA was not designed to provide an avenue of attack against a person who obtained and used documents independent of the ORA. The circuit court designated its opinion and order as final and appealable.

Trageser moved to convert the opinion and order to an interlocutory order pending a decision on his request for an award of attorney's fees and penalties under KRS³ 61.882(5). The circuit court granted the requested relief. After a December 6, 2018 hearing, the circuit court entered an "order and final judgment" awarding Trageser attorney's fees and statutory penalties under KRS 61.882(5).⁴

This appeal followed.

³ Kentucky Revised Statutes.

⁴ The circuit court ordered the City to pay Trageser \$12,037.00 in attorney's fees, as well as a statutory penalty of \$25.00 per day for each day Trageser was denied the right to inspect or copy the records until such time as he was provided access to the records, for a total penalty of \$16,500.00.

II. ANALYSIS

A. *The City's Motion to Strike any Reference to the Attorney General's Opinion*

Trageser attached the Attorney General's opinion to his memorandum in support of his motion to dismiss/motion for summary judgment; the body of his memorandum also cited to the Attorney General opinion. Citing *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the City moved the circuit court to strike Trageser's memorandum. The City argued inclusion of the Attorney General opinion was improper because the Supreme Court of Kentucky held in *City of Fort Thomas* that "[t]he Circuit Court does not review and is not in any sense bound by the Attorney General's decision, nor is it limited to the 'record' offered to the Attorney General." *Id.* at 848. The circuit court denied the City's motion to strike as part of a hearing it held on March 8, 2018; it memorialized its decision by including a handwritten notation that the motion was denied. The notation was made on a docket sheet calendar entry page bearing the judge's signature and the date at the bottom of the page.

As a preliminary matter, the City asserts that there is no written order with findings of fact from the circuit court ruling on its motion to strike. However, no formal findings of fact are required when a circuit court rules on a non-dispositive motion, like a motion to strike. *See* CR⁵ 52.01 ("Findings of fact and

⁵ Kentucky Rules of Civil Procedure.

conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or *any other motion* except as provided in Rule 41.02.”) (emphasis added).

Moreover, the docket sheet notation is sufficient to satisfy any requirement for a written ruling on the motion to strike. It states that the circuit court denied the motion and is dated and signed by the judge.

Substantively, the City argues that the circuit court should have granted its motion and refrained from reviewing or referencing the Attorney General’s opinion. We disagree. In *City of Fort Thomas*, the Supreme Court of Kentucky merely explained the standard of review a circuit court should apply when tasked with deciding an ORA dispute. The Court explained the process as follows:

To begin, it is helpful to observe that when an agency denies an ORA request, the requester has two ways to challenge the denial. He or she may, under KRS 61.882, file an original action in the Circuit Court seeking injunctive and/or other appropriate relief. Alternatively, under KRS 61.880, he or she may, as was done in this case, ask the Attorney General to review the matter. Once the Attorney General renders a decision either party then has thirty days within which to bring an action pursuant to KRS 61.882(3) in the Circuit Court. Although the statutes refer to this second type of Circuit Court proceeding as an “appeal” of the Attorney General’s decision, it is an “appeal” only in the sense that if a Circuit Court action is not filed within the thirty-day limitations period, the Attorney General’s decision becomes binding on the parties and enforceable in court. Otherwise, this second sort of Circuit Court proceeding is an original action just like the first sort. KRS

61.880(5)(a) (The appeal is to be treated “as if it were an action brought under KRS 61.882.”). The Circuit Court does not review and is not in any sense bound by the Attorney General’s decision, nor is it limited to the “record” offered to the Attorney General. KRS 61.882(3) (The circuit court is to “determine the matter *de novo*”). The agency, rather, bears the burden of proof, *id.*, and what it must prove is that any decision to withhold responsive records was justified under the Act. *Bowling v. Lexington-Fayette Urban County Gov’t.*, 172 S.W.3d 333 (Ky. 2005). Its proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld. *See, e.g., Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992) (agency’s proof included verified catalog of file’s contents and affidavit by person who examined file describing the contents); *and cf. McDonnell v. United States*, 4 F.3d 1227 (3rd Cir. 1993) (discussing the importance of agency affidavits to explain claims of exemption in typical cases under the Freedom of Information Act). The trial court may also hold a hearing if necessary, *Bowling*, and the parties may request or the court on its own motion may require the *in camera* inspection of any withheld records. KRS 61.882(3). We review the trial court’s factual findings for clear error, and issues concerning the construction of the ORA we review *de novo*. *Commonwealth, Department of Corrections v. Chestnut*, 250 S.W.3d 655 (Ky. 2008).

City of Fort Thomas, 406 S.W.3d at 848-49 (footnote omitted).

We have carefully reviewed *City of Fort Thomas* in conjunction with the ORA. Having done so, we are confident the Supreme Court of Kentucky was merely reaffirming that the circuit court’s review from an Attorney General

opinion in an ORA matter is *de novo*. *De novo* review is defined as “a court’s nondeferential review of an administrative decision, [usually] through a review of the administrative record plus any additional evidence the parties present.”

Review, BLACK’S LAW DICTIONARY (11th ed. 2019). We do not believe the Supreme Court meant to hold that the circuit court is precluded from viewing or citing to the Attorney General’s opinion in conjunction with its review. Rather, it was simply explaining that the circuit court was not bound by the Attorney General’s opinion or required to afford it any deference. In fact, the Supreme Court itself routinely references Attorney General opinions when reviewing ORA appeals. *See Utility Management Group, LLC v. Pike County Fiscal Court*, 531 S.W.3d 3 (Ky. 2017); *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013); *Commonwealth, Dep’t of Corrections v. Chestnut*, 250 S.W.3d 655 (Ky. 2008).

The Attorney General’s opinion is part of the administrative record. It was entirely permissible for Trageser to cite and include the opinion in his memorandum. While the circuit court was not limited to the record before the Attorney General nor bound by its opinion in any way, it was not error for the circuit court to allow the opinion to remain in the record. In fact, the circuit court could have adopted the Attorney General’s opinion if it independently agreed with

the logic expressed in the opinion so long as it recognized that it was not bound to do so.

B. Dismissal of the City's Money Damages Complaint Against Trageser

The City's complaint against Trageser alleged that Trageser obtained and published on his website a copy of an August 29, 2016 interoffice memorandum from Clerk Biven to the City Commissioners. According to the City, the memorandum was marked "DRAFT" and concerned sensitive personnel-related information about specific named employees and their performances. The City alleges that Trageser is well-versed in the ORA and knew or should have known that the memorandum was exempt from disclosure under the ORA. The City argues that Trageser's release of the document "created turmoil and adversely effected [sic] moral [sic] of [the] individuals named in the 'posted' Memo as well as to the other City employees and staff, which cost the City and its taxpayers in the loss of production time and other cost[s] such as legal fees, in having to deal with the public posting of the exempt document." Appellants' Brief at 17. The City asserted that it was entitled to compensatory and punitive damages.

Although a bit unclear, the City's first argument appears to be that the circuit court did not address its motion to compel Trageser to answer certain interrogatories it served on him on or about February 13, 2018, before dismissal of the City's claim. Instead of ruling on the motion to compel, the circuit court held

the motion in abeyance pending a decision on Trageser's motion to dismiss. It was not error for the circuit court to hold discovery in abeyance pending a decision on the motion to dismiss. A motion to dismiss should only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977) (citation omitted). Because motions to dismiss are decided as a matter of law based on the allegations in the pleadings, discovery is not generally necessary. Having carefully examined the record, we cannot see how the requested discovery was necessary for the circuit court to determine whether the City pleaded a legally viable claim against Trageser.

The City argued that it asserted a proper claim against Trageser pursuant to KRS 446.070, which provides: "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." The problem with this argument is that the ORA does not provide that it is the *exclusive* means through which a member of the public may obtain government records. It is designed to assist members of the public in obtaining government records. In turn, it describes various categories of documents government officials are not required to release.

The ORA is a statute that provides one mechanism for members of the general public to obtain government records through an official and orderly channel. The statute is designed to assist the public. Nowhere does the statute prohibit a member of the public from publishing a government document obtained by other means even if the document falls within one of the exemptions listed under the statute. The ORA does not provide a remedy to the City or to any government entity to seek civil damages for the publication of a document, even one exempt under the ORA. To put the matter a different way, the government can use the ORA as a shield; it cannot use it as a sword. The circuit court correctly dismissed the City's claim against Trageser.

C. Statutory Penalties & Attorney's Fees

The City does not contest the circuit court's conclusion that the documents Trageser sought were not exempt from disclosure as the City initially maintained. It does, however, assert that the circuit court erred in awarding Trageser statutory penalties and attorney's fees based on the City's decision to withhold the documents.

KRS 61.882(5) governs the award of attorney's fees, costs, and penalties in ORA actions. It provides:

Any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of KRS 61.870

to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof. In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said public record. Attorney's fees, costs, and awards under this subsection shall be paid by the agency that the court determines is responsible for the violation.

Id.

“A public agency's mere refusal to furnish records based on a good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Act.” *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 343 (Ky. 2005) (citation omitted). “More is required to trigger this sanction [under KRS 61.882(5)] than the erroneous denial of an ORA request.” *City of Fort Thomas*, 406 S.W.3d at 854. As used in KRS 61.882(5), “‘willful’ connotes that the agency withheld requested records without plausible justification and with conscious disregard of the requester's rights.” *Id.*

The circuit court's “decision on the issue of willfulness is a finding of fact and, as such, will not be disturbed [on appeal] unless clearly erroneous.” *Cabinet for Health and Family Services v. Courier-Journal, Inc.*, 493 S.W.3d 375, 384 (Ky. App. 2016) (quoting *Bowling*, 172 S.W.3d at 343-44). “If the circuit

court awards attorneys' fees, costs, or penalties, the amount thereof is within the discretion of the circuit court and may be only disturbed on appeal when an abuse of discretion is manifest." *Id.* (citing *City of Fort Thomas*, 406 S.W.3d at 854).

The circuit court did not simply order penalties and attorney's fees out of the blue and without explanation. First, Trageser made it very clear that he was seeking attorney's fees and penalties in his March 6, 2018 memorandum, a request he renewed in August 2018, well before the December 2018 hearing. The City was well aware of the purpose of the December 2018 hearing, and could have produced whatever evidence it desired on the willfulness issue at or before that time. It is disingenuous for the City to maintain that the circuit court did not afford it with notice and an opportunity to be heard prior to deciding whether statutory penalties were in order.

Following the hearing, the circuit court explained its findings on the City's willful withholding in detail. It stated as follows:

The Court is well aware of the City of Taylorsville's ongoing pattern of non-compliance with Open Records Act requests submitted by Trageser. In this case, the City and its Ethics Commission wrongfully withheld public records from Trageser without a good faith basis or plausible justification, and they continued in a pattern of improperly denying and delaying Trageser's exercise of rights under the Open Records Act. The Court finds that the City of Taylorsville and its Ethics Commission willfully withheld the records at issue in this matter in violation of the Open Records Act in bad faith, beginning

with the initial denial of Trageser's Open Records Act request on February 14, 2017.

Equally troubling is the fact that the Plaintiffs also brought an unfounded claim in this case for compensatory and punitive damages against Trageser in an apparent attempt at intimidation to dissuade him from further exercising his rights under the Open Records Act in this case and in future cases. This court finds this tactic by the City and its Ethics Commission to be in bad faith and designed to subvert the intent and purpose of the Open Records Act.

The Court hereby awards to Trageser reasonable attorney's fees, and statutory penalties pursuant to KRS 61.882(5). Based upon the affidavit of Trageser's counsel, the Court awards the sum of \$12,037 in reasonable attorney's fees and costs. In addition, the Court further awards the statutory penalty of \$25 per day for each day Trageser has been denied the right to inspect or copy the public records at issue in this case, beginning on February 14, 2017 and continuing until the time the City of Taylorsville and its Ethics Commission provide complete unredacted copies of the public records to Trageser. As of the date of the last hearing in this case, December 6, 2018, that has been 660 days, for a total penalty of \$16,500 and continuing to accumulate at the rate of \$25 per day.

(Record 161-62).

At the time the circuit court awarded Trageser attorney's fees and statutory penalties, his ORA request had been pending for approximately two years. In that time, the City responded to the request with vague and mostly inapplicable objections, appealed to the OAG, and brought suit in the circuit court. The City delayed serving its complaint on Trageser for some time delaying final

resolution even longer. The circuit court properly considered these facts. Additionally, the circuit court properly factored in the City's specious claim against Trageser for compensatory and punitive damages, which it brought as part of the same action. Having reviewed the record, we are confident the circuit court's determination that the City willfully withheld the requested documents is supported by substantial facts in the record. We do not believe the circuit court abused its discretion in either the fact or amount of the penalties assessed against the City.

This brings us to the City's final argument. It maintains that it was improper for the circuit court to order the City of Taylorsville to pay the penalties because the Ethics Commission withheld the documents, not the City itself. The Ethics Commission is merely a division of the City of Taylorsville. The City is the ultimate entity. We find no error with respect to the wording of the judgment entered by the circuit court.

In light of our decision, and per Trageser's request, we remand this matter to the circuit court for a supplemental award of attorney's fees and costs incurred on appeal. Under KRS 61.882(5), upon a showing of a willful withholding, Trageser is entitled to any fees and costs "incurred in connection with the legal action," which would necessarily include fees and costs incurred in defending the judgment on appeal. *Lexington H-L Services, Inc.*, 382 S.W.3d at

884. Since Trageser has requested a determination on this issue, remand is appropriate. *Id.*

III. CONCLUSION

For the foregoing reasons, the decision of the Spencer Circuit Court is affirmed, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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