COMMONWEALTH OF KENTUCKY
SUPREME COURT
APPEAL NO. 2006-SC-000086-D

FILED
JUL 10 2006
CLERK
SUPREME COURT

DEPARTMENT OF CORRECTIONS,
WESTERN KENTUCKY CORRECTIONAL COMPLEX — APPELLANTS

v. — APPEAL FROM COURT OF APPEALS
APPEAL NO. 2004-CA-1497-MR

BOBBY CHESTNUT — APPELLEE

BRIEF FOR APPELLANTS

Respectfully submitted,

EMILY DENNIS
Justice and Public Safety Cabinet
Office of Legal Services
125 Holmes Street, Second Floor
Frankfort, Kentucky 40601
502-564-3279

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that the original and nine true and correct copies of the foregoing Brief for Appellants was hand-delivered this the 10th day of July, 2006 to the Clerk of the Supreme Court, 209 Capitol Bldg., 700 Capitol Avenue, Frankfort, Kentucky 40601 for filing; and that a true and correct copy of said brief was mailed, first class mail, postage prepaid, this 10th day of July, 2006 to the following: Hon. Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. William L. Graham, Judge, Franklin Circuit Court, Division II, Franklin County Courthouse, 214 St. Clair Street, Frankfort, KY 40601; Hon. James L. Ringo, Assistant Attorney General, Capitol Building, Suite 118, 700 Capitol Avenue, Frankfort, KY 40601; and Mr. Bobby Chestnut, # 124460, Blackburn Correctional Complex, 3111 Spurr Rd., Lexington, KY 40511.

COUNSEL FOR APPELLANTS

I. INTRODUCTION

This case arises out of a Kentucky correctional institution's response to an inmate's open records request for a copy of, in its entirety, "my file." Reversing several open records decisions holding otherwise, with no notice or opportunity for the Appellants to be heard regarding a novel interpretation of the Kentucky Open Records Act, the Office of Attorney General decided that Kentucky correctional institutions must now honor non-specific requests from inmates for copies of entire files maintained on them as a result of their incarceration. The Franklin Circuit Court overruled Appellants' appeal and affirmed the Attorney General's decision, with no hearing and despite the fact that Appellee (who was at that time a parolee) failed to file a responsive memorandum of law pursuant to Court Order. On appeal, the Court of Appeals affirmed the Franklin Circuit Court, applying a standard of review which would require Appellants to present conclusive proof that compliance with the request constitutes an unreasonable burden.[1] Appellants then sought discretionary review, which this Court granted.

II. STATEMENT CONCERNING ORAL ARGUMENT

The Appellants respectfully request that the Court set this case for oral argument since this case offers issues of first impression before the Court. Specifically, the Court will be asked to determine whether the open records decision rendered by the Attorney General's Office was arbitrary. Secondly, the Court will be asked to determine whether the Appellants demonstrated to the Franklin Circuit Court that compliance with inmate requests for copies of "my entire file" constitutes an unreasonable burden. At no time in this proceeding have the Appellants been heard on oral argument. There is no Kentucky law on point for these issues. Oral argument will serve to clarify any issue for which the Court has questions after reading the parties' briefs.

[1] See attached Appendix 1: Court of Appeals decision rendered 12/29/2005; Appendix 2: Franklin Circuit Court Opinion and Order entered 06/28/2004; and Appendix 3: Open Records Decision 03-ORD-117 dated 05/19/2003.

III. STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT i

STATEMENT OF POINTS AND AUTHORITIES .... ii-v

STATEMENT OF THE CASE 1-3

KRS 61.872(2) 1,2

KRS 61.882(3) 2

ARGUMENT 3-21

I. THE COURT OF APPEALS IMPROPERLY FOUND THE ATTORNEY GENERAL'S ARBITRARY DECISION IN 03-ORD-117 TO BE PERSUASIVE AUTHORITY SUPPORTIVE OF A RULING AGAINST THE APPELLANTS 3-10

A. The Attorney General's opinion in 03-ORD-117 constitutes an arbitrary administrative agency decision. 4-9

Hougham v. Lexington-Fayette Urban County Government, 29 S.W.3d 370, 373 (Ky. App. 1999) 4

American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450, 456 (Ky. 1964) 4

1. The Office of Attorney General acted outside the statutory authority of KRS 61.880(5)(b) by failing to rationally explain its departure from prior opinions relating to access to inmate file records. 4-6

KRS 61.880(5)(b) 4,5

In re Appeal of Hughes & Coleman, 60 S.W.3d 540, 543 (Ky. 2001) 5

KRS 61.872 6

KRS 61.880(1) 6

2. The Office of Attorney General failed to provide Appellants with notice of its new interpretation of the law and opportunity to respond. 7-8

40 KAR 1:030 7

40 KAR 1:030, Section 4 7

KRS 61.872(6) 7

Medley v. Board of Education of Shelby County, 168 S.W.3d 398, 402 (Ky. App. 2004) 7

Palmer v. Driggers, 60 S.W.3d 591 (Ky. App. 2001) 7

York v. Commonwealth, 815 S.W.2d 415 (Ky. App. 1991) 7

Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 612 (Ky. 2004) 8

Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky. App. 1998) 8

B. Appellants' response to Appellee's request complied with the Kentucky Open Records Act. 8-10

KRS 61.870(2) 8, 10

KRS 61.872(2) 9, 10

KRS 61.872(3)(b) 9, 10

Hoy v. Kentucky Industrial Revitalization Authority, 907 S.W.2d 766, 768 (Ky. 1995) 9

Layne v. Newberg, 841 S.W.2d 181, 183 (Ky. 1992) 9

Beckham v. Board of Education of Jefferson Co., 873 S.W.2d 575, 577 (Ky. 1994) 9

II. THE COURT OF APPEALS ERRED BY FINDING THAT APPELLANTS FAILED TO DEMONSTRATE TO THE FRANKLIN CIRCUIT COURT THAT PROVIDING STATE INMATES COPIES OF ENTIRE FILED UPON REQUEST CONSTITUTES AN UNREASONABLE BURDEN 11-22

A. The Franklin Circuit Court erred by finding that speculative evidence was necessary to substantiate an unreasonable burden under KRS 61.872(6). 11-13

KRS 61.872(6) 11, 12

KRS 61.882(3) 11

KRS 61.878(1)(l) 13

KRS 197.025 13

KRS 439.510 13

B. The Court of Appeals improperly applied an abuse of discretion standard of review. 14-16

CR 52.01 14

Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822, 824 (Ky. 1975) 14

Fayette County Bd. of Educ. v. M.R.D. ex rel K.D., 158 S.W.3d 195 (Ky. 2005) 14

40 KAR 1:030 15

KRS 61.880(5)(b) 15

KRS 61.872(6) 15

KRS 61.882(3) 15

Miller v. Eldridge, 146 S.W.3d 909, 915 (Ky. 2004) 15

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) 15

C. Substantial evidence supports Appellants' argument that compliance with Appellee's request constitutes an unreasonable burden under KRS 61.872(6). 16-21

KRS 61.878(1)(l) 16,18,19

KRS 197.025(1) 16,18,20

KRS 197.025 18

KRS 197.025(2) 18

KRS 197.025(4) 18

KRS 61.872 18

KRS 421.530 18

KRS 61.878(1)(a) 18

KRS 61.878(1)(i) 19

KRS 61.878(1)(j) 19

KRS 61.878(1)(k) 19

28 U.S.C. § 534 19

KRS 439.510 19,20

Commonwealth v. Bush, 740 S.W.2d 943 (Ky. 1987) 20

Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 2260, 96 L.Ed.2d 64 (1987) 20

Pell v. Procunier, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974) 20

Smith v. O'Dea, 939 S.W.2d 353, 358 (Ky. App. 1997) 21

KRS 61.872(6) 21

CONCLUSION 21-22

KRS 61.882(5) 21

KRS 61.872(6) 21,22

KRS 61.872(3)(b) 22

APPENDIX

STATEMENT OF THE CASE

In April 2003, Appellee Bobby Chestnut was one of the six hundred plus (600+) state inmates housed at Western Kentucky Correctional Complex (hereinafter "WKCC"). On 4/10/2003, Mr. Chestnut submitted the following open records request at WKCC:

> "An entire copy of my inmate file excluding any documents that would be considered confidential. Specifically beginning with date of entrance into the Department of Corrections in October of 1996 until the current date." (T.R. 105)

WKCC's appointed open records coordinator, Ellen Cockerham, received Mr. Chestnut's request. In addition to her duties as the designated open records coordinator for WKCC, she served as offender information supervisor, custodian of more than six-hundred (600) WKCC institutional inmate record folders. Keeping current the records contained in the institutional inmate files was and remains only one of the many responsibilities of an offender information supervisor or specialist at a Kentucky adult correctional institution (See Affidavit of Ellen Cockerham at T.R. 139-141).[2] Upon receipt of Appellee's request, Ms. Cockerham immediately responded as follows:

> "Your request is too broad and overly vague. KRS 61.872(2) states in part, 'The official custodian may require written application describing the records requested.' This means you must describe the records (forms) with reasonable particularity, so that the records can be identified."(T.R. 105) [3]

Appellee then amended his request to specifically identify several types of records contained in an institutional inmate file (T.R. 108).[4] Appellee knew many of the records he sought to obtain because copies of these records had been provided to him during his incarceration, as final agency action had been taken. In response to his amended request, Ms.

[2] Ms. Cockerham's Affidavit is also attached as Appendix 13.
[3] See attached Appendix 4: Open Records Request and Response dated 04/09/2003.
[4] See attached Appendix 5: Open Records Request dated 04/10/2003 (rcvd. on 04/11/2003).

Cockerham provided Appellee with one-hundred thirty-eight (138) documents from the institutional inmate record folder in her custody, denying only that portion of the request in which Appellee requested "... any and every document contained within my file from the front cover to the back" (T.R. 108-110). [5]

Dissatisfied with the first response received from Ms. Cockerham, however, Mr. Chestnut simultaneously appealed WKCC's initial response. In his letter to the Attorney General, Appellee alleged that the Appellants (KY DOC and WKCC) had violated KRS Chapter 61 by initially denying his request for copies of his entire inmate file, excluding confidential documents. Appellee further claimed that Appellants had violated his right to access public records by responding with the statement that his request was too broad and overly vague and asserted his request was sufficiently specific to require Appellee to compile documents from his inmate file (T.R. 107).[6]

Relying on KRS 61.872(2) and prior decisions of the Attorney General affirming public agency denials of nonspecific requests for access to inmate file records, Appellants argued that Ms. Cockerham's response to Appellee's request complied with the Kentucky Open Records Act. (T.R. 111-113)[7] The Attorney General rejected this argument. Providing Appellants with no notice and reversing a long line of open records decisions holding otherwise, the Attorney General informed Appellants they must now honor nonspecific requests for copies of an "inmate file"(T.R. 91-104).[8]

Appellants timely appealed 03-ORD-117 to the Franklin Circuit Court (T.R. 1-17). Pursuant to KRS 61.882(3), a circuit court shall determine an open records appeal "de novo."

---

[5] See attached Appendix 6: WKCC's response dated 04/17/2003.
[6] See attached Appendix 7: Open Records Appeal dated 04/10/2003.
[7] See attached Appendix 8: Agency response to open records appeal dated 04/28/2003.
[8] See Appendix 3: O3-ORD-117.

By Order entered 6/12/2003, Franklin Circuit Judge William L. Graham established a briefing schedule for the case (T.R. 19). In compliance with Judge Graham's Order, Appellants filed a Memorandum of Law on 8/29/2003 (T.R. 74-173). Appellee, having been released on parole 7/01/2003, did not file a brief or make any argument to oppose the Appellants' argument. Appellants noticed submission of the case more than sixty (60) days following the last date the Appellee's brief was due (T.R. 176-177). By Opinion and Order entered 6/28/2004, the Franklin Circuit Court overruled Appellants' appeal, affirming the Attorney General's decision (T.R. 182-187).[9] On or about 7/10/2004, Appellee notified Appellants' counsel that he was lodged at the Logan County Detention Center. Appellee was returned to state custody due to a new sentence on 11/17/2004. On appellate review, the Court of Appeals affirmed the Franklin Circuit Court, specifically finding the reasoning of the Attorney General and Circuit Court "more persuasive" and holding that the Appellants failed to introduce evidence "so conclusive at the trial level as to compel a finding in their favor."[10] The Appellants seek reversal of this ruling.

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY FOUND THE ATTORNEY GENERAL'S ARBITRARY DECISION IN 03-ORD-117 TO BE PERSUASIVE AUTHORITY SUPPORTIVE OF A RULING AGAINST THE APPELLANTS.

The Court of Appeals improperly found the reasoning of the Attorney General as "more persuasive" than the Appellants' argument.[11] The Court of Appeals' holding was in error as it adopted an arbitrary administrative agency decision in 03-ORD-117 and demonstrates failure by the Court of Appeals to provide Appellants a true *de novo* review of questions of law.

---

[9] Attached as Appendix 2.

[10] See attached Appendix 1: Court of Appeals decision rendered 12/29/2005; Appendix 2: Franklin Circuit Court Opinion and Order entered 06/28/2004; and Open Records Decision 03-ORD-117 dated 05/19/2003.

[11] See Appendix 1 at p. 10.

A. The Attorney General's opinion in 03-ORD-117 constitutes an arbitrary administrative agency decision.

To determine whether an administrative agency decision is arbitrary, a reviewing court must consider the following factors: (1) whether the administrative agency acted within its statutory powers; (2) whether due process was afforded; and (3) whether the decision reached was supported by substantial evidence. Hougham v. Lexington-Fayette Urban County Government, 29 S.W.3d 370, 373 (Ky. App. 1999) (citing American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450, 456 (Ky. 1964). In this case, the open records decision by the Office of Attorney General in 03-ORD-117 as affirmed by the Franklin Circuit Court and Court of Appeals was arbitrary due not only to the Attorney General's failure to act within the confines of statutory power granted KRS 61.880(5)(b) but also due to the Attorney General's failure to provide adequate due process protection to Appellants who were adversely affected by the outcome of the appeal.

1. The Office of Attorney General acted outside the statutory authority of KRS 61.880(5)(b) by failing to rationally explain its departure from prior opinions relating to access to inmate file records.

KRS 61.880(5)(b) provides that an Attorney General's decision regarding an open records appeal has the "force and effect of law" and is enforceable in the Circuit Court where the agency maintains its principal place of business or where the record is maintained unless an appeal of the decision is filed within thirty (30) days pursuant to KRS 61.880(5)(a). Because of this statutory authority, Assistant Attorneys General considering open records appeals regard their own open records decisions as *stare decisis* for future open records appeals. That is until the attorney considering the merits of an appeal simply changes his or her interpretation of the law.

Assistant Attorney General James M. Ringo stated in 03-ORD-117:

> "We acknowledge that, based on prior decisions of this office affirming public agency denial of nonspecific requests for personnel records and inmate files, the WKCC responded in good faith that it is not obligated to honor a nonspecific request for records from an inmate file or to make a determination as to which documents contained in the file are exempt and nonexempt. However, in 03-ORD-012 this office reversed this long line of decisions and held a request for the complete personnel records of two school district employees was sufficiently specific and the school district was obligated to review the requested personnel files and disclosed all nonexempt records contained in the files. Accordingly, we find that the holding in 03-ORD-012 extends to inmate files . . . ".[12]

The Attorney General misapplied 61.880(5)(b) by simply adopting the findings of an appeal regarding access to personnel files to inmate files and failing to make findings of fact specific to the inmate's appeal. The Attorney General also failed to rationally explain the change in precedent or examine the effect of the decision on the KY DOC and Kentucky correctional facilities, making no reference to decisions involving access to inmate records, which are significantly different from personnel file records.[13]

This Court has stated, "It is axiomatic that an administrative agency either must conform to its own precedents or explain its departure from them." In re Appeal of Hughes & Coleman, 60 S.W.3d 540, 543 (Ky. 2001). "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute." Id. Extending a holding on access to personnel files to inmate files fails to take into account security issues inherent in managing inmates in a correctional setting. In 03-ORD-117, the Office of Attorney General

[12] See page 1 of Appendix 3 attached.
[13] See 03-ORD-012 attached to Appendix 3.

failed to reference, let alone consider, its prior open records decision relating specifically to overbroad requests for KY DOC records.[14]

In 00-ORD-190,[15] the Attorney General affirmed a response from the open records coordinator at Northpoint Training Center (NTC), in which NTC informed an inmate's attorney that portions of her request were " 'overly broad and non-specific'." In her open records request to NTC, Attorney Suzanne Cassidy requested a copy of an inmate's prison file. While Ms. Cassidy's request was general, the inmate had signed an authorization for release of specific forms of documents to Ms. Cassidy. The records specifically identified and not otherwise exempt from disclosure were released, but with regard to the request for the complete prison file, NTC employee Kathy Gifford informed Ms. Cassidy as follows: "The remaining portion of the request is overly broad and non-specific. KRS 61.872 provides for a specific description of the records you wish to be copied.'".[16] In her appeal, Ms. Cassidy argued that the inmate and her (his attorney of record) were entitled to receive an entire copy of the inmate file. Finding that the agency response did not violate the open records act, the Attorney General stated:

> The agency asked for clarification as to portions of her request . . . The requester ***must describe with particularity the records within the file*** she seeks. . . . The agency, should it deny access to a ***particularly described record***, should state the exception upon which it relies for the nondisclosure and provide a brief explanation as to how the cited exception applies to the record withheld. KRS 61.880(1)." (Emphasis added).[17]

The Attorney General in 03-ORD-117 made no reference to 00-ORD-190, let alone any reasonable explanation for this departure from law which was directly on point.

[14] See attached Appendix 9: 00-ORD-190 - In re: Suzanne Cassidy/ Northpoint Training Center.
[15] Attached as Appendix 9.
[16] See Appendix 9 at p.2.
[17] See Appendix 9 at p. 2.

2. The Office of Attorney General failed to provide Appellants with notice of its new interpretation of the law and opportunity to respond.

Rudimentary regulations exist for the open records appeal process. See 40 KAR 1:030.[18] Agencies receive inadequate notice and opportunity to be heard in the open records appeal process. It is not as if an agency attorney can Shepardize or KeyCite open records decisions to determine if the Attorney General's Office has changed its interpretation of the law. Appellants were provided neither notice nor an opportunity to respond before the Office of Attorney General changed a long standing interpretation that the Attorney General will hereafter consider "the law." Pursuant to 40 KAR 1:030, Section 4, the Attorney General will not reconsider a decision rendered under the Kentucky Open Records Act.[19] Given the opportunity, Appellants would have amended their response to include the argument that providing inmates access to entire files constitutes a security risk and an unreasonable burden on the KY DOC and Kentucky correctional institutions pursuant to KRS 61.872(6). The decision of the Attorney General in 03-ORD-117 was arbitrary, as the decision was not predicated by a hearing or required to meet any standard.

The ultimate irony is that the Kentucky Court of Appeals considers Attorney General's open records decisions to be " 'highly persuasive' ". Medley v. Board of Education of Shelby County, 168 S.W.3d 398, 402 (Ky. App. 2004), quoting Palmer v. Driggers, 60 S.W.3d 591 (Ky. App. 2001). The Court of Appeals will give " 'great weight to the reasoning and opinion expressed [by the Attorney General]' ". Medley at 402, quoting York v. Commonwealth, 815 S.W.2d 415 (Ky. App. 1991). Appellate Court in Kentucky interpret, construe and apply statutes

[18] See attached Appendix 10: 40 KAR 1:030. Open records and open meetings decisions.
[19] See Appendix 10.

de novo without deference to interpretations adopted by a lower court. Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 612 (Ky. 2004), see also Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky. App. 1998). The Court of Appeals improperly gave undue deference to the Attorney General's arbitrary decision, specifically finding the decision "more persuasive" than the Appellants arguments.[20] Appellants request this Court to guide lower courts away from undue deference to open records decisions by the Office of the Attorney General. Appellants urge this Court to reject an approach to this case that gives any deference to the opinion of the Attorney General in 03-ORD-117.

B. Appellants' response to Appellee's request complied with the Kentucky Open Records Act.

KRS 61.870(2) defines "public record" as " . . . all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." A "file" is not included in this definition.

In fact, there is no specific or single "inmate file" from which records or information may be gleaned. An "inmate file" is not a discreet public record from which documents may be identified, disclosed, or withheld. For each inmate assigned to the custody of the KY DOC, several files identified by the inmate's name and institutional number are created, including but not limited to an institutional file, a central office file, and a medical records file (T.R. 124-128).[21] Other files containing inmate records which are not identified by inmate name and institutional number are maintained at both the Central Office and institutional levels, such as correspondence file and grievance files.

[20] See Appendix 2 at p. 10.
[21] See attached Appendix 11: Offender Information Services Training Manual – 2002 Ed., Chapter III.

The Court of Appeals incorrectly cited KRS 61.872(2) as the provision applicable to the Appellee's request.[22] KRS 61.872(2) applies only to those persons requesting to inspect public records. To receive copies of public records, KRS 61.872(3)(b) provides that an agency's duty to mail copies is triggered when a requester "*precisely describes* the public records which are readily available within the public agency." See KRS 61.872(3)(b).

At the risk of quoting an arbitrary decision, the Attorney General's Office has interpreted KRS 61.872(3)(b) as follows:

> KRS 61.872(3)(b) places an additional burden on requesters who wish to access public records by receipt of copies through the mail. Whereas KRS 61.872(2) requires, generally, that the requester 'describe' the records he wishes to access by on-site inspection, KRS 61.872(3)(b) requires the requester to 'precisely describe' the records which he wishes to access by mail.
>
> A description is precise if it is 'clearly stated or depicted,' Webster's II, New Riverside University Dictionary 926 (1988); 'strictly defined; accurately stated; definite,' Webster's New World Dictionary 1120 (2d ed. 1974); and 'devoid of anything vague, equivocal, or uncertain.' Third New International Dictionary 1784 (1963). We believe that a requester satisfies the second requirement of KRS 61.872(3)(b) if he described in definite, specific and unequivocal terms the records he wishes to access by mail.

See 03-ORD-067, quoting 97-ORD-46, p. 3. Since Appellee's request for copies of nonconfidential parts of an inmate file was not precise - in the Attorney General's own words - definite, specific and unequivocal - Appellants correctly requested clarification from Appellee, which he was able to provide. Thereafter, Appellants provided Appellee with one-hundred thirty-eight (138) pages of records he precisely described.

Kentucky Courts are prohibited from construing provisions of the Kentucky Open Records Act in variance with its express terms. Hoy v. Kentucky Industrial Revitalization Authority, 907 S.W.2d 766, 768 (Ky. 1995), see also Layne v. Newberg, 841 S.W.2d 181, 183 (Ky. 1992). Courts " . . . are not at liberty to add or subtract from the legislative enactment nor

[22] See Appendix 1 at p. 2.

discover meaning not reasonably ascertainable from the language used." Beckham v. Board of Education of Jefferson Co., Ky., 873 S.W.2d 575, 577 (Ky. 1994). According to the express terms of KRS 61.870(2) and KRS 61.872(3)(b), it is clear that the Legislature never intended for public agencies to spend hours reviewing and copying public records in response to blanket requests for "any and all" or "each and every" record contained in a file simply because the records are contained in a file that is identified by a particular name. Appellants followed the law as it is written by informing Appellee to amend his initial overly broad request for copies of records. To the extent that Appellants initially incorrectly cited KRS 61.872(2) as the applicable provision (which applies solely to inspection of records), this is because Appellants relied on former decisions of the Office of Attorney General, which failed to draw the distinction between requests for copies as distinguished from requests to inspect public records.[23] The fact of the matter is that Appellants relied on prior decisions of the Attorney General's Office to their own peril. Appellants urge this Court to correct the Court of Appeals' misapplication of the law by finding that Appellants complied with the Kentucky Open Records Act by (1) informing the Appellee of the requirement that his request be specific; and (2) providing Appellee with records he precisely identified in his second request.[24] Anything less varies from the express terms of the Kentucky Open Records Act.

[23] See, e.g., Appendix 9.
[24] See Appendices 5 and 6.

II. THE COURT OF APPEALS ERRED BY FINDING THAT APPELLANTS FAILED TO DEMONSTRATE TO THE FRANKLIN CIRCUIT COURT THAT PROVIDING STATE INMATES COPIES OF ENTIRE FILES UPON REQUEST CONSTITUTES AN UNREASOANBLE BURDEN.

A. The Franklin Circuit Court erred by finding that speculative evidence was necessary to substantiate unreasonable burden under KRS 61.872(6).

Providing inmates copies of entire files upon request also constitutes an unreasonable burden upon the KY DOC. The Court of Appeals affirmed clear error by the Franklin Circuit Court, who interpreted burdens imposed on the Appellants in light of the Attorney General's opinion and would have required speculative evidence of unreasonable burden. Specifically, the Franklin Circuit Court found:

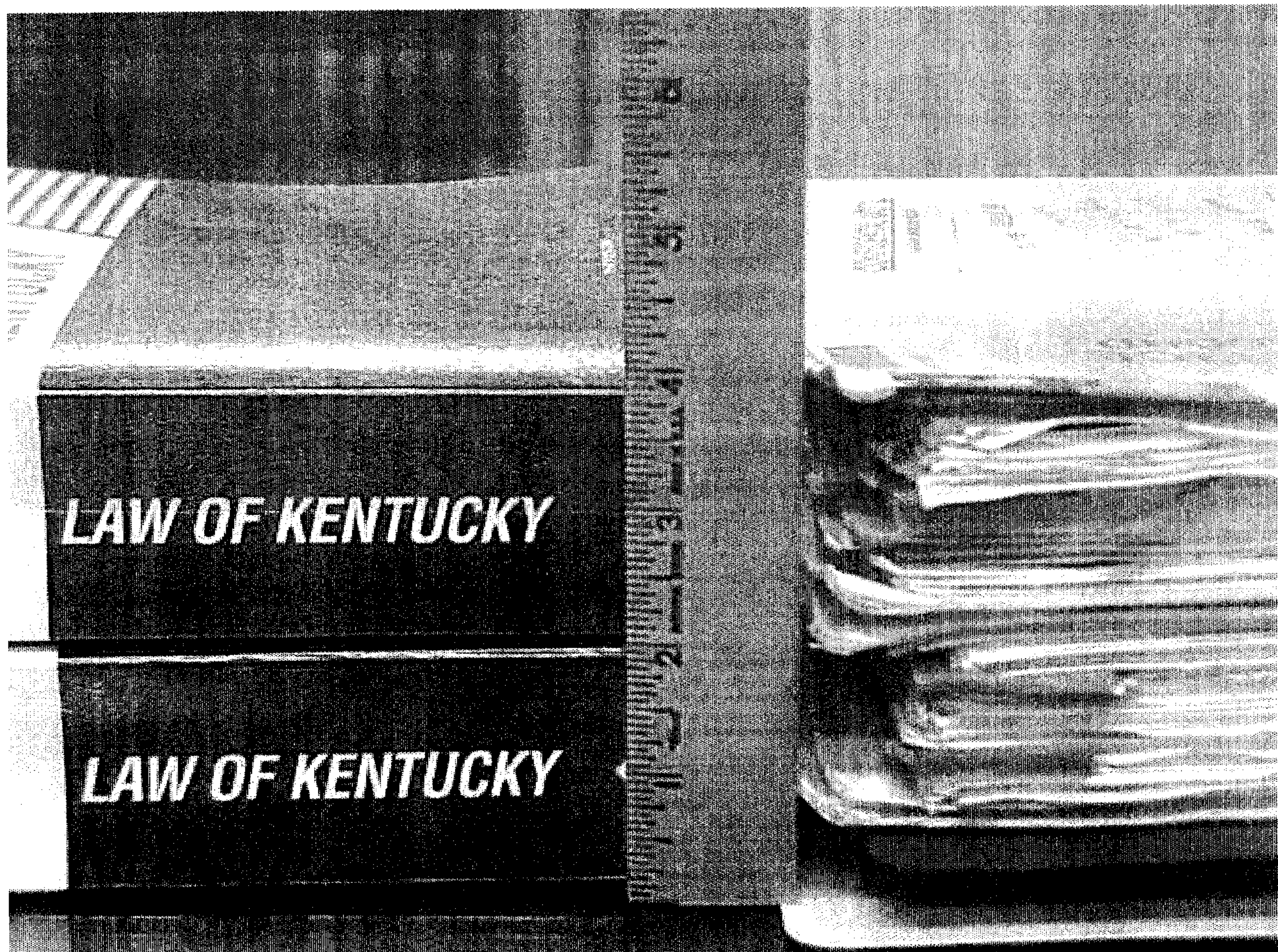
> The Plaintiffs, nevertheless, fail to prove by clear and convincing evidence that the AG's decision imposes an unreasonable burden on it. The Plaintiffs provide the Court with evidence showing that inmate records are often hundreds of pages long and that different parts of the files are located in different facilities. The Plaintiffs allege that they receive many requests by inmates to review their files and that many employees are needed to deal with these requests. The Plaintiffs also note that many statutes and laws prevent inmates from seeing parts of their files. Sorting through the files to pull out the documents that the prisoners cannot view and explaining why the documents cannot be viewed is undoubtedly tedious.
>
> The problem with the Plaintiffs' proof [of unreasonable burden] is that they do not attempt to show how the new burden will actually affect them. The Plaintiffs, for instance, do not estimate how many new employees they will have to hire to deal with the new requirement. The Plaintiffs argue that the current scheme is onerous and will become unbearable because many inmates will now request to review all of their non-confidential documents. The Plaintiffs, however, do not indicate the likelihood of this scenario, and they do not forecast what its actual burden will be. In short, the Plaintiffs fail to satisfy the clear and convincing standard under KRS 61.872(6) that the AG decision imposes an unreasonable burden on them.[25]

The Circuit Court determines open records appeals *de novo*. See KRS 61.882(3). The Franklin Circuit Court ignored Appellants' arguments regarding failure by the Office of

---

[25] See page 5 of Appendix 2 attached.

Attorney General to distinguish this case citing prior "authority" or make findings of fact specific to the agency. Appellants presented "clear and convincing" evidence to the Franklin Circuit Court that responding to non-specific open records requests from inmates constitutes an unreasonable burden on the KY DOC. See KRS 61.872(6). Specifically, Appellants described how inmate records are maintained in various "inmate files", maintained at both the institutions and at Central Office in Frankfort, KY.[26] Appellants included the photograph depicted below of the several files maintained due to the Appellee's incarceration, including at that time over six-hundred-thirty (630) records.[27]



[26] See attached Appendix 11:
[27] See Appendix 12.

The photograph above illustrates the six-hundred thirty-one (631) records in the Appellee's institutional, medical, and central office files as of August 26, 2003 (See also T.R. 84 and T.R.123). As early as 1976, when Kentucky's open records law was enacted, the Office of Attorney General recognized, "[public] agencies and employees are the servants of the people as stated in the Preamble of the Open Records Act, but they are the servants of all the people and not only of persons who may make extreme and unreasonable demands on their time," OAG 76-375, p. 4. It is unreasonable and against sound public policy to require a public agency to devote the time and energy necessary to review over six hundred documents contained in various files when the actual records sought can be (and were) identified by the requester.[28] This is especially true when the request comes from a segment of the population that uses the open records act as a means of recreation.

Appellants included the Affidavits of KY DOC employees devoted to the task of managing offender information services, of which handling open records requests is only one component, and detailed the number of open records requests received in a six-month period.[29] Appellants explained how the inmate population uses the open records act as a means of recreation or to harass prison officials. Appellants explained how the exempt records in an inmate's file are highly sensitive and exempt under provisions of law dealing with institutional security and the confidentiality of information received by probation and parole officers. See KRS 61.878(1)(l), KRS 197.025, and KRS 439.510.

[28] See Appendix 6.
[29] See Appendices 13-23: Affidavits of KY DOC employees charged with responsibility as open records coordinators as of August 2003.

B. The Court of Appeals improperly applied an abuse of discretion standard of review.

The Court of Appeals mischaracterized its review of the Franklin Circuit Court's findings of fact regarding Appellants' proof of unreasonable burden as appellate review of an administrative agency decision pursuant to CR 52.01.[30] "Under these circumstances," the Court of Appeals stated, "the test of whether its [the circuit court's] finding is clearly erroneous is not one of support by 'substantial evidence,' but rather, one of whether the evidence adduced is so conclusive as to compel a finding in his favor as a matter of law."[31] The Court went on to hold as follows, "On the basis of our review of the evidence in the record, we might not have arrived at the same conclusion as the circuit court. Nonetheless, we cannot say that the evidence is so conclusive as to compel a finding in favor of the DOC. See Morrison, 526 S.W.2d at 824. The circuit court did not therefore abuse its discretion in making this determination."[32]

Quite unlike Morrison, Appellants' case was not before the Franklin Circuit Court on motion for directed verdict. There was no bench trial on the matter. Appellants were, in fact, never heard by the Franklin Circuit Court, as the case was decided solely upon Appellants' submitted brief. Therefore, the status of the case at the time of its disposition was more akin to motion for summary judgment than motion for directed verdict. CR 52.01 and Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822 (Ky. 1975) are inapplicable to this case.

A Circuit Court appeal of an Attorney General's open records decision is not comparable to judicial review of an adverse administrative determination such as presented in Fayette County Bd. of Educ. v. M.R.D. ex rel K.D., 158 S.W.3d 195 (Ky. 2005). An open records appeal is not predicated by a hearing or required to meet any standard. It must be remembered

[30] See Appendix 1 at p. 6.
[31] See Appendix 1 at p. 6, citing Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822, 824 (Ky. 1975).
[32] See Appendix 1 at p.12.

that the Attorney General's own open records appeal procedures (40 KAR 1:030) and misapplication of KRS 61.882(5)(b) foreclosed any presentation by Appellants of the issue regarding whether compliance with inmate requests for entire file contents constitutes an unreasonable burden under KRS 61.872(6). This issue was never addressed by the Attorney General, only by the Franklin Circuit Court. In addition, the circuit court must determine the open records appeal *de novo*, whether the case is an original action or an appeal from the Office of Attorney General. See KRS 61.882(3).

The Court of Appeals erred by imposing an extreme burden of proof upon Appellants which would require Appellants to conclusively show that compliance with requests for entire files maintained on inmates constitutes an unreasonable burden under KRS 61.872(6). The evidentiary burden imposed upon Appellants by the Court of Appeals is so high that it would literally require an employee or inmate to be injured, or a fire or other disturbance to occur at a Kentucky adult institution for the Court of Appeals to be convinced that allowing inmates this latitude in accessing records from Appellants constitutes an unreasonable burden.

This burden resulted from the Court of Appeals incorrectly reviewing the Franklin Circuit Court's findings of fact regarding proof of unreasonable burden under an abuse of discretion standard.[33] The correct standard is clear error. Miller v. Eldridge, 146 S.W.3d 909, 915 (Ky. 2004). Under this standard, Kentucky appellate courts will set aside findings that are not supported by "substantial evidence." Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003). "Substantial evidence" is evidence "that a reasonable mind would accept as adequate to support a conclusion." Id. It is " . . . evidence that, when taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Id. What the Franklin Circuit Court would have required the KY DOC to submit as factual proof of

[33] See Appendix 1 at p. 12.

"unreasonable burden" is no more than conjecture. An estimate of how many new employees would be needed to operate under the new interpretation is not factual proof. The likelihood that inmates will use any provision of the law that imposes an additional burden on the KY DOC to their advantage is, in fact, substantial.

C. Substantial evidence supports Appellants' argument that compliance with Appellee's request constitutes an unreasonable burden under KRS 61.872(6).

At the time of the original action before the Franklin Circuit Court, there were over seventeen thousand (17,000) inmates committed to state custody.[34] In fact, records are maintained on all of these individuals, both where the inmates are housed and in Central Office in Frankfort, KY. It is a fact that custodians of inmate records were and remain vastly outnumbered by inmates. Inmates are provided copies of many of the non-exempt records contained in an institutional "inmate file" at the time the record is created. Due to the disruptive effect of responding to inmates' requests for entire files, the KY DOC required an inmate to provide a reasonably particular description of the records requested.[35] A request for an "entire file" is not reasonably particular. The expectation of specificity from an inmate requesting access to records for which he has received copies throughout his incarceration is reasonable. Pursuant to KRS 61.878(1)(l) and KRS 197.025(1), the KY DOC is expressly authorized to limit a person's right to access public records for security reasons.[36] A Kentucky inmate knows what types of records are contained in an inmate file because he or she receives copies of many of the non-exempt public records contained in the record folder during his or her incarceration at the time that the record is created. There is no reason why an inmate cannot provide a more particular description of the records from which he or she wants to receive copies than "my

---

[34] At present, the KY DOC has custody of more than twenty-thousand (20,000) inmates.
[35] See Appendix 24 at p. 4.
[36] See Appendix 25.

entire file". The Appellee was able to do so while his appeal was pending before the Attorney General. The Appellants demonstrated to the Franklin Circuit Court, by substantial, clear and convincing evidence, that compliance with the Appellee's request constitutes an unreasonable burden. If the Franklin Circuit Court had any further question for the Appellants, he should have required Appellants' appearance rather than overruling the appeal and affirming the Attorney General's arbitrary decision.

Appellants presented to the Franklin Circuit Court the Affidavits of ten (10) employees at different adult male institutions operated by the Department that illustrates the number of open records requests received by each institution and the number of staff persons devoted to the task of managing offender information services (See T.R. 139-173). The numbers of requests received by the individual institutions is staggering. For instance, at Western Kentucky Correctional Complex (WKCC), an offender records staff consisting of two (2) persons had responded to two-hundred ten (210) non-medical open records requests between 1/01/2003 - 7/31/2003 (T.R. 139-141). At Luther Luckett Correctional Complex (LLCC), where three (3) persons were employed in the offender information services department, four-hundred twenty-six (426) non-medical open records requests were processed in the same time period (T.R. 142-144). It is not difficult to imagine KY DOC offender records, central office, and medical records staff held hostage by an inmate population demanding the "right" to copies of entire inmate files.

Although many of the documents contained in inmate files are subject to disclosure (and routinely provided to an inmate free of charge at the time the record is created), the few that are not subject to disclosure may amount to a life or death situation for other inmates and employees of the KY DOC. The General Assembly has expressly recognized that considerations unique to the penal system justify limitations on a prisoner's right to access public records maintained by

correctional facilities. See KRS 197.025.[37] KRS 197.025(1) provides: "KRS 61.884 and 61.878 to the contrary notwithstanding, no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person." KRS 197.025(2) states the KY DOC is not required to comply with requests from confined inmates and others under supervision of the KY DOC unless " . . . the request is for a records which contains a specific reference to that individual." In addition, KRS 197.025(4) unequivocally directs the KY DOC to refuse to accept hand delivery of an open records request from a confined inmate, notwithstanding the provisions of KRS 61.872.

Specific examples of inmate file records that can be withheld under the authority of KRS 197.025(1) include inmate conflict notification forms, psychological reports, and institutional occurrence or incident reports. Conflict notification forms are internal reports used for classification and housing purposes to determine which inmates should not be housed together. These forms contain the names of the inmate or employee who reported the conflict and the inmate with whom a conflict has been reported, the circumstances of the conflict, and justification for the conflict. The disclosure of a documented conflict notice can be a matter of life and death within a correctional setting. Death or injury to the Appellee or another inmate can occur if a conflict notice is inadvertently disclosed. Similar to conflict notices, victim impact statements to the Parole Board are authorized under KRS 421.530. These statements are records that the KY DOC will not release to the inmate, to protect the personal privacy and safety of the victim under KRS 61.878(1)(a), KRS 61.878(1)(l), and KRS 197.025(1). This is information that, once furnished, cannot be recalled. The risk of an inadvertent disclosure of these records is

[37] Attached as Appendix 26.

another tangible reason why compliance with inmate requests for entire files of records constitutes an unreasonable burden on the KY DOC.

Portions of the inmate file records are exempt from disclosure pursuant to KRS 61.878(1)(i), (j), (k), and (l). KRS 61.878(1)(i) exempts correspondence with private individuals not intended to give notice of final action by a public agency. Thus, letters to the Parole Board in which individuals give personal opinions and recommendations as to whether a prisoner should be granted parole are exempt from disclosure to inmates. Documents or portions thereof which are preliminary in nature or which contain preliminary recommendations of correctional staff are exempt from disclosure under KRS 61.878(1)(j). One example of a preliminary recommendation is a caseworker's pre-parole progress report. Unless the pre-parole progress report is incorporated into the Parole Board's final decision, it is exempt from public inspection pursuant to KRS 61.878(1)(j). Additionally, letters from a member of the judiciary to the Parole Board are exempt from disclosure pursuant to KRS 61.878(1)(j), unless incorporated into or made a part of the Parole Board's final decision.

KRS 61.878(1)(k) prohibits disclosure of "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation." 28 U.S.C. § 534 prohibits the KY DOC's disclosure of an FRI rap sheet to anyone, including the individual who is the subject of the rap sheet. Thus, an FBI rap sheet is exempt from disclosure under 28 U.S.C. § 534 in conjunction with KRS 61.878(1)(k).

KRS 61.878(1)(l) prohibits disclosure of "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly." KRS 439.510 provides, in part:

> All information obtained in the discharge of official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any

> court. Such information shall not be disclosed directly or indirectly to any person other than the court, board, cabinet or others entitled under KRS 439.250 to 439.560 to receive such information, unless ordered by such court, board, or cabinet.

The Department will provide an inmate the opportunity to be advised of the factual contents and conclusions of a pre-sentence investigation report (PSI) if the inmate waived the PSI prior to sentencing; however, that is the exception to the rule. See Commonwealth v. Bush, 740 S.W.2d 943 (Ky. 1987).

Prison security and safety are well-recognized, legitimate penological interests. The Supreme Court has noted that judgments regarding prison security " 'are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 2260, 96 L.Ed.2d 64 (1987), quoting Pell v. Procunier, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974).

Pursuant to KRS 197.025(1), the KY DOC is authorized to impose limitations on a prisoner's right to inspect its public records for security reasons. WKCC is one of several Kentucky prisons where prison rules prohibit an inmate from entering the offender records office to physically inspect the prison's institutional offender record folder, or "inmate file". To compensate for this limitation, inmates are provided complimentary copies of many of the non-exempt public records contained in an institutional inmate file at the time the record is created, such as follows: (1) Parole Board decisions; (2) Classification records; (3) Disciplinary records; (4) Resident record cards; and (5) Sentencing information (See T.R. 124-128 describing records

maintained in institutional inmate record folders).[38] In addition, offender information specialists provide inmates opportunities to inspect and receive copies of records, so long as the inmate provides a reasonably particular description of the records requests. A request for "my file" is not reasonably particular. Conversely, the expectation that the KY DOC will honor any one of twenty thousand (20,000) inmate requests for copies of entire files of records for which inmates have knowledge of the file contents is an unreasonable burden.

In other contexts, the Court of Appeals has recognized that " . . . the prison administration's compelling interest in order and in authority as a means to order." Smith v. O'Dea, 939 S.W.2d 353, 358 (Ky. App. 1997). "In a prison, where a state of emergency and high alert is unrelieved, any defect in the administration's authority poses a risk of disruption." Id. Unfortunately, the inmate population continues to grow. Due to the sheer volume of requests received, and the security risk inherent in providing copies of entire files of records that could result in another inmate's death, institutional fire, or prison riot, compliance with an inmate's request for "my file" constitutes an unreasonable burden under KRS 61.872(6).

CONCLUSION

This case is fraught with error at all levels. The Attorney General's decision in 03-ORD-117, which the Court of Appeals was first to characterize as an administrative agency decision, was arbitrary. The Franklin Circuit Court committed clear error by failing to conduct a true *de novo* review of the Appellants' claims under KRS 61.882(3). The Circuit Court not only unduly deferred to the Attorney General's arbitrary decision, but also overruled Appellants' claim without first holding a hearing, and clearly erred by holding that Appellants should present speculative proof to the Court to substantiate a claim of unreasonable burden under KRS 61.872(6). The Court of Appeals improperly reviewed the Franklin Circuit Court's findings

[38] See also Appendix 11.

under an abuse of discretion standard instead of reviewing the decision for clear error and likewise failed to review questions of law *de novo*, specifically finding the Attorney General's decision to be "more persuasive" than the Appellants' arguments. Appellants complied with the Kentucky Open Records Act by initially denying the Appellee's request, then providing the Appellee with one-hundred thirty-eight (138) pages of records he precisely identified to be copied from an institutional inmate record folder. KRS 61.872(3)(b). In the alternative, Appellants presented substantial, clear and convincing evidence to the Franklin Circuit Court that compliance with an inmate's request for a copy of "my file" constitutes an unreasonable burden upon the KY DOC and Kentucky correctional institutions under KRS 61.872(6).

WHEREFORE, for the foregoing reasons, the Appellants respectfully request this Court to REVERSE the Opinion of the Court of Appeals and REMAND to the Franklin Circuit Court for findings that Appellants either complied with the Kentucky Open Records Act or, in the alternative, demonstrated that compliance with Appellee's request constitutes an unreasonable burden under KRS 61.872(6). Appellants further request that this Court's Order of Remand requires the Franklin Circuit Court to direct the Attorney General's Office to vacate its decision in 03-ORD-117 and remove the decision from its public website, http://ag.ky.gov/civil/openrec.htm.

COUNSEL FOR APPELLEES