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

DEPARTMENT OF CORRECTIONS,
WESTERN KENTUCKY CORRECTIONAL COMPLEX — APPELLANTS

v.

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

BOBBY CHESTNUT — APPELLEE

REPLY BRIEF FOR APPELLANTS

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the original and nine true and correct copies of the foregoing Reply Brief for Appellants was hand-delivered this the 12th day of April, 2007 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 12th day of April, 2007 to the following: Hon. Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Thomas Wingate, 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, 3982 Duncan Chapel Rd., Auburn, KY 42206.

COUNSEL FOR APPELLANTS

STATEMENT OF POINTS AND AUTHORITIES

I. APPELLEE FAILED TO IDENTIFY WITH REASONABLE PARTICULARITY WHAT DOCUMENTS HE SOUGHT IN HIS ORIGINAL REQUEST.

Appellee's argument is based on the incorrect premise that a request for "(a)n entire copy of my inmate file excluding any documents that would be considered confidential" is a reasonably particular description of documents that the Appellee wanted from the WKCC records custodian. To reach this conclusion, Appellee speculates that WKCC record's custodian knew without question that the records Appellee sought were from the inmate institutional file, and not the inmate medical records file, the Central Office file, or some other program related file containing individual references to inmates.

An offender records custodian is not a mind-reader. In fact, an offender records custodian must read a request and take it at face value. Appellant WKCC was not in a position to know what copies of records the Appellee sought, because Appellee's request was not reasonably particular. Contrary to the Franklin Circuit Court's ruling, the Appellee's original request failed to adequately describe the documents he wanted copied, because the Appellants were unable to identify exactly what documents he wanted.[1] In fact, it is contradictory for Appellee to claim to this Court that Appellants knew that Appellee was requesting records only from the inmate institutional file (see Appellee's brief, p. 15). In a related case where Appellee sought to enforce 03-ORD-117, the Appellee complained that " . . . none of his medical documentation or results from urinalysis tests were included in those 138 pages."[2] Appellee also claimed that " . . . other internal memos exist in the file that represent the inmate's current status in programs ."[3] Appellee wanted records beyond those contained in an institutional inmate file.

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[1] See Appellant's brief, Appendix 2, p.3.
[2] See attached Appendix 1: Lyon Circuit Court, C.A. # 03-CI-00120, Complaint for Declaratory Relief, at p.5 (Exhibits omitted); and Appendix 2: Order and Judgment, Lyon Circuit Court, # 03-CI-00120.
[3] See attached Appendix 1 at p. 5.

II. APPELLANTS PROVIDE INMATES AN OPPORTUNITY TO INSPECT RECORDS IN INSTITUTIONAL INMATE FILES.

Another invalid theme behind Appellee's argument is that Appellants deprive inmates of the opportunity to inspect public records contained in institutional inmate files (see Appellee's brief, pp. 10, 19, 20, 42, and 43). This premise is false. In fact, despite an inmate's lack of physical access to the offender information services office at WKCC (which is a perimeter building in a restricted area), an inmate has the same access to KY DOC offender records maintained on himself as a member of the public. Both an inmate and a member of the public must make a reasonably particular request of records to be inspected (see Appendix 24 to Appellants' brief at pp. 2-4). With respect to both inmates and members of the general public, Corrections' duly promulgated regulation, 501 KAR 6:020, CPP 6.1 states as follows: "A general or blanket request may be denied by the Custodian. The individual or organization shall be given the opportunity to amend the request to describe the document with reasonable particularity."[4] Unlike the general public, an inmate has the benefit of an assigned Classification and Treatment Officer (CTO), also known as a caseworker or case manager, at the institution where he is incarcerated. An inmate's assigned caseworker is responsible for several functions relative to the inmate, including interviewing the inmate and answering an inmate's questions.[5]

Upon arrival at WKCC, an inmate is assigned a caseworker, whose offices are located in the yard office on the Compound or in the living units for the Minimum Security Unit. Office hours are posted and an inmate may schedule appointments with his assigned caseworker. When an inmate makes a reasonably particular request for records to be inspected (see Appellant's brief, p. 21), the caseworker is physically present with the inmate during the records inspection

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[4] See Appellants brief, Appendix 24, p. 5. This provision still exists in CPP 6.1.

[5] See attached Appendix 3: 501 KAR 6:020, Corrections Policy & Procedure (CPP) 18.1 (Effective date 09/16/1999-07/16/2003), p.4. This policy has been revised, however, the provisions regarding assignment of a CTO to each inmate still remain.

process. During the inspection, the inmate may take notes or ask the caseworker questions regarding the records. It is simply incorrect to conclude that "blind luck" determines whether an inmate accesses the records he needs (see Appellee's brief, p. 19). Unlike a member of the general public, an inmate's assigned caseworker guides the inmate through the records request and inspection process. There was nothing to prevent the Appellee from asking his caseworker to help him clarify his original request as the caseworker is very familiar with the contents of an institutional inmate records folder.

Counsel for Appellants appreciates that she may not have preserved the issue regarding applicability of KRS 61.872(3) or that KRS 61.872(3) may not apply. However, there should be no question here but that the Appellee submitted a general request for copies of records that he failed to identify with reasonable particularity, as required by the open records act and the Appellants' duly promulgated regulation. Once he amended his request to reasonably describe the documents he sought copied, Appellants provided him those records. Appellee had the benefit of a caseworker to help him further refine his request if there were particular records he sought but did not receive as a result of his amended request. Appellee never at any time requested to inspect records and did not ask his caseworker for help to further refine his request. If he had, Appellants would have provided him the records he sought.

III. THE COURT OF APPEALS ERRED BY AFFIRMING A DECISION THAT REQUIRED APPELLANTS TO SUBMIT SPECULATIVE EVIDENCE AS PROOF.

Appellants still contend that the Court of Appeals incorrectly reviewed the Franklin Circuit Court's findings of fact regarding proof of unreasonable burden for abuse of discretion, despite Appellee's claims that the Court of Appeals simply made a wrong reference to this standard (see Appellee's brief, p. 31). 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 evidence of "unreasonable burden" is no more than conjecture. Remote or speculative evidence has little to no probative value in Kentucky Courts. Johnson Controls, Inc. v. Russell, 95 S.W.3d 921 (Ky. App. 2002. Morgan v. Commonwealth, 878 S.W.2d 18 (Ky. 1994); American National Bank & Trust Co. v. Penner, 444 S.W.2d 751 (Ky. 1969). An estimate of how many new employees would be needed to operate under the new interpretation is not factual proof. For instance, Appellants could not have reasonably, let alone accurately, predicted in April 2003 (when Appellee filed his request) that the Department of Corrections would be required to add thirteen (13) new offender records employees at an additional monthly payroll cost of $37,631.97 by July 2006 (the month when Appellants' brief before this Court was filed).[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. As of July 2006, there were over twenty thousand (20,000) inmates.

Appellee can criticize Appellants' record-keeping system (see Appellee's brief, p. 39) or find insufficient the language used in Affidavits by offender records custodians (See Appellee's brief, p. 37-38) all day; however, the theory of how things should be done and the reality of what works are altogether different concepts. An entire document may not be confidential, but a single reference to confidential information may be found in the document. Under the open records act, the Appellants are required to redact the single reference, but disclose the document. See KRS

[6] See attached Appendix 4: Offender Records Employees (Institutional only) July '06 and April '03. This information is public record and computes to an annual payroll cost to Kentucky taxpayers of $451,583.64.

61.878(4). Appellee fails to demonstrate an abuse of the Department of Corrections' discretionary authority to limit access to records under KRS 197.025(1) by requiring a request for records *from any person* to be reasonably particular. 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). 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, certainly compliance with any inmate's request for "my file" constitutes an unreasonable burden under KRS 61.872(6). Even Justice Cunningham recognized, *with no proof before him*, ". . . the real potential in a maximum security prison for an overload of demands by prisoners for their inmate files and the serious threat to security in disclosing sensitive materials."[7]

The Franklin Circuit Court, Court of Appeals and the Attorney General all but ignored that Appellants provided Appellee with records responsive to his reasonably particular request while his appeal was pending. It made no difference to the Franklin Circuit Court that Appellee all but abandoned his efforts to obtain his "entire file" once he was granted parole. Appellants demonstrated to the Franklin Circuit Court, by substantial, clear and convincing evidence, that compliance with the Appellee's original request constitutes an unreasonable burden. Thus, the Court of Appeals erred by affirming a decision that would have required Appellants to submit

[7] See Appendix 2 at p. 4.

speculative evidence to prove the unreasonable burden of complying with an inmate's request for his entire file.

IV. THE ATTORNEY GENERAL'S DECISION FORMING THE BASIS OF THE FRANKLIN CIRCUIT COURT'S DECISION AS AFFIRMED BY COURT OF APPEALS IS ARBITRARY AND UNCONSTITUTIONAL.

Finally, Appellee mischaracterizes Appellant's use of the terms "vague and overbroad" as a "naked allegation". (See Appellee brief at p. 11). In fact, WKCC's records custodian used these terms in reliance on an Attorney General's open records decision with facts very similar to this case. In 00-ORD-190,[8] 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 had 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 documents to Ms. Cassidy, his attorney. The NTC released those records specifically identified by the inmate's authorization which were not exempt from disclosure. With regard to the request for the complete prison file, however, the Attorney General found that NTC employee Kathy Gifford correctly 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.'".[9] In her appeal, Ms. Cassidy argued that the inmate and she (his attorney of record) were entitled to receive an entire copy of his inmate file. Finding that the NTC response complied with 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

[8] Attached as Appendix 9 to Appellants' brief.
[9] See Appellants' brief, Appendix 9 at p.2.

explanation as to how the cited exception applies to the record withheld. KRS 61.880(1)." (Emphasis added).[10]

In the present case, Appellee failed to describe with reasonable particularity the records he sought copied. The Appellants asked Appellee to clarify his request. When he did, Appellants provided Appellee with 138 pages of records. The Attorney General then found, without reasonable explanation, that the Appellants violated the open records act by asking the Appellee to clarify his request. The Attorney General's decision in 03-ORD-117 was arbitrary and unconstitutional.

Appellant incorrectly states that " . . . the Attorney General's Office understands the nature and extent of a circuit court's *de novo* review."[11] (see Appellee's brief at p. 25) The flawed logic applied by the Office of Attorney General - which considers its own open records decisions to be "the law" - deserves the attention of this Court. If this Court reads closely the decision, the Court will see that the Attorney General's Office exercised both legislative and judicial functions in a manner repugnant to Sections 27, 28, and 29 of the Kentucky Constitution, as follows:

> "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]

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[10] See Appellants' brief, Appendix 9 at p. 2.

[11] In a separate open records matter where the undersigned is counsel of record (Justice & Public Safety Cabinet v. Stephen Malmer, Franklin Circuit Court, Division I, C.A. # 06-CI-1373), the Office of Attorney General has intervened and filed a brief in which the Attorney General argues, in a matter of first impression, that the Circuit Court has no jurisdiction over the Attorney General in open records matters.

[12] See page 1 of Appendix 3 attached to Appellant's brief. See also p. 2 of 03-ORD-117 at Appendix 3, "Because of our recent decision in 03-ORD-012, copy enclosed, we conclude the responses of WKCC to Mr. Chestnut's requests were inconsistent with the Open Records Act."

Does the Attorney General have authority to "reverse" and "extend" its own "holding" in a matter regarding "personnel files" to "inmate files"? What would this Court say to a Circuit Court or other administrative agency (for instance, the Personnel Board) who reversed or extended holdings or incorporated by reference its own prior decisions into subsequent ones?

The Court of Appeals panel in this case characterized the Attorney General's open records decision to be an administrative agency decision.[13] Assuming, for the sake of argument, that an open records decision is to an administrative agency decision, this court may take notice that the Attorney General Open Records Division does not adhere to the provisions of KRS Chapter 13B; however, it is not expressly exempt from those provisions pursuant to KRS 13B.020. Regardless of whether the Attorney General's open records division is subject to KRS Chapter 13B, a major problem in this case is that once the Attorney General made its decision, in an arbitrary manner, the Courts below simply deferred to that decision.

The Attorney General's arbitrary practice of quoting its open records decisions in subsequent unrelated cases stems from the language of KRS 61.880(5)(b), which states as follows:

> If an appeal is not filed within the thirty (30) day time limit, **the Attorney General's decision shall have the force and effect of law** and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained.

See KRS 61.880(5)(b). The intention of this statute was likely to provide, that if there was no appeal of an Attorney General's open records decision, the decision would be binding only on the parties to the controversy; however, this is not what the statute says. In Commonwealth v. Allen, 980 S.W.2d 278 (Ky. 1998), this Court stated:

> Where a statute on its face is intelligible, the courts are not at liberty to supply words or make additions which amount, as sometimes stated, to providing *casus*

[13] See Appendix 1 of Appellant's brief at p. 6.

> *omissus,* or cure an omission, however just or desirable it might be to supply an omitted provision. It makes no difference that it appears the omission was mere oversight.

Id. at 280-281. In response to the language of KRS 61.880(5)(b), the Office of the Attorney General has engaged in an unfortunate practice of considering its decisions to be law and citing them as binding authority in subsequent open records cases, even in cases when appellate review of the original controversy has not been concluded, such as this one.[14] To be lawful, KRS 61.880(5)(b) must not include an exercise of discretion as to what the law shall be. Legislative Research Com'n By and Through Prather v. Brown, 664 S.W.2d 907, 915 (Ky. 1984). There must be standards controlling the exercise of administrative discretion and the delegating authority must have the right to withdraw the delegation. Id. KRS 61.880(5)(b) is unconstitutional because it "hampers judicial action or interferes with the discharge of judicial functions." Arvin v. Meade, 462 S.W.2d 940, 946 (Ky. 1971). Thus, KRS 61.880(5)(b) violates Sections 26, 27 and 29 of the Kentucky Constitution.

Even if KRS 61.880(5)(b) is facially valid, it is clear that the Office of Attorney General administered KRS 61.880(5)(b) in an unconstitutional manner in this case. See Commonwealth v. DLX, Inc. 42 S.W.3d 624 (Ky. 2001). It is repugnant to the authority of the judicial branch for the Attorney General to publicly state that its open records decisions are "legally binding", then quote its own decision (which was properly appealed pursuant to KRS 61.880(5)(b)) and an unpublished Court of Appeals decision *while the underlying case is still in controversy.*[15] The Attorney General's Office clearly misapplied the law by extending its so-called holding in a prior

[14] See attached Appendix 5: References to 03-ORD-117 as found on the Attorney General's website, and home page of the Attorney General's open records website, in which the Attorney General advertises its decisions as "legally binding."

[15] See Appendix 5 and Appendix 6: References to Department of Corrections v. Chestnut, Ky. App., 2004-CA-1497-MR (2005), presently in controversy before this Court.

open records decision that had no similarity to the facts at hand in Bobby Chestnut's case. The Appellee cites decisions of the Attorney General extensively in argument.

The Court may not want to go so far as to approach these constitutional issues in this case. Nonetheless, Appellants encourage this Court to guide Kentucky Courts away from considering 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 has given " '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). This Court has held that appellate courts in Kentucky interpret, construe and apply statutes *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). There is no reasonable basis upon which to find that an appellate court should be "persuaded" by the decision of an administrative agency, particularly one which was not predicated by a hearing or required to meet any standard in the first place. Without action by this Court, there will continue to be no standard for open records decisions by the Office of Attorney General, yet Kentucky Courts will continue to defer to these decisions.

WHEREFORE, for the foregoing reasons, the Appellants respectfully request this Court to REVERSE the Opinion of the Court of Appeals.

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