SUPREME COURT OF KENTUCKY
NO. 2006-SC-000086-DG

DEPARTMENT OF CORRECTIONS,
WESTERN KENTUCKY CORRECTIONAL COMPLEX

APPELLANT

v.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS
NO. 2004-CA-1497-MR

FRANKLIN CIRCUIT COURT
NO. 03-C1-00706

BOBBY CHESTNUT

APPELLEE

BRIEF FOR THE APPELLEE

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and nine copies of the foregoing Brief for Appellee will be hand-delivered this the 27th day of February, 2007 to the Clerk of the Supreme Court, 209 State Capitol Bldg. 700 Capital Avenue, Frankfort, Kentucky 40601; and that a true and correct copy of Appellee's brief was mailed, postage prepaid, this 27th day of February, 2007 to Emily Dennis Justice and Public Safety Cabinet, Office of Legal Services, 125 Holmes Street, Second Floor, Frankfort, Kentucky, 40601; Judge Thomas Wingate, Franklin Circuit Court, Second Division, P.O. Box 678, 218 St. Clair St., Frankfort, KY 40601; Hon. James Ringo 700 Capitol Avenue, Frankfort, KY 40601; and, Hon. Samuel P. Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601-9230. I further certify that the Record on Appeal has been returned to the Clerk of the Supreme Court.

COUNSEL FOR APPELLEE

INTRODUCTION

Bobby Chestnut just wants to know the contents of the non-confidential documents in his institutional file. He properly requested an "entire copy of [his] inmate file excluding any documents that would be considered confidential" under Kentucky's Open Records Act. Corrections responded that his request was "too broad and overly vague." Thus, the issue before this Court is the degree of specificity with which an inmate, a member of the public, must describe the documents he seeks from his institutional file. Additionally, if Mr. Chestnut's description sufficiently describes the documents he is seeking, Corrections cannot refuse to comply with his request because such compliance does not constitute an "unreasonable burden" under the Act.

STATEMENT CONCERNING ORAL ARGUMENT

This is a case of first impression that goes to the heart of the public's right to know; the public's right to access records created by its government. As such, Appellee Chestnut requests this Court to set this case for oral argument. The degree of specificity one must achieve in order to access public records is a threshold issue that determines the extent and degree to which the public can access, or is restricted from accessing, the records its government creates, maintains and collects at public expense. This Court has never spoken on this issue, and both the public and the government need guidance.

NOTICE TO CITATIONS

Citations to the record of the Franklin Circuit Court Clerk are made (TR, Vol. #, page number). References to the Appendix to this brief are made (Appendix, Tab Number, page number).

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

II

COUNTERSTATEMENT OF THE CASE

The information contained in Bobby Chestnut's institutional file shapes and controls his life in Kentucky's prison system; that is why he wanted to review its contents. And, that is why and where this case began. The quality and duration of Bobby's prison life is dependent upon a fair and accurate institutional file. The records in his file determine the length of his sentence, his good time, housing, job prospects, parole eligibility, parole opportunities, custody level, discipline, and visitation privileges.

In April 2003, Bobby Chestnut was incarcerated at the Western Kentucky Correction Complex (WKCC), (TR, Vol. I, 2, 61). Because he was hoping for parole, Mr. Chestnut submitted an open records request to the WKCC records custodian on April 10, 2003. (TR, Vol. I, 32). Using a proper form, Mr. Chestnut requested:

> [a]n entire copy of my inmate file excluding any document that would be considered confidential. Specifically beginning date of entrance into the Department of Corrections in October of 1996 until the current date [April 9, 2003]. (*Id.*; Appendix, hereinafter A1).

Bobby Chestnut didn't receive the documents he requested and he didn't get to inspect his file. Rather, the records custodian responded:

> 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 with reasonable the records (forms) with reasonable particularity, so that the records can be identified." (*Id.*; A1).

Mr. Chestnut appealed WKCC's decision denying his open records request to the Attorney General. (TR, Vol. I, 34.) At the same time, he also amended his initial request. He tried to satisfy Corrections' vague "reasonable particularity" requirement even though he didn't know the actual contents of his institutional file. (TR, Vol. I 33; A2). The WKCC records custodian again responded to Mr. Chestnut's request. (TR, Vol. II, 109; A3). This time he was provided with copies of 138 records that Corrections decided he had described with sufficient specificity, but Corrections refused to provide the remaining non-confidential documents in his file. (TR, Vol. II, 109-110; A3). Specifically, the portion of Mr. Chestnut's amended request seeking "any and every document contained within my file from front cover to the back" was denied. (TR, Vol. II, 110; A3).

The Attorney General responded to Mr. Chestnut's initial request with a decision that Corrections provide Mr. Chestnut with all of the non-confidential contents of his inmate file. (TR, Vol. II, 91-94; Ky. Op. Atty. Gen., 03-ORD-117 (2003)). The Attorney General's decision found "that Mr. Chestnut's requests were sufficiently specific to require the WKCC to respond to his requests," and so the "reasonable particularity" requirement was satisfied where the description "enable[d] the agency's custodian of records to identify and retrieve the records." (TR, Vol. I, 93; 03-ORD-117, p. 3). Under this more lenient standard, "where the records are of an identified, limited class, the requester satisfied this condition." *Id.*

Despite the Attorney General's opinion, Corrections continued to withhold Mr. Chestnut's records and appealed the opinion to the Franklin Circuit Court.

Corrections filed a "Memorandum of Law" and submitted evidence to the circuit court in the form of affidavits from its records custodians, pictures of Mr. Chestnut's "files," some information about the contents of an inmate file, its Open Records policy and other exhibits. (TR, Vol. II, 74-173).

Mr. Chestnut did not submit any evidence to the circuit court. Nevertheless, the Franklin Circuit Court affirmed the Attorney General's opinion and held that Corrections must provide Mr. Chestnut with all the non-confidential records in his inmate file. (TR, Vol. II, 182-186). The circuit court's opinion concluded that the "purpose and plain language of the Open Records Act" was inconsistent with the interpretation of KRS 61.872(2) that demands identification of records with "reasonable particularity." (TR, Vol. II, 183-184). Relying solely upon the evidence presented by Corrections, the trial court further concluded that Corrections "fail[ed] to prove by clear and convincing evidence that the AG's decision imposes an unreasonable burden on it." (TR, Vol. II, 185).

Corrections timely appealed the decision of the Franklin Circuit Court to the Kentucky Court of Appeals. The Court of Appeals reaffirmed the Attorney General's interpretation of KRS 61.872(2). The Attorney General concluded that the "purpose and plain language" of the Open Records Act demonstrated that Bobby Chestnut had reasonably described the records he wished to review. *Department of Corrections v. Bobby Chestnut*, Ky. App., 2004-CA-001497-MR, slip op. at 10 (December 29, 2005). The Court of Appeals also found that "[n]othing in KRS 197.025 . . . authorizes [Corrections] to require an inmate to offer a more detailed description of the records he wishes to see . . .[T]he

Department fails to explain how [permitting inmate access to all non-confidential documents in an institutional file] would threaten institutional security." *Id.* at 8. Finally, the Court of Appeals upheld the circuit court's determination that Corrections had failed to prove that compliance with the Attorney General's decision would constitute an undue burden. *Id.* at 12. This Court accepted discretionary review and this appeal followed.

ARGUMENTS

I.

THE COURT OF APPEALS CORRECTLY HELD *DE NOVO* THAT THE PURPOSE AND PLAIN LANGUAGE OF THE OPEN RECORDS ACT REQUIRES THE DEPARTMENT OF CORRECTIONS TO HONOR AN INMATE'S REQUEST FOR COPIES OF ALL NON-CONFIDENTIAL DOCUMENTS IN HIS INSTITUTIONAL FILE.

Inmate Bobby Chestnut's request for an entire copy of all non-confidential documents in his institutional file, reasonably described the documents he wanted from the records custodian at Western Kentucky Correctional Complex (WKCC). His request identified the documents he wanted from Corrections because the records custodian could easily locate the nonexempt records and make them available for review. Corrections challenges this interpretation that was affirmed by both the circuit court and the Court of Appeals. Indeed, the Court of Appeals determined, as a matter of law, that the purpose and plain language of the Open Records Act requires Corrections to honor Chestnut's request for all the non-confidential documents in his file. *Department of*

Corrections v. Bobby Chestnut, Ky. App., 2004-CA-001497-MR, slip op. at 10 (December 29, 2005).

A. A prison inmate reasonably describes the public records he seeks by requesting all non-confidential documents in his inmate file.

In this case of first impression, the Attorney General concluded and both lower courts held that under the plain language and legislative purpose of the Open Records Act, Bobby Chestnut reasonably described the records he was seeking from Corrections.

The definition of what constitutes an adequate description by an inmate who seeks documents from his prison file revolves around the express language and legislative intent of three statutes found in the Open Records Act: KRS 61.871, the Policy of the Open Records Act; KRS 61.872(1) and (2), the Right to Inspection & its Limitation; and, KRS 197.025(2), Restrictions on Access to Inmate and Facility Records. Contrary to Corrections new claims before the Court of Appeals, this dispute does not revolve around KRS 61.872(3). This newly minted argument isn't preserved for appellate review. Even if this Court reaches the merits of Corrections new claim, the statute, by its own terms, is inapplicable.

In KRS 61.871, the General Assembly declared that "the basic policy of [the Open Records Act] is that free and open examination of public records is in the public interest," and the statutory exceptions to disclosure "shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." In *Beckham v. Board of Education,* 873 S.W.2d 575 (Ky. 1994), the Court concluded that "[t]he unambiguous

purpose of the Open Records Act is the disclosure of public records even though such disclosure may cause inconvenience or embarrassment." *Id.* at 577 (citing *Gateway Construction Co. v. Wallbaum,* 356 S.W.2d 247 (Ky. 1962). Given the unambiguous language and purpose of the Act, it "undoubtedly militates in favor of disclosure." *Hahn v. University of Louisville,* 80 S.W.3d 771, 774 (Ky. App. 2001), (disc. rev. denied 2002). In short, an agency's obligation to disclose records is construed broadly while the exemptions to disclosure are construed strictly. *See also,* KRS 446.080.

In addition to a strong legislative policy favoring records disclosure, the degree of specificity required for an inmate to access all non-confidential records in his inmate file is found in KRS 61.872(2) and KRS 197.025.

KRS 61.872 (2) states:

> Any person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected . . .

The plain language of KRS 61.872(2) only requires a person seeking access to public records to "describe the records to be inspected." "In analyzing the Open Records Act . . . [the court is] guided by the principle that 'under general rules of statutory construction, we may not interpret a statute at variance with its stated language.'" *Hoy v. Kentucky Industrial Revitalization Authority,* 907 S.W.2d 766, 768 (Ky. 1995) (citing *Layne v. Newberg,* 841 S.W.2d 181, 183 (Ky. 1992)); *see also,* KRS 446.080. The General Assembly chose not to require an exacting standard in KRS 61.872(2). It could have required the requester to

specifically or particularily describe each public record to be reviewed. Instead, the General Assembly chose to use a minimal standard that merely requires the requester "to describe the records to be inspected." KRS 61.872(2). "In giving effect to the General Assembly's intent, the plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source." *Stopher v. Conliffe,* 170 S.W.3d 307, 308-309 (Ky. 2005). The Department of Corrections is not at liberty to fashion a more demanding standard than that used or intended by the Legislature.

The purpose of the KRS 61.872(2) description is to require the requester to "identify the records to be inspected with sufficient specificity to enable the agency's custodian of records to identify and retrieve the records." Ky. Op. Atty. Gen., 94-ORD-12, p. 2 (1994). This is because "the request should not require 'the specificity . . . of a carefully drawn set of discovery requests, so as to outwit narrowing legalistic interpretations by the government.'" Ky. Op. Atty. Gen., 95-ORD-49, p.5 (1995), (citing *Providence Journal Company v. Federal Bureau of Investigation,* 460 F.Supp. 778, 792 (D.C.D. Rhode Island, 1978)). Mr. Chestnut's request provided the records custodian with a sufficient description of the records he wanted to review for the custodian to "identify and retrieve the records." 94-ORD-12, p. 2.

In construing the precision required for access to public records under KRS 61.872(2), the Attorney General's office has long held that "a requesting party must identify with "reasonable particularity" those documents which he

wishes to review." Ky. Op. Atty. Gen., OAG 89-81 (1989). "Where the records sought are of an identified, limited class, the requester satisfies this condition." 92-ORD-1261, p. 3. The request "only needs to be framed with sufficient clarify and directness to enable the custodian of records to identify and retrieve the records he wishes to access." *Id.* at 2. Consequently, "as long as the custodian can identify what documents the applicants wish to see, the statute is satisfied." *Chestnut,* slip op., p. 10.

Similarly, under the federal Freedom of Information Act (FOIA), each agency must make records available to "any person" who *"reasonably describes such records."* 5 U.S.C. § 552(a)(3)(i) (emphasis added). Several federal circuit courts have construed and defined this provision under FOIA. After researching FOIA's legislative history, the D.C. Circuit Court determined that a description is sufficient if it "calls for 'a reasonable description enabling the Government employee to locate the requested records.'" *Bristol-Meyers Company v. Federal Trade Commission,* 424 F.2d 935, 938 (D.C. Cir. 1970), (citing S.Rep. No. 813, 89th Cong., 1st Sess. 3, note 5, at 8 (1965)).

To Corrections, however, a reasonably particular description means that the inmate must specifically designate each requested record or bundle of records. Corrections Policy and Procedure (CPP) 6.1, requires that a request for a public record "shall" include "a reasonably particular description of the record being requested." 601 KAR 6:020, CPP 6.1, p. 4; (*See also,* TR, Vol. II, 117; A4, p. 4). The inmate must identify each document he wishes to see by a particular

name, subject matter, class, author or date. Surely, if the General Assembly had intended such a construction it would have used more direct language.

While "[p]ublic agencies are authorized to adopt rules and regulations [they] may not impose requirements that have the effect of thwarting access" to public records. *Beckham,* 873 S.W.2d 577 (citing KRS 61.878(1)). Corrections' narrow interpretation and use of the "reasonably particular description" requirement found in CPP 6.1, "thwarts access" to public records. Corrections has added an additional obstacle to the attainment of public records not found in the Act. The description requirement shifts the burden of acquiring records from Corrections to the requester, and the overall effect is to undermine rather than facilitate records access. Nowhere in the Open Records Act has the Legislature explicitly or implicitly stated that a public record request must enumerate and describe each document or category of documents. If a court "is not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used," neither is Corrections. *Id.*, (citing *Gateway Construction Co. v. Wallbaum,* 356 S.W.2d 247 (Ky. 1962)).

Corrections' narrow construction undermines the intent of the Open Records Act and contravenes its plain language and legislative intent. It is simply not necessary that a specific document be named or cited in an open records request if the "record is 'described' in sufficient detail so that the custodian can locate it with a reasonable amount of effort." *State Board of Equalization v. Superior Court,* 10 Cal. App.4th 1177, 1186 (1992); *See also* KRS 61.872(2).

Moreover, Corrections' specificity requirement not only unacceptably shifts its burden onto the public; it disproportionately burdens a particular segment of the public. There is no evidence in the appellate record that Corrections provides inmates with a complete document index to the records contained in an inmate's file. (*See*, Training Manual Index, TR, Vol. II, 124-128; A5). Without such an index, it would be nearly impossible for an inmate to meet Corrections' specificity standard and obtain all the non-confidential documents in his file.

Thus, the inmate is placed in a classic "Catch-22 situation." Inmates, like many members of the public, are unschooled in technical, legalistic language distinctions. Likewise, those who are uneducated, illiterate, unfamiliar with the prison system, and untrained in the law are most affected by Corrections' specificity requirement. How could any person, literate or not, know how to "particularly describe" many of documents Corrections names, uses and collects? (*See* A5). It runs contrary to the intent of the Open Records Act to deny the public access to a record simply because of arguable imperfections in the form in which the request for a record is couched. An insistence on the use of a particular word to describe a particular record is inconsistent with the spirit and policy of the Open Records Act.

There is no question that Mr. Chestnut's request for all non-confidential records in his inmate file reasonably described identifiable documents as required by KRS 61.872(2). With little effort, the custodian could easily "identify and retrieve" the records Mr. Chestnut wished to review. The records custodian

at WKCC could have easily identified the requested records because "inmate files are identified by the names of individuals housed at the correctional facility." (TR, Vol. I, 39, 80). The custodian could easily have retrieved the documents because "[a] state inmate's institutional file 'follows' the inmate throughout his or her period of incarceration." (TR, Vol. I, 39). Given that the requested records--- the inmate's institutional file--- are of "an identified, limited class"--- by Mr. Chestnut's name and institutional number--- it cannot be seriously argued that the records custodian could not "locate and retrieve" the requested records.

Despite Corrections claims, the custodian would not be required to "perform research to respond to requests for documents that can't be identified by the requester." (*Id.*). The custodian only needed to walk to the file cabinet, pull Mr. Chestnut's file, remove the confidential documents, and provide him with the remaining documents. Corrections claims "once the agency knew the records [Mr. Chestnut] sought, it would be in a position to answer his request." (TR, Vol. II, 80). Despite this unsupported assertion, the records custodian knew exactly what documents Mr. Chestnut was seeking. (*Id.*). Corrections simply cannot evade the broad disclosure provision of the Open Records Act on the naked allegation that the request was "vague and overbroad."

Admittedly, KRS 61.872(2) must be read in conjunction with KRS 197.025(1) and (2). KRS 197.025 is incorporated into the Open Records Act by operation of KRS 61.878(1)(l) which authorizes public agencies to withhold "[p]ublic records or information the disclosure of which is prohibited or

restricted or otherwise made confidential by enactment of the General Assembly."

KRS 197.025(2) states an inmate is not entitled to obtain records under the Open Records Act "unless the request is for a record which contains a specific reference to that individual." In other words, "[t]he statute constitutes an absolute prohibition on inmate access to any and all records that do not contain a specific reference to the inmate, including policies and procedures." Ky. Op. Atty. Gen., 06-ORD-217, p. 1 (2006). "Nothing in KRS 197.025, however, authorizes [Corrections] to require an inmate to offer a more detailed description of the records he or she wishes to see." *Chestnut,* slip op. p. 8. The statute does not give Corrections "the authority to insist that an inmate request documents with specificity." *Id.* Bobby Chestnut complied with KRS 197.025(2) in requesting his file because he only asked for records that "contained a specific reference" to him. Corrections can require nothing more.

B. Corrections response to Bobby Chestnut's records request did not comply with Kentucky's Open Records Act.

Corrections maintains that its response to Mr. Chestnut complied with the Open Records Act because "there is no specific or single 'inmate file' from which records or information may be gleaned." (Brief for Appellant, p. 8). According to Corrections, a file is not even included in the definition of a public record. *Id.* As such, Mr. Chestnut's requests were "too broad and overly vague because 'an inmate file' consists of several files in various locations that are often voluminous and contain material that is privileged or confidential . . ." (TR, Vol. II, 74). Given the language of Mr. Chestnut's two requests, how and where he made the

requests, the requirements of Corrections' own Open Records policy found in CPP 6.1, and Corrections' response in denying the documents, the facts establish that the records custodian at WKCC knew exactly what records from which file Mr. Chestnut was seeking.

First, the records contained in a "file" are included in the definition of public record found in KRS 61.870(2). The documents found in an "inmate's file" are public records because they are "papers . . . or other documentation . . . which are prepared, owned, used, in the possession of or retained by a public agency." In fact, Corrections "construct[s] and maintain[s]" the "master or institutional file,"[1] "in order to maintain a cumulative, organized and accurate record for each inmate incarcerated by . . . Corrections." (TR, Vol. II, 124; A 5, p. 1). The inmate's name and institutional number identifies the file. (TR, Vol., 80). The WKCC records custodian knew exactly what records Mr. Chestnut was requesting because the inmate's master file is "a repository for all written materials pertinent to the individual case." (TR, Vol. II, 124; A 5, p. 1). Indeed, "as the inmate progresses through his period of incarceration, a copy of all material relating to his case [is] placed in the master file." *(Id.)*

Bobby Chestnut first requested "an entire copy of [his] inmate file," [not files,] excluding confidential documents, from the date he entered the corrections system until the date of the request. (TR, Vol. I, 32). When WKCC denied his first request, he made a second request for "every document contained in [his]

[1] The Offender Information Services Training Manual uses master file and institutional file interchangeably. (TR, Vol. II, 124-128). Counsel for Corrections also refers to the master file as the institutional file. (TR, Vol. II, 80; *see also* Brief for Appellant, p. 8).

file from the front cover to the back." (TR, Vol. I, 25, 33). The WKCC custodian knew exactly what documents Bobby Chestnut wanted from his institutional file.

Second, the WKCC records custodian knew that Mr. Chestnut was requesting all non-confidential documents from his master or institutional file because Mr. Chestnut followed CPP 6.1, Corrections' open records policy, in making his requests. (TR, Vol. II, 115-119; A 4). CPP 6.1 required Mr. Chestnut to "forward" his open records requests "by institutional mail to the Coordinator; or by first class mail to the Custodian of the agencies records." (TR, Vol. II, 117; A 4, p. 4). CPP 6.1 defines coordinator as "the individual designated by the Warden at each institution to receive, date and forward an open records request to the appropriate custodian for processing." (TR, Vol. II 115; A4, p. 1). Neither the coordinator nor the WKCC records custodian forwarded Mr. Chestnut's requests to the "Principal Office" where the central office file is held. (TR, Vol. II, 80, 115, 164-167). Rather, Mr. Chestnut's requests were received by the WKCC custodian who had "personal custody and control" of Mr. Chestnut's master or institutional file. (TR, Vol. II, 115).

Finally, the WKCC records custodian knew Mr. Chestnut wasn't seeking documents from his central office file or medical file for three reasons. First, offender records custodians are trained on and know that the institutional file and the central office file are nearly identical (Compare, TR, Vol. II, 124-128 with TR, Vol. II, 164-167). Corrections knew Mr. Chestnut wasn't seeking duplicative records. Second, Mr. Chestnut's "residence" or place of incarceration was in the same county where the public records are located. *See* KRS 61.872(3). Different

rules of inspection may apply when an individual's "residence or principal place of business is outside the county in which the public records are located." KRS 61.872(3). Bobby Chestnut resided where his institutional file was located and he was entitled to access all the non-confidential records in that file.

Third, KRS 422.317(2) states, "The Department of Corrections . . . may make medical records of an individual inmate available to that individual inmate unless the department . . . determines that the provision of the record is subject to the provisions of KRS 197.025." Corrections has admitted that "an inmate's medical file consists of records which the inmate is entitled to review with one narrow exception: psychological or psychiatric records . . . Ky. Op. Atty. Gen., 99-ORD-7, p. 1 (1999). Moreover, an inmate's request to inspect his "entire medical file" is sufficiently specific under the Open Records Act. *Id.* The records custodian knew Mr. Chestnut wasn't requesting documents from his medical file.

C. KRS 61.872(3) does not authorize Corrections to require Bobby Chestnut to precisely describe the records to be copied.

Corrections also argues that because Bobby Chestnut requested *copies* of the non-confidential documents in his inmate file, a reasonably particular description of the documents he seeks is insufficient. *See,* KRS 61.872(2); (emphasis added). Rather, Mr. Chestnut must *precisely describe* the records he wants copied under KRS 61.872(3); (emphasis added). Corrections now maintains that the Court of Appeals "incorrectly cited KRS 61.872(2) as the provision applicable to [Mr. Chestnut's] request." (Brief for Appellant, p. 9). This argument fails for three reasons. First, the argument is unpreserved.

Second, use of the "precise description" standard found in KRS 61.872(3) would violate Corrections' own Open Records policy found in CPP 6.1, and third, 61.872(3) is inapplicable because of the plain meaning of its statutory language.

First, Corrections fed "one can of worms to the trial judge and another to [the Court of Appeals.]" *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976). The application of KRS 61.872(3) was never cited, presented or mentioned to the Franklin Circuit Court. Corrections' theory before the trial court was based on the application of KRS 61.872(2), which requires the requester to describe the records he seeks with "reasonable particularity." (*See,* Corrections Memorandum of Law, TR, Vol. II, 74-83). In denying Mr. Chestnut's first request, the WKCC records custodian cited KRS 61.872(2), not KRS 61.872(3). (TR, Vol. I, 32; A1). In denying Mr. Chestnut's second request as "vague and overbroad," the WKCC records custodian again cited KRS 61.872(2), not KRS 61.872(3). (TR, Vol. II, 110; A3, p.2). However, before the Court of Appeals, Corrections' theory changed. For the first time on appeal, Corrections argued, "KRS 61.872(3) authorized [Corrections] to require [Mr. Chestnut] to precisely describe the records he wanted copied." (Brief for Appellant before Court of Appeals, p. 7-8). In short, Corrections raised a new argument on appeal that was not presented to the trial court.

"It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Carrier v. Commonwealth,* 142 S.W.3d 670, 677 (Ky. 2004) (citing *Skaggs v. Assad, By and Through Assad,* 712 S.W.2d 947, 950 (Ky. 1986); *See also,* CR 76.12(4)(c)(iv).

Consequently, the merits of Corrections' new claim aren't properly before this Court.

Likewise, Corrections' Open Records policy found in CPP 6.1 requires an inmate who wishes to "inspect or obtain of copy of a Public Record which pertains to him [to give] a reasonably particular description of the record being requested." (TR, Vol. II, 116-117; A 4, p. 3-4). In *Hagan v. Farris,* 807 S.W.2d 488, 490 (Ky. 1991), this Court held that "an agency must be bound by the regulations it promulgates." More specifically, in *Commonwealth Transportation Cabinet v. Weinberg,* 150 S.W.3d 75, 77 (Ky. App. 2004), the court said: "Although never specifically articulated by a Court of this Commonwealth, it is axiomatic that failure of an administrative agency to follow its own rule or regulation generally is *per se* arbitrary and capricious." Corrections can't promulgate a regulation that contains one standard for inmate record access, and then argue to this Court that another standard applies. Such an action is "*per se* arbitrary and capricious." *Id.*

Finally, if this Court decides to reach the merits of this issue, KRS 61.872(3) is inapplicable based on the plain meaning of its statutory language. In this case, when a prison inmate requests copies of documents, KRS 61.874 controls.

KRS 61.872(3) states:

> A person may inspect public records:
> (a) During the regular office hours of the public agency; or
> (b) By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in

> which the public records are located after he precisely describes the public records which are readily available within the public agency . . .

When reading this statute several things must be kept in mind. First, "a prison inmate has the same right to inspect public records as any other person." *Blair v. Hendricks,* 30 S.W.3d 802, 806 (Ky. App. 2000), (citing Ky. Op. Atty. Gen., OAG 92-94 (1992)), *overruled on other grounds by Lang v. Sapp,* 71 S.W.3d. 133 (Ky. App. 2002). The Open Records Act "makes no exception for records held by incarceration facilities or requests for public records made by prison inmates." *Id.* Kentucky prisons "are required to comply with open records requests." *Id.* (citing Ky. Op. Atty. Gen., OAG 92-64 (1992)).

Second, KRS 61.872(3)(b) "contemplates records access by one of two means: onsite inspections . . . or receipt of records from the agency through the mail." Ky. Op. Atty. Gen., 06-ORD-018, p. 2 (2006). "Whereas KRS 61.872(2) requires, generally, that the requester 'describe' the records which he wishes to access by onsite inspection, KRS 61.872(3)(b) requires the requester to 'precisely describe[]' the records he wishes to access by mail." *Id.*

Third, KRS 61.872(3)(b) requires an agency to mail copies of the public records "to a person whose residence . . . is outside the county in which the public records are located. As such, "a requester residing in the same county where the public records are located may be required to inspect prior to receiving copies." Ky. Op. Atty. Gen., 95-ORD-52 (1995). Conversely, "a requester who live or works in a county other than the county where the public records are located may demand that the agency provide him with copies of records, without inspecting

those records, if he precisely describes the records . . ."*Id.* Thus, a greater burden of records specificity is placed upon individuals who, without onsite inspection, access public records by mail.

However, Bobby Chestnut has no right to conduct an onsite inspection of his inmate file before "describing" the copies of records he wants to receive. Corrections admitted "WKCC is one of the 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.'" (Brief for Appellant, p. 20). In other words, the only means of records access for a prison inmate is to blindly request copies of the documents they wish to review from their institutional file. Blind luck then determines whether a request happens to appropriately refer to the documents the inmate needs. A prisoner like Bobby Chestnut is deprived of the opportunity to conduct an onsite inspection of his institutional file as permitted by KRS 61.872(2), to take notes during that inspection, and "of the right to make abstracts of the public records . . . and to obtain copies of all public records not exempted by the terms of [the Open Records Act]." KRS 61.874. Bobby Chestnut is deprived of the benefit of KRS 61.874.[2]

However, unlike the out of county mailing provision found in KRS 61.872(3)(b), Mr. Chestnut resides in the same county where his records are located, and the records he requests are not "mailed" to him by the records

[2] The legality of Corrections' bright-line rule that prohibits inmates from conducting an onsite records inspection is suspect given that the "Open Records law provides that any person[if it contains a specific reference to the requesting inmate] can inspect the original records and cannot be required only to purchase a copy of the original record." OAG 82-396; KRS 197.025(2). However, this issue wasn't preserved for appeal and won't be addressed by Appellee's brief.

custodian but are transferred to him by the onsite records custodian. In other words, an inmate's request for records doesn't factually or legally fit under KRS 61.872(3)(b). Moreover, because Corrections prohibits him from inspecting his file, he can't claim the benefits of KRS 61.874 that are triggered "upon inspection." One thing is clear, Corrections, who prohibits onsite records inspections by inmates, now insists that the inmate endure a heavier statutory burden by describing the documents in his file with precision. Such a requirement shifts the burden of providing public access to records onto the inmate and completely subverts the policy and purpose of the Open Records Act.

D. The Court of Appeals properly reviewed de *novo* the specificity required to obtain documents under the Open Records Act and determined as a matter of law that the Attorney General's new interpretation complied with the Open Records Act.

"In an appeal of an Attorney General's decision . . . the court shall determine the matter *de novo* . . . [and] the burden of proof shall be on the agency [to sustain the action.]" KRS 61.882(3). The Franklin Circuit Court "determined the matter *de novo*," and concluded that Corrections had failed to sustain its burden of proof. The trial court did not confine itself to the record before the Attorney General, but accepted and made additional factual findings. Based on those facts, the circuit court made a judicial determination of law in favor of disclosure. The Court of Appeals reviewed "the circuit court's opinion as [it] would the decision of a trial court," *Moore v. Asente,* 110 S.W.3d 336, 354

(Ky. 2003). The Court of Appeals reviewed anew the questions of law. *Hardin County Schools v. Foster,* 40 S.W.3d 865, 868 (Ky., 2001).

The Department of Corrections pays lip service to the *de novo* standard and its burden to sustain the action, but argues that the Court of Appeals did not conduct "a true *de novo* review of [the] questions of law." (Brief for Appellant, page 3). Corrections insists that the Court of Appeals' review of the decisions below was inadequate because appellate court found the "AG's reasoning and that of the circuit court more persuasive" than Corrections' arguments. *Chestnut*, slip op. at 10). Simply put, those arguments were more persuasive because they were correct.

First, there is no law to support a government agency's claim to due process protection. The Due Process Clause only applies to "persons." *Zadvydas v. Davis,* 533 U.S. 678 (2001); *see also, Division of Driver Licensing v. Bergmann,* 740 S.W.2d 948, 951 (Ky. 1987). Moreover, governmental action must threaten the "person" with a deprivation of life, liberty or property. *Town of Castle Rock, Colo. v. Gonzales,* 125 S.Ct. 2796, 2803 (2005). A state is not a person under the Due Process Clause. *Premo v. Martin,* 119 F.3d 764, 771 (9th Cir. 1997), *cert. denied* 522 U.S. 1147 (1998). Corrections has no Due Process protection.

Second, the Attorney General's change in interpretation of the specificity required to access records, does not make the change illegal, arbitrary or unconstitutional. The Attorney General's opinion admitted it departed from past precedent, but explained that "the reasoning of the [past] decisions relied upon

[was] not supported by the express language of the Open Records Act." (TR, Vol. I 43-45, 48; 03-ORD-117, p. 1-3; 03-ORD-12, p. 1). As such, the Attorney General "had an affirmative responsibility to abandon that erroneous [opinion] when it discovered its error" of statutory interpretation. *Delta Air Lines, Inc. v. Com. of Kentucky, Revenue Cabinet,* 689 S.W.2d 14, 20 (Ky. 1985). "The failure of a public officer to correctly administer the law does not prevent a more diligent and efficient public administrator" from correctly administering the law because "an erroneous interpretation of the law will not be perpetuated." *Id.,* (citing *City of Louisville v. Board of Education,* 154 Ky. 316, 157 S.W. 379 (1913)).

Both lower courts affirmed the Attorney General's more liberal interpretation of the specificity requirement. On *de novo* review, the Franklin Circuit Court held the plain language of the Act "mandates that [Chestnut] have access to his entire non-confidential inmate file. (TR, Vol. II, 185). In affirming the circuit court, the Court of Appeals held that the "plain language and purpose of the Open Records Act supports the AG's new interpretation . . . [that] as long as the custodian can identify what documents the applicants wish to see, the statute is satisfied." *Chestnut*, slip op. at 10. Consequently, the Attorney General's opinion in Chestnut's case was not arbitrary because the express language of the Open Records Act supports the Attorney General's new interpretation.

Third, the Franklin Circuit Court's *de novo* review under the Open Records Act is not limited to questions of law. Rather, the General Assembly has provided the circuit court with a broader power of review in open records disclosure cases;

a review that permits the circuit court to engage in additional judicial fact-finding while determining the questions of law before it. KRS 61.882. Corrections reliance on the zoning case of *Hougham v. Lexington-Fayette Urban County Government*, 29 S.W.3d 370, 373 (Ky. App. 1999), is misplaced. Corrections' claims *Hougham* supports the rule that the Attorney General's failure to provide "notice of the new interpretation of the law and [an] opportunity to respond," violated Corrections' "due process protections." (Brief for Appellant at 4, 7).

In relevant part KRS 61.882(1) provides: "The Circuit Court . . . shall have jurisdiction to enforce the provisions of [the Open Records Act] by injunction or other appropriate order on application of any person. KRS 61.882(3) states, "In an appeal of an Attorney General's decision . . . the court *shall determine the matter de novo.. . [and] the burden of proof shall be on the public agency.*" (emphasis added.) Finally, KRS 61.882(4) adds, "proceedings arising under this section . . . *shall be assigned for hearing and trial* at the earliest practicable date." (emphasis added).

The statutory language is clear; the circuit court must make additional factual findings on nondisclosure issues, while the Attorney General's legal conclusions are not binding on the circuit court. For example, the trial court must have the power to make additional factual finding to determine whether an agency's compliance with a request would create an "undue burden" to produce records. Indeed, Corrections understands this because it filed a "Complaint On Appeal," and submitted additional factual information to the Franklin Circuit Court in an effort to sustain its statutory burden of proof. (TR, Vol. I, 1).

By statute, an open records action is not a case where the "legislature has designated an administrative agency to carry out a legislative policy by the exercise of discretionary judgment in a specialized field [where] the courts do not have the authority to review the agency decisions *de novo*." *American Beauty Homes Corp v. Louisville and Jefferson Co. Planning and Zoning Commission*, 379 S.W.2d 450, 458 (Ky. 1964). Under the Open Records Act, the Attorney General's Office is not "afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *See, Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 309 (Ky. 1972). Instead, it is the circuit court action that ensures due process to all parties. *Carter v. Craig,* 574 S.W.2d 352, 354 (Ky. App. 1978) (citing *Bell v. Board of Education,* 450 S.W.2d 229, 232 (Ky. 1970)). It is the circuit court that examines the entire factual and legal record anew, finds additional facts and makes conclusions of law.

The line of nondisclosure cases in which this Court states that judicial review of a disclosure decision must be determined on a case-by-case basis also supports this interpretation. For example, in *Kentucky Board of Examiners of Psychologists v. The Courier-Journal & Louisville Times Co.,* 826 S.W.2d 324, 328 (Ky. 1992), this Court said, "The statute [KRS 61.878] contemplates a case-specific approach by providing for *de novo* judicial review of agency actions, and by requiring that the agency sustain its action by proof." *Id.* Such a question is "intrinsically situational, and can only be determined within a specific context." *Id.*

Even the Attorney General's Office understands the nature and extent of a circuit court's *de novo* review. "In a line of decisions dating back to 1988, the Attorney General has recognized: 'It is clear from KRS 61.882 that the legislature has vested the circuit courts with authority overriding that of the Attorney General in determining open records questions.'" Ky. Op. Atty. Gen., 04-ORD-58, p. 3 (2004).

Finally, the federal Freedom of Information Act (FOIA) uses the same language found in KRS 61.882(3). FOIA says, if the agency fails to disclose requested documents, "the court shall determine the matter *de novo.*" 5 USC § 552 (c) (1976). Relying on the Congressional Record, the court in *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978), explained that "courts were given authority to review *de novo* any denial of access [of records] 'in order that the ultimate decision as to the propriety of the agency's action is made by the court and (to) prevent (review) from becoming a meaningless judicial sanctioning of agency discretion.'" *Id.* (citing S. Rep. No 813, 89th Cong., 1st Sess. 8 (1965)).

The Franklin Circuit Court and the Kentucky Court of Appeals reviewed *de novo* the specificity required to obtain documents under Kentucky's Open Records Act. Both lower courts independently determined that the plain language and explicit intent of the Open Records Act requires the Department of Corrections to honor an inmate's request for copies of all non-confidential documents in his institutional file; that holding should be affirmed.

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT PROVIDING ACCESS TO NONCONFIDENTIAL INMATE RECORDS WAS NOT AN UNREASONABLE BURDEN UNDER KRS 61.872(6).

Corrections failed to "satisfy the clear and convincing standard under KRS 61.872(2)" that providing access to all non-confidential records in an inmate's institutional file constituted an unreasonable burden to them. (TR, Vol. II, 186). After reviewing all the evidence submitted by Corrections, the Franklin Circuit Court found "that the problem with [Corrections'] proof [of unreasonable burden] is they do not attempt to show how the new burden will actually affect them." *Id.* As an example, the Court notes that Corrections didn't "estimate how many new employees they will have to hire" to honor inmate requests for all non-confidential records in their institutional file. *Id.* Corrections predicted many inmates will now request to review all of their non-confidential documents," but it was unable to "forecast what its actual burden will be." *Id.* Because Corrections failed to present clear and convincing evidence of its unreasonable burden to the trial court as mandated by KRS 61.072(6), the Court of Appeals correctly held that Corrections had not sustained its burden of proof.

Moreover, the purpose and plain meaning of the text of the Open Records Act, precludes Corrections from claiming the unreasonable burden exception based on its total prison population. Under the Act, the unreasonable burden exception in KRS 61.872(6) applies only to individuals. As such, the Court of Appeals correctly held that Corrections had not sustained its burden of proof.

A. The Court of Appeals correctly applied the clear error standard of review in affirming the trial court's determination that Corrections was not unreasonably burdened.

The action of the Franklin Circuit Court in denying relief to the Department of Corrections was not arbitrary because the factual record before this Court doesn't compel relief. *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822 (1975). Despite the fact that Bobby Chestnut presented no evidence, the Franklin Circuit Court determined that Corrections failed to meet its statutory burden. Corrections failed to present clear and convincing evidence that its refusal to provide Mr. Chestnut copies of all non-confidential records in his institutional file constituted an unreasonable burden. KRS 61.872(6); *See, Medley v. Board of Education,* 168 S.W.3d 398, 402 (Ky. App. 2005) (citing *Moore v. Asente,* 110 S.W.3d 336, 354 (Ky. 2003)); *See also,* KRS 61.882(3).

Corrections and Bobby Chestnut agree that the appellate standard of review for a circuit court's findings of fact is clear error. *Fayette County Board of Education v. M.R.D. ex rel. K.D.,* 158 S.W.3d 195, 201 (Ky. 2005). *See also,* CR 52.01. However, the parties differ on the meaning of "clear error" under the facts of this case. In the usual case, the dispositive question is whether the factual findings are supported by "substantial evidence." *Medley,* 168 S.W.3d 402. However, Bobby Chestnut, who was defending the action brought by Corrections, presented no evidence to the Franklin Circuit Court. In such circumstances, under *Morrison v. Trailmobile Trailers, Inc.,* 526 S.W.2d 822, 826 (Ky. 1975), the correct appellate standard of review is:

> When a trial court makes a finding of fact adverse to the party having the burden of proof and his is the only evidence presented, the test of whether its 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.***

In this case, the dispositive question on review is whether the evidence presented by Corrections to the trial court compelled a finding in its favor as a matter of law. *Id.* A review of the record demonstrates that the evidence placed before the Franklin Circuit Court does not compel a finding in Corrections' favor.

The *Morrison* rule stems from CR 41.02(2), the involuntary dismissal rule, which is the bench trial equivalent of a directed verdict in a jury trial under CR 50.01. *Morrison, 526 S.W.2d 823.* The rationale for the *Morrison* standard was best explained in *Withers v. Berea* College, 349 S.W.2d 357 (Ky. 1961). *Withers* points out that the substantial evidence test "can hardly apply in reviewing a finding adverse to the party with the burden of proof [like Corrections]." *Id.* "In such a case, the trier of fact simply may not be convinced by the evidence adduced in support of the burden, in which event his finding does not necessarily rest on the sufficiency, or even the existence, of proof on the other side." *Id.* at 359. Furthermore, "the considerations in a bench trial are quite different from those on a motion for a directed verdict in a jury trial. . . The trial court does not, as in the case of a motion for a directed verdict [in a jury trial,] indulge every inference in the plaintiff's favor." *Morrison,* 526 S.W2d 824.

Corrections attempts to distinguish *Morrison* and CR 52.01 by saying that because this case was decided solely on Corrections' brief, affidavits and exhibits, there was no bench trial of the case. (Brief for Appellant, p. 14). Rather, Corrections complains there wasn't even a hearing and so the disposition of the case was "more akin to a motion for summary judgment than a motion for directed verdict." *Id.*

There are several problems with Corrections' argument. First, the language of CR 52.01 doesn't support the limited construction Corrections wishes to place on the actions of the trial judge. CR 52.01 begins, "*in all actions* . . . the court shall find the facts specifically . . .and render an appropriate judgment." "All actions" is expansive language that at the very least encompasses appeals from agency determinations and *de novo* reviews. In fact, Corrections admits that an open records appeal is determined *de novo* by the circuit court. KRS 61.882(3). In the context of the Open Record Act, *de novo* review contemplates the taking of additional evidence, making findings of facts and conclusions of law. KRS 61.882(3). A "bench trial" is defined as a trial "where the judge decides questions of fact as well as questions of law." Black's Law Dictionary, 1543 (8th ed. 2004). As previously discussed, the trial court must make factual findings in determining whether compliance with a request would create an undue burden on the agency to produce records. KRS 61.872(6). These judicial decisions aren't made in a procedural void; they are made within the framework of the Rules of Civil Procedure.

Second, Corrections filed a notice of "Submission of Case for Final Adjudication," (TR, Vol. II, 174-175). Instead of asking for a hearing or filing a motion for summary judgment, Corrections rolled the dice because Mr. Chestnut hadn't filed a trial brief in support of his position. Corrections "requested the Court to reverse the Attorney General's decision based on the arguments presented in their previously filed Memorandum of Law." (TR, Vol. II, 175). The court responded to Corrections' request. Consequently, Corrections waived its right to a hearing when it submitted the case for final adjudication on the record.

Likewise, the case law is clear that "that a trial court has no authority to otherwise dismiss claims [on summary judgment] without a motion, proper notice and a meaningful opportunity to be heard." *Storer Communications v. Oldham County Board Of Education,* 850 S.W.2d 340, 342 (Ky. App. 1993). "CR 56.01 and CR 56.02 clearly provide that a 'party may seek a summary judgment.' The rules do not contemplate such a proceeding on the court's own motion." *Id.* Finally, "CR 56.03 provides that one will have a minimum of ten days to respond to such a motion. This requirement is mandatory unless waived." *Id.* If Corrections wanted a summary judgment, it should have filed a motion and served it on Mr. Chestnut at his last known address. Corrections bypassed that procedural right, and decided instead to submit the case for a final adjudication.

In its review of the evidence, the Franklin Circuit Court determined that Corrections had failed to sustain its burden of proof. As such, the court

involuntarily dismissed the case under rule CR 41.02(2) and determined Bobby Chestnut was entitled to all non-confidential records in his institutional file.

Corrections then complains that CR 52.01 and *Morrison* are inapplicable because the case was decided "solely upon [Corrections'] submitted brief [which included supporting affidavits and exhibits.]" (Brief for Appellant, p. 14). However, in *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986), this Court had the opportunity to discuss the breadth of the clearly erroneous standard. The Court noted that even when the trial court bases her decision on depositions, and thus doesn't have the opportunity to physically judge the credibility of the witnesses, "the 'clearly erroneous standard' is sufficiently broad to permit the reviewing court to adopt a method of review which best fits the questions involved and the particular facts in a specific case." *Id.* at 444. "Even where a trial judge has essentially tried the case on depositions, the [reviewing court] should not make a *de novo* determinations of the facts." *Id.*, (citing *Department of Human Resources v. Moore*, 552 S.W.2d 80 (Ky. App. 1954). Trying a case on deposition testimony, "does not allow the reviewing court to substitute its judgment for that of the original finder of fact." *Id.* Under *Reichle* and CR 52.01, the *Morrison* standard applies to the review to be conducted by this Court; that is *whether the evidence adduced is so conclusive as to compel a finding in [Corrections] favor as a matter of law. Morrison*, 526 S.W.2d 826.

Admittedly, the Court of Appeals did wrongly refer to the "abuse of discretion" standard in its opinion. *Chestnut*, slip op. p.12. However, the Court of Appeals cited *Morrison* and then applied the "clear error" standard of

Morrison to the facts of this case. *Id.* Relying on *Morrison,* the Court of Appeals stated, "[W]e cannot say that the evidence is so conclusive as to compel a finding in favor of [Corrections.] *Id.* As such, the abuse of discretion standard was never actually employed and didn't affect the Court of Appeals' review of the evidence. As *Miller v. Eldridge,* 146 S.W.3d 909 (Ky. 2004), stated, the "difficulty in defining and applying "abuse of discretion" is illustrated by the importation by various courts of the clearly erroneous standard into the abuse of discretion standard." *Id.* at 914. "These courts maintain that an abuse of discretion also occurs when a trial court 'relies on clearly erroneous findings of facts.'" *Id.* at 914-915. In its opinion, the Court of Appeals found the Franklin Circuit Court did not abuse its discretion because the court didn't "rely on clearly erroneous findings of facts." *Id.* In actuality, the Kentucky Court of Appeals applied the *Morrison* standard, and no error was committed.

B. On review, the evidence adduced by Corrections was not so conclusive as to compel a finding that it met the undue burden standard of KRS 61.872(6).

Corrections argues that "due to the sheer volume of requests received, and the security risk inherent in providing copies of entire files of records [to inmates,] compliance with an inmate's request for [all non-confidential documents in his] file constitutes an unreasonable burden under KRS 61.872(6)." (Brief for Appellant, p. 21). In affirming the Franklin Circuit Court, the Court of Appeals determined that the evidence Corrections presented was not so conclusive as to compel a finding in its favor as a matter of law; that finding should be affirmed.

Corrections must prove more than the existence of a burden to the trial court; it must prove clearly and convincingly an unreasonable burden and it failed to do so. Corrections must do more than say that inmates use the Open Records Act to harass prison officials; it must prove it. But, Corrections failed to prove it. Admittedly, Corrections would be greatly inconvenienced by inmate records requests, but that is all the evidence established. To meet the clear and convincing standard of proof to sustain the applicability of the exception, Corrections was required to provide hard evidence to support a trial court finding that the burden in honoring inmate requests for file access is unreasonable. The evidence Corrections presented just didn't meet this demanding standard.

KRS 61.872(6) states:

> If the application [to inspect or copy] places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection . . .or mail copies. *However, refusal under this section shall be sustained by clear and convincing evidence.* (emphasis added.)

In interpreting this provision, the Attorney General has noted that "KRS 61.872(6) is intended to afford relief to public agencies where there is a pattern of harassing records requests aimed at disrupting essential agency functions, or, alternatively, where a *single* records request is such that production of those records would place an unreasonable burden on the agency." Ky. Op. Atty. Gen., 06-ORD-133, p. 3 (2006) (emphasis added). The Attorney General added, "[t]o prevent agencies from exploiting this provision as a means of circumventing the

requirements of the Open Records Act, the legislature has provided that refusal under this section must be sustained by clear and convincing evidence." *Id.*, (citing KRS 61.872(6)).

First and foremost, the explicit language of KRS 61.872(2), (3) and (6) speaks in terms of a person, not groups of individuals. As evidence of its unreasonable burden, Corrections erroneously wants this Court to focus on inmates as a group instead of focusing on each inmate's records request or application. Corrections wants this Court to sanction special rules that apply only to its inmate population and not the public at large. Corrections casts the unreasonableness of its burden based on the "volume of [inmate] requests received, and the security risk inherent in providing copies of entire files of records [to inmates.]" (Brief for Appellant, p. 21). However, nothing in the language of Kentucky's Open Records Act permits or supports Corrections' ability to lump all inmates together to sustain by clear and convincing evidence the unreasonableness of its burden of producing documents. Indeed, such an interpretation conflicts with the requirement that exceptions to public records access "shall be strictly construed." KRS 61.871.

KRS 61.872(2) says, "*Any person* shall have the right to inspect public records. The official custodian may require *written application*, signed by *the applicant* . . ." (emphasis added.) The remainder of KRS 61.872(2) and (3) refers only to "a person" or "the person." KRS 61.872(6) explicitly states, "If the *application* [not applications] places an unreasonable burden in producing public records . . . the official custodian may refuse" the request. Likewise, " . . . if

the custodian has reason to believe that repeated requests are intended to disrupt other essential [agency] functions . . . the official custodian may [also] refuse" the request. KRS 61.872(6).

The statutory provisions speak to individuals, and as this Court well knows it is "not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used. *Beckham v. Board of Education,* 873 S.W.2d 575, 577 (Ky. 1994), (citing *Gateway Construction Co. v. Wallbaum,* 356 S.W.2d 247 (Ky. 1962)). The Attorney General, has recognized this interpretation by pointing out:

> Determining when an application places an unreasonable burden upon an agency to produce voluminous public records is at best difficult. Each request for inspection of public records must be assessed *based on the facts in that particular situation* . . . However, it is stressed that this office has previously opined that [an individual's] request to inspect 10,000 cases [is] certainly 'voluminous,' but not necessarily unreasonably burdensome.

Ky. Op. Atty. Gen., 04-ORD-028, p. 4 (2004) (citing Ky. Op. Atty. Gen., OAG 84-278, p. 2) (emphasis added). In other words, it isn't clear and convincing evidence of Corrections' unreasonable burden to turn the plain meaning of the Open Records Act on its head in an attempt to categorize the entire population of the Kentucky prison system as "a person."

Second, a review of the evidence presented by Corrections allows this Court to "conduct a thorough but deferential examination of the record and trial court's findings of fact . . ." *Miller v. Eldridge,* 146 S.W.3d 909, 917 (Ky. 2004). The record reveals that Corrections presented the trial court with the affidavits

and job descriptions of ten records custodians, and the affidavit and job description of the branch manager of Offender Records. (TR, Vol. II, 139-173). It presented the trial court with a picture of Bobby Chestnut's central office, institutional and medical records files consisting of over 600 pages. Although the central office file and the institutional file are nearly identical, and despite the fact that Bobby Chestnut didn't request his medical records file that he has a right to inspect, the trial court noted, "inmate records are often hundreds of pages long." (TR, Vol. II, 185). Moreover, the trial court acknowledged "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." *Id.*

However, in "weighing the evidence" and examining its sufficiency, it was the lack of evidence that led the trial court to conclude that Corrections had failed to sustain its burden. On review, the appellate "court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence." *Johnson v. Galen Health Care, Inc.*, 39 S.W.3d 828, s32 (Ky. App. 2001).

The trial court found that Corrections merely "alleged" that it receives "many requests by inmates to review their files and that many employees are needed to deal with these requests." *Id.* There was no estimate on the amount of time Corrections' employees would expend in finding and producing the records. (TR, Vol. II, 186). The trial court did not find that inmates "use the open records act as a means of recreation or to harass prison officials," (Brief for Appellant, p. 13), because Corrections presented no evidence to substantiate its statement.

Indeed, the affidavits of the eleven records custodians were silent on this claim. Nor did Corrections present any proof from any of the eleven records custodians that "they had reason to believe that repeated requests were intended to disrupt other essential functions of the agency." *See*, KRS 61.872(6). Only one custodian of the eleven stated, "a significant amount of time currently is involved with open records requests." (TR, Vol. II, 155). Finally, there was no evidence presented on how difficult and/or time consuming it would be for a records custodian to segregate and/or redact confidential documents from inmate files.

The unsupported allegation of counsel is not evidence. The mere speculation that "many inmates will now request to review all of their non-confidential documents" is not evidence of substance. (TR, Vol. II, 185). The silence of the record as to repeated records requests from inmates, or the use of requests to harass Correctional officials, demonstrates Corrections lack of evidence. Indeed, a careful review of the eleven records custodian's affidavits establishes Corrections raised no more than a mere possibility of a burden, and a possibility does not meet the clear and convincing standard of proof.

The record presented to the trial court, through the eleven affidavits of the records custodians, contained too many generalities and left too many unanswered questions. There was no evidence presented to the trial court on the following: 1)how much time was spent responding to open records requests; 2) how much time it would take to copy a typical file; 3) the size of the typical file since the sizes of inmate files vary, with "*some* inmate files [becoming] very large" (TR, Vol. II, 168); (emphasis added); 4) how many requests were made to inspect

documents and how many requests were made to copy documents; 5) of the requests for inspection or copying how many determinations were made not to comply; 6) how many open records requests were made by people other than the inmates--- from the general public, defense attorneys, law enforcement or the judicial system (*Id.*) ; 7) how many documents were typically requested; 8) what was the total amount of fees received for copying records; 9) how many requests were there for medical records as opposed to institutional file records;[3], and finally, 10) how many requests were repeat requests from the same inmate.

The requirement that Corrections honor inmate requests for access to all non-confidential records in an inmate's file will inevitably impose some burden on Corrections, but the evidence of the unreasonableness of its burden wasn't clear and the trial court wasn't convinced. "In such a case, the trier of fact simply may not be convinced by the evidence adduced in support of the burden, in which event his finding does not necessarily rest on the sufficiency, or even the existence, of proof on the other side." *Bourbon County Bd. of Adjustment v. Currans,* 873 S.W.2d 836, 838 (Ky. App. 1994). In short, Corrections just didn't meet its burden of proof.

Next, Corrections appears to argue that it will be unreasonably burdened by its duty to segregate or redact "the few" confidential records from non-confidential records if inmates are permitted access to all non-confidential documents in their file. (Brief for Appellant, p. 17). Corrections also complains that the "risk of inadvertent disclosure" of confidential information to an inmate

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[3] Some of the affidavits Corrections submitted to the trial court speak only of non-medical records requests. Other affidavits do not make that distinction.

creates an institutional security risk that leads to an unreasonable burden. (Brief for Appellant, p. 18). Corrections is wrong on both counts.

First, Corrections' failure to maintain a filing system by which records can be safely and easily accessed for public inspection or copying does not constitute an exception to the Open Records Act. Corrections' argument overlooks the legislative judgment made explicit in the Open Records Act that Corrections has the responsibility of designing and implementing an organizational scheme that permits timely and appropriate access to records. "Each public agency shall adopt rules and regulations . . .to provide full access to public records . . ." KRS 61.876. Corrections can't complain that its system of providing public access is unduly burdensome when Corrections has the opportunity and the obligation to create and institute an appropriate system for responding to requests. Corrections presented the trial court with very little evidence on its system of record keeping. Consequently, the record is silent as to whether filed confidential documents are even clearly stamped as **"CONFIDENTIAL"** when they are placed in an inmate's file.

Second, requiring Corrections to segregate "confidential documents from non-confidential documents [cannot] serve as a basis for denying a request under KRS 61.872(6)," the unreasonable burden exception. Ky. Op. Atty. Gen., 04-ORD-028, p. 5 (2004). To the contrary, KRS 61.878(4) states: "If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." The statute is clear. A public agency has a mandatory duty to

separate out confidential documents from non-confidential documents, and make the non-confidential documents available for review.

Third, the necessity of denying access to certain records for the purpose of institutional safety and security in correctional facilities is a genuine concern. Yet, providing an inmate with access to all the non-confidential documents in his file doesn't implicate institutional safety and security. In KRS 197.025(1), the legislature has created a statutory scheme for prohibiting inmate access to otherwise nonexempt public records where disclosure of those records is "deemed by the commissioner . . . to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution or any other person." Moreover, an inmate is only entitled to records that contain a "specific reference" to that inmate. KRS 197.025(2). As the Attorney General points out, "KRS 197.025 is broad in scope and vests the correctional facility with a great deal of discretion in the release of records maintained at its facilities. However, this exercise of discretion is not unfettered." Ky. Op. Atty. Gen. 06-ORD-176, p. 6 (2006) (citing Ky. Op. Atty. Gen., 96-ORD-179).

Corrections failed to "convincingly explain how requiring an inmate to make a more specific open records request furthers" the goal of institutional safety and security. *Chestnut*, slip op. p. 3. For example, Corrections was required to present proof to the trial court, but provided only conjecture. Corrections' brief lists nine examples of confidential records, including conflict notification forms, which are exempt from disclosure under the Act. (Brief for Appellant, p. 18-20.) Given Corrections' knowledge of the confidential nature of

these forms, it would not impose significant costs in time or money to separate the confidential forms from the non-confidential documents. Corrections already has an obligation under KRS 197.025(1) to make certain that an inmate who requests records isn't provided confidential documents, such as the conflict notification form. Consequently, an inmate's right to access to all non-confidential documents in his file won't increase the likelihood of "inadvertent disclosure." Confidential documents are well known to Corrections and are already banned to the inmate under current policy, rule or law. Appropriate file management should prevent inadvertent disclosure.

Furthermore, Bobby Chestnut requested records from his institutional file, not his central office file. According to the offender records branch manager, "not all documents related to an inmate are included in both the central office inmate file and the institutional file." *Id.* "Parole supervision reports, correspondence from private individuals regarding a prisoner's prospect of parole . . . may only be contained in the Central Office inmate file." (TR, Vol. II, 167). Of the nine specific confidential documents listed by Appellant, the record shows that four of those documents, including the "victim impact statements to the Parole Board," "letters to the Parole Board," the "pre-parole progress report," and "letters from a member of the judiciary to the Parole Board," (TR, Vol. I, 18-19) may only be found in the central office file, not the inmate's institutional file. (TR, Vol. II, 167). Consequently, the "risk of inadvertent disclosure" of those confidential records is virtually nonexistent and cannot constitute an unreasonable burden.

Corrections can't complain that the necessity of copying and mailing a large quantity of records for an inmate is burdensome since the inmate is prohibited from inspecting the records before requesting copies. Corrections' own rule limits an inmate's option to receiving copies of records after providing the custodian with "a reasonably particular description of the record being requested." (Brief for Appellant, p. 20 and TR, Vol. II, 117). As the Attorney General has observed, "[r]equiring inspection prior to furnishing copies is an important part of Open Records provisions. Requiring inspection prior to making copies aids in preventing frivolous requests, and may prevent controversy regarding whether the proper records were copied." Ky. Op. Atty. Gen., OAG 90-31, p. 2 (1990).

Nevertheless, Corrections maintains "to compensate for this limitation [the inability to physically inspect their files,] inmates are provided complimentary copies of many of the non-exempt records contained in an institutional inmate file at the time the record is created . . ." [4] (Brief for Appellant, p. 20). Even though most of these listed documents are provided to the inmate to meet Due Process requirements, Corrections argues the receipt of these "complimentary copies" demonstrates the inmate "knows what types of records are contained in an inmate file." (Brief for Appellant, p. 16). Therefore, the inmate should be able to provide a particularized description of the records he is seeking. *Id.*

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[4] Appellant's brief goes on to list many of the documents that the inmate receives from Corrections. However, this list was not placed into evidence in the Franklin Circuit Court. Relying on facts outside the record is improper. *Callahan v. Fluhr*, 267 Ky. 637, 103 S.W.2d 109, 110 (Ky. 1937).

Once again, Corrections can't shift the burden of acquiring access to the inmate to limit its workload. To place the burden on the inmate undermines the stated purpose of the Open Records Act "to provide free and open examination of public records." KRS 61.871. A requirement that an inmate's request for records be made with "reasonable particularity," only alleviates the burden on Corrections because inmates are discouraged or prevented from accessing their records. Corrections can't evade the duties imposed upon it by the Open Records Act through imposition of a method that arbitrarily dismisses otherwise legitimate requests for records by claiming the inmate should know what is in his file.

A review of the evidentiary record before the Franklin Circuit Court, in the context of the purpose and plain meaning of the Open Records Act, demonstrates that the evidence "adduced" by Corrections is not so conclusive as to compel a finding in [its] favor as a matter of law. *Morrison,* 526 S.W.2d 824. In applying this standard, "mere doubt as to the correctness of [a] finding [will not justify [its] reversal." *Moore v. Asente,* 110 S.W.3d 336,353 (Ky. 2003) (citation omitted). As such, the Court of Appeals correctly held that Corrections had not sustained its burden of proof.

CONCLUSION

For the above stated reasons, the Kentucky Court of Appeals decision that inmate Bobby Chestnut was entitled to review all non-confidential documents in his inmate file should be affirmed. Mr. Chestnut's description of the records he wished to review was sufficient to allow the records custodian to identify and retrieve them. The plain language and purpose of Kentucky's Open Records Act requires that Corrections honor Mr. Chestnut's requests. Likewise, the Court of Appeals correctly affirmed the Franklin Circuit Court's factual determination that it is not an unreasonable burden for the Department of Corrections to provide access to all non-confidential documents in an inmate's file. Under the clearly erroneous standard as enunciated in *Morrison*, the evidence "adduced" by Corrections was not so "conclusive as to compel a finding in its favor as a matter of law. *Morrison*, 526 S.W.2d 824.

Respectfully submitted,

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