

NO. 19CI-4289

JEFFERSON CIRCUIT COURT
DIVISION ONE (1)
JUDGE ERIC J. HANER

INSTITUTE FOR JUSTICE

PLAINTIFF

v.

**ORDER ADDRESSING THE PARTIES'
CROSS MOTIONS FOR SUMMARY JUDGMENT**

BRANDON COAN, et al.

DEFENDANTS

This case is before the Court on the cross motions for summary judgment filed by the parties on January 27 and February 10, 2022. The parties finished briefing the motions on March 2, 2022. The Court heard oral arguments and took additional proof during a hearing on April 29, 2022. The motions are ripe for a decision.

I. Factual and Procedural Background

On June 18, 2018, Plaintiff Institute for Justice (“IJ”) entered into a consent decree with Louisville/Jefferson County Metro Government (“Louisville Metro”) providing that Louisville Metro would not discriminate against food-truck vendors or prohibit them from operating within a certain distance of commercial food establishments and, for five years thereafter, would notify IJ before promulgating any administrative rule or ordinance addressing food-truck operations (the “Consent Decree”). (See Ex. B to Compl.) Less than four months later, four members of the Louisville Metro Council, including Defendants Brandon Coan, Pat Mulvihill, Scott Reed, and Barbara Sexton-Smith (the “Councilmembers”), proposed a new ordinance, O-347-18, that imposed new regulations on food-truck vendors without notifying IJ. (Compl. ¶ 14.) On or around October 11, 2018, IJ sent a letter to Louisville Metro Mayor Greg Fischer in which it took the position that the proposed ordinance violated the terms of the Consent Decree. (See Ex. C to Compl.) After receiving no response from Mayor Fischer, IJ sent a request to the Councilmembers seeking copies of certain records related to the proposed ordinance pursuant to Kentucky’s Open Records Act, KRS 61.870 *et seq.*¹ (See Ex. D to Compl.) IJ’s request specifically sought disclosure of the following items:

¹ Both IJ’s letter to Mayor Fischer and its requests to the Councilmembers under the Open Records Act were submitted on its behalf by Arif Panju, who serves as a managing attorney for IJ. (See Exs. C & D to Compl.; Compl. ¶¶ 5, 15.)

1. Copies of all documents and communications concerning (or referencing) the proposed ordinance O-347-18;
2. Copies of all documents reflecting communications (sent or received by you or your staff) between June 1, 2017 and November 1, 2018 containing any of the following words: (1) "food truck"; (2) "food trucks"; (3) "vendor"; (4) "vendors"; (5) "vending"; (6) "restaurant"; or (7) "restaurants";
3. Copies of all documents concerning (or referencing) the Louisville Downtown Partnership containing any of [those terms];
4. Copies of all documents and communications to or from the Louisville Downtown Partnership (including to or from any of its representatives or employees) containing any of [those terms]; and
5. All documents and communications concerning or referencing the "No Food Trucks" signs authorized and/or installed by Louisville Metro in 2017.

(*Id.*) The record does not reflect the date or dates on which the Councilmembers received IJ's request.

On November 7, 2018, the Louisville Metro Council's open records coordinator sent an initial joint response to IJ's request on the Councilmembers' behalf. (See Ex. E to Compl., Pl.'s Appeal to Attorney Gen'l, Ex. C.) In the initial joint response, the open records coordinator stated that a search was "in progress, but [had] not yet returned results on the specified search terms, although "with the broad terminology it [was] expected to yield sizable results."

(*Id.* 2) For that reason, the open records coordinator invoked KRS 61.872(5) and stated that additional time for disclosure was necessary because of the need for the Councilmembers to conduct searches and to review records "for exemptions and/or redactions in order to protect against invasions of personal privacy." (*Id.*) The open records coordinator nevertheless assured that the Councilmembers would make all responsive records available to IJ by December 7, 2018. (See *id.*)

On December 7, 2018, Louisville Metro Council Clerk H. Stephen Ott sent another response to IJ's request on the Councilmembers' behalf. (See Ex. D to Pl.'s Appeal to Attorney Gen'l.) Rather than producing any responsive records, Clerk Ott stated that the Councilmembers would be denying IJ's request in its entirety on the grounds that it was an "improperly framed open records request" and "compliance would create an unreasonable burden on the agency." (*Id.* 1.) Clerk Ott argued that IJ's request did not reasonably identify the records to be disclosed and was "more properly characterized as a request for research to be performed." (*Id.*) Clerk Ott further stated that, "upon

coordinating an electronic search utilizing the search [IJ] provided, approximately 8,300 records were uncovered” and that “[p]roducing these records would require an extraordinary amount of time as each record would be reviewed for, at least, attorney-client privileged information and personal information exempt pursuant to KRS 61.878(1)(a).” (*Id.*)

On April 5, 2019, IJ appealed the Councilmembers’ decision to deny its request under the Open Records Act to the Kentucky Attorney General. (See Pl.’s Appeal to Attorney Gen’l.) The Attorney General issued a decision on May 9, 2019 upholding the Councilmembers’ denial of all but one of the items in IJ’s request. (See Ex. A to Compl.) More specifically, the Attorney General found that the Councilmembers had violated the Open Records Act by denying the second item of IJ’s request (*i.e.* the one seeking disclosure of documents reflecting communications sent or received by the Councilmembers or their staff between June 1, 2017 and November 1, 2018 containing certain key terms related to food trucks) because that item gave a “sufficiently precise description” and “did not [im]pose an unreasonable burden. . . under KRS 61.872(6).” (*Id.* 6, 7.) The Attorney General found that the Councilmembers acted lawfully in denying the first, third, fourth, and fifth items of IJ’s request, all of which he considered to be inadequate to give rise to any obligations under the Open Records Act. (See *id.* 6.)

The Louisville Metro Council’s open records coordinator received a copy of the Attorney General’s decision on or around May 13, 2019. (See Ex. 1 to Defs.’ Resp. to Pl.’s Mot. for Summ. J. ¶ 4.) IJ also sent a copy of the Attorney General’s decision to each Councilmember on or around May 16, 2019. (See Ex. F to Compl.) After reviewing the Attorney General’s decision, the open records coordinator began working with the Councilmembers and the Jefferson County Attorney’s Office to research, retrieve, review, and redact over a thousand pages of correspondence related to the proposed ordinance that were responsive to the second item of IJ’s request. (See Ex. 1 to Defs.’ Resp. to Pl.’s Mot. for Summ. J. ¶¶ 5-13; Ex. 2 to Defs.’ Resp. to Pl.’s Mot. for Summ. J.) Neither the open records coordinator nor the Councilmembers nor anyone at the Jefferson County Attorney’s Office, however, ever communicated with IJ concerning their efforts to retrieve and review responsive records or to establish a deadline for producing those records.² (See Ex. I to Compl. ¶ 8.) Nor did the Councilmembers file an appeal of the Attorney General’s decision. As a result, the Attorney General’s decision became final on June 10, 2019 by operation of KRS

² Councilmember Mulvihill did send a letter to IJ on May 19, 2019 indicating that he would comply with the Attorney General’s decision but without establishing a deadline for doing so. (See Ex. H to Compl.)

61.880(5)(b).

Over the course of the next month, the Councilmembers failed to produce any responsive records. (See generally Ex. 1 to Defs.' Resp. to Pl.'s Mot. for Summ. J.; see also Ex. I to Compl. ¶ 8.) On July 16, 2019, IJ filed this lawsuit against the Councilmembers seeking declaratory relief, injunctive relief, and statutory penalties based on their alleged violation of the Open Records Act and non-compliance with the Attorney General's decision. (See generally Compl.) On July 26, 2019, prior to answering IJ's complaint, the Councilmembers produced, for the first time, 960 pages from hundreds of responsive documents with a letter from their attorney stating that they were withholding 432 pages on the grounds that those pages were exempt from disclosure under KRS 61.878(1)(i), (j), and (l) as either "preliminary" documents or as communications subject to the attorney-client privilege. (See Ex. 2 to Defs.' Resp. to Pl.'s Mot. for Summ. J. 1.) The 920 pages produced by the Councilmembers also contained a significant amount of redactions of the names of businesses as well as of the names of individual citizens and their contact information, including home addresses, personal email addresses, and phone numbers, which the letter from their attorney claimed were exempt from disclosure under KRS 61.878(1)(a). (*Id.* 1-2.)

IJ's attorney responded to the Councilmembers' initial production by letter on August 27, 2019. (See Ex. C to Defs.' Mem. in Supp. of Mot. for Summ. J.) IJ's attorney claimed that the Councilmembers had improperly redacted personal information, underreported responsive records, failed to search for responsive records in one of their personal email accounts, and inappropriately asserted the attorney-client privilege. (See *id.* 2-3.) In response to the letter from IJ's attorney, the Councilmembers agreed to search for and produce additional records from one of their personal email accounts, which, according to their attorney, had been "originally missed due to confusion with numerous email accounts connected to one cellphone application," (Ex. D. to Defs.' Mem. in Supp. of Mot. for Summ. J. 1.) and to remove redactions of the names of businesses and of anyone associated with a business who had corresponded with them concerning the proposed ordinance. (See Ex. 3 to Defs.' Resp. to Pl.'s Mot. for Summ. J.) The Councilmembers, however, refused to remove the redactions of the names of individual citizens and their contact information from the documents that they produced. (See Ex. D to Defs.' Mem. in Supp. of Mot. for Summ. J. 1.) The Councilmembers produced the additional records from the private email account on September 6, 2019 and

re-produced all previously-produced records without redactions of the names of businesses or of anyone associated with a business on September 20, 2019. (See Ex. D. to Defs.' Mem. in Supp. of Mot. for Summ. J.; Ex. 3 to Defs.' Resp. to Pl.'s Mot. for Summ. J.) Those productions effectively ended the parties' dispute over whether the Councilmembers had produced all responsive documents in their possession. The parties, however, continue to dispute whether IJ is entitled to compensation for the initial delay in the Councilmembers' efforts to produce responsive records and whether the Councilmembers acted properly in redacting the names of individual citizens and their contact information in the documents that they produced.

After receiving the Councilmembers' supplemental productions, IJ never renewed its objection to the Councilmembers' redactions of the names of individual citizens and their contact information. Over the next nearly two-and-a-half years, IJ took no action to further this litigation or enforce its rights under the Open Records Act. IJ also did not file its motion for summary judgment until after the Councilmembers filed their motion summary judgment on January 27, 2022.

The Councilmembers contend that they are entitled to summary judgment on all claims asserted against them by IJ because, having produced all responsive documents in their possession, this lawsuit is now moot. (See Defs.' Mem. in Supp. of Mot. for Summ. J. 4-6.) Though conceding that the Councilmembers have produced all responsive documents in their possession, IJ contends that it is entitled to summary judgment because no genuine issues of material fact exist as whether it is entitled to compensation, including over \$2 million in costs, attorney's fees, and statutory penalties, for the initial delay in the Councilmembers' efforts to produce responsive records or as to whether the Councilmembers' redactions of the names of individual citizens and their contact information from the documents that they have produced violates the Open Records Act. (See Pl.'s Mem. in Supp. of Mot. for Summ. J. 9-15.) The Court examines the parties' arguments in more detail below.

II. Standard of Review

The Open Records Act provides that "[a]ll public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of this right." KRS 61.872(1). "[T]he basic policy of [the Act] is that free and open examination of

public records is in the public interest.” KRS 61.871. Any exemptions from disclosure provided by the Act or any other law “shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.” *Id.*

When a public agency denies a request under the Open Records Act, the requester has two ways to challenge the denial. The requestor may, under KRS 61.882, file an original action in the circuit court seeking injunctive or other appropriate relief. See 61.882(1). Alternatively, under KRS 61.880, the requestor may, as was done in this case, ask the Attorney General to review the matter. See KRS 61.880(2)(a). Once the Attorney General renders a decision on the matter, either party then has thirty days within which to file an appeal in circuit court. KRS 61.882(3). If, as here, no appeal is filed, the Attorney General’s decision becomes final and binding on the parties. See KRS 61.880(5)(b).

The public agency bears the burden of proof in actions under KRS 61.882, and what it must prove is that any decision to withhold responsive records was justified under the Open Records Act. See *id.*; *Bowling v. Lexington–Fayette Urban County Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Such proof may include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld. See, e.g., *Ky. Bd. of Examiners of Psychologists v. Courier–Journal & Louisville Times Co.*, 826 S.W.2d 324, 328-29 (Ky. 1992) (agency’s proof included verified catalog of file’s contents and affidavit by person who examined file describing the contents). The circuit court may also hold a hearing if necessary, and the parties may request or the court on its own motion may require the *in camera* inspection of any withheld records. See *id.*; KRS 61.882(3).

III. Analysis

As noted above, IJ no longer disputes that the Councilmembers have produced all records in their possession that are responsive to the second item of its request under the Open Records Act. The sole remaining issues pertain to (A) whether the Councilmembers’ production of all responsive records in their possession after IJ commenced this action renders IJ’s claims moot, (B) whether IJ is entitled to compensation for the initial delay in the Councilmembers’ efforts to produce responsive records, and (C) whether the Councilmembers’ redactions of the

names of individual citizens and their contact information violate the Open Records Act. The Court considers each issue in turn.

A. *Whether The Councilmembers' Production of All Responsive Records in Their Possession after IJ Commenced This Action Renders IJ's Claims Moot*

The Court must reject the Councilmembers' argument that their production of all responsive documents in their possession after IJ commenced this lawsuit renders IJ's claims moot. Unlike the situation in *Cabinet for Health & Family Servs. v. Courier-Journal*, 493 S.W.3d 375 (Ky. App. 2016), a case cited by the Councilmembers in support of their argument related to mootness, a live controversy still exists as to whether IJ is entitled to recover its costs, including reasonable attorney's fees, and statutory penalties for the initial delay in the Councilmembers' efforts to produce responsive records and for having to seek the removal of their redactions of the names of individual citizens and their contact information. The record shows that the Councilmembers precipitated this lawsuit by failing to produce responsive records for over two months after the Attorney General rendered his decision concerning IJ appeal's on May 9, 2019 and for over one month after the Attorney General's decision became final on June 10, 2019. See, e.g., Ex I to Compl. ¶ 8. During that period of time, the Councilmembers never communicated with IJ concerning their efforts to search for and review responsive records or to establish a deadline for producing responsive records. See *id.* The Councilmembers' actions left IJ with no other option but to go to the substantial expense of seeking redress in a court of law. By the time that IJ filed this lawsuit on July 16, 2019, the Councilmembers still had not produced any responsive documents in their possession. See *id.* The Councilmembers' subsequent production of all responsive documents in their possession does nothing to cure the prejudice that IJ suffered as a result of the initial and unjustifiable delay in their efforts to produce responsive records. For those reasons, IJ still has viable claims under the Open Records Act.

B. *Whether IJ Is Entitled to Compensation for The Initial Delay in The Councilmembers' Efforts to Produce Responsive Records*

The Court finds that IJ is entitled to recover the costs, including reasonable attorney's fees, that it has incurred in bringing this action to obtain the records produced by the Councilmembers on July 26, 2019. The Court also finds that IJ is entitled to recover statutory penalties for each day that they were denied the right to inspect or

copy the records produced by the Councilmembers, beginning with the date on which the Attorney General's decision became final on June 10, 2019 and ending on July 26, 2019.³

Any person who prevails against an agency in an action under KRS 61.882 may be awarded its costs, including reasonable attorney's fees, in bringing the action upon a finding that the agency willfully withheld responsive records in violation of the Open Records Act. KRS 61.882(5). An agency acts "willfully" by withholding records "without plausible justification and with conscious disregard of the requester's rights." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). In addition to awarding costs and attorney's fees, the Court also has the discretion to award any party who prevails against an agency in action under KRS 61.882 statutory penalties "not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said record." KRS 61.882(5).

Here, the record shows that Councilmembers not only violated the Open Records Act by withholding responsive records but also that they did so willfully. The Councilmembers have not presented any proof that could justify their decision to withhold the records that they produced on July 26, 2019 for such a long period of time after the Attorney General rendered his decision. The Attorney General's decision made clear that IJ had a right to receive any records in the Councilmembers' possession that were responsive to the second item of its request. See Ex. A to Compl. 6-7. If the Councilmembers were truly working diligently to comply with IJ's request after the Attorney General rendered his decision, good faith on their part would have required, at the very least, communicating this fact to IJ and working with IJ to establish a deadline for producing responsive records, neither of which the Councilmembers did. See Ex. 1 to Defs.' Resp. to Pl.'s Mot. for Summ. J.; Ex I to Compl. ¶ 8. The record supports no other conclusion than that the Councilmember willfully violated the Open Record Acts by withholding responsive records that they only finally produced after IJ commenced this action against them.

³ Based on the evidence in the record, the Court is incapable of quantifying the precise number of responsive records that were initially withheld and then subsequently produced by the Councilmembers on July 26, 2019. IJ must present additional proof (or the parties may stipulate to an amount) that quantifies those records before the Court will enter an award of statutory penalties under KRS 61.882(5).

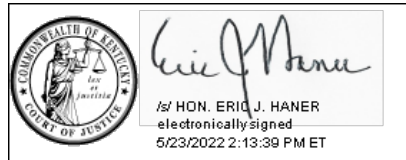
The Court does not believe that IJ is entitled to recover any damages for being denied the right to inspect or copy the additional records produced by the Councilmembers on September 6, 2019. Those records consisted of correspondence from a Councilmember's personal email account. See generally Ex. D to Defs.' Mem. in Supp. of Mot. for Summ. J. The record shows that those records were withheld purely by accident and were produced within a reasonable amount of time and without objection once the issue had been spotted by IJ's attorney. See *id.* 1. The Court cannot say that the Councilmembers willfully violated the Open Records Act by withholding those records.

C. Whether The Councilmembers' Redactions of The Names of Individual Citizens and Their Contact information Violate The Open Records Act.

Well-established authority supports IJ's position that it is entitled to learn the names of individual citizens who corresponded with the Councilmembers concerning the proposed ordinance. See *Cap Publ'ns, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.2d 818, 821-25 (Ky. 2008) (addressing the issue of whether names are subject to disclosure under the Open Records Act). The same, however, cannot be said with respect to the contact information of those individuals. See *Zink v. Com., Dep't of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 828 (Ky. App. 1994) (addressing the issue of whether a person's contact information is subject to disclosure under the Open Records Act). Though the Councilmembers were justified in redacting the contact information of individual citizens in the documents that they produced, they have not presented any proof that could justify their decision to redact the names of those individual citizens. Based on the evidence in the record, the Court finds that the Councilmembers willfully violated the Open Records Act by redacting the names of individual citizens from the documents that they produced, thereby entitling IJ to an award under KRS 61.882 of all costs, including reasonable attorney's fees, that they incurred to obtain that information. The Court, however, will only award costs and attorney's fees that IJ incurred to obtain this information up until September 20, 2019. The record shows that, after that date, IJ never renewed its objection to the Councilmembers' redactions and failed to take any steps to further this litigation, which could have given rise to no other expectation than that the Councilmembers' supplemental production with fewer redactions on September 20, 2019 effectively settled the matter. The Court finds that any costs, including attorney's fees, incurred by IJ after September 20, 2019 to obtain information redacted by the Councilmembers are unreasonable and not recoverable pursuant to KRS 61.882(5).

IV. Conclusion

For the foregoing reasons, IJ's motion for summary judgment is GRANTED and the Councilmembers' motion for summary judgment is DENIED. No later 30 days after this Order is entered, the Councilmembers shall deliver to IJ new copies of the documents that they have already produced without redactions of the names of the individual citizens who corresponded with them concerning the proposed ordinance. Within the same period of time, IJ shall submit to the Court and opposing counsel additional proof showing the precise number of records produced by the Councilmembers on July 26, 2019 and all costs and attorney's fees that it believes it is entitled to recover pursuant to this Order, along with a detailed description of all hours worked, the amount and nature of all services performed, and the hourly rate or contingency fee charged by its attorney. The Councilmembers shall have 15 days after receiving IJ's submission to file any exceptions. If it determines that no hearing is necessary, the Court will then take the matter under submission and issue a separate order setting forth the amount of costs, attorney's fees, and statutory penalties to be awarded to IJ.



ERIC J. HANER
JEFFERSON CIRCUIT COURT JUDGE

cc: April A. Wimberg
Natalie Johnson