

**ENTERED**

OCT 27 2008

FRANKLIN CIRCUIT COURT  
SALLY JUMP, CLERK

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 07-CI-328

UNIVERSITY OF KENTUCKY/  
OFFICE OF STATE ARCHAEOLOGY, et al.

PLAINTIFFS/APPELLANTS

V.

OPINION AND ORDER

CHARLES M. NIQUETTE, et al.

DEFENDANTS/APPELLEES

This matter is before the Court on Plaintiffs' and Defendants' Cross-Motions for Summary Judgment. The case at bar is one regarding a decision of the Attorney General's office construing the provisions of the Kentucky Open Records Act. The Court having reviewed the pleadings and memoranda, and being otherwise sufficiently advised, hereby issues the following Opinion and Order reversing, in part, the decision of the Attorney General.

**Background**

The Kentucky Heritage Council ("KHC") and the Office of State Archeology ("OSA") work jointly to inventory historical properties and archaeological sites. These records, commonly referred to as "site inventories," contain information regarding the archaeological data regarding conditions and potentially valuable archaeological sites within the Commonwealth. In compiling this information, KHC and OSA are assisted by various federal agencies that contribute a large percentage of the state's total inventory of archaeological data. In addition, private contractors who use the services of KHC and OSA report their findings back to these agencies, further supplementing the state's inventory of archaeological data..

Traditionally, the data held by these agencies was stored in the form of documents and maps, which were updated to include new information as it was received and verified by KHC

and OSA. The OSA library is maintained at the University of Kentucky, and is statutorily kept under the authority of the University of Kentucky Department of Anthropology as the legal custodian of archaeological site records. The Kentucky Antiquities Act ("KAA") names the University Department of Anthropology as the institution to which sites should be reported. KRS 164.725; KRS 164.730.

As technology advanced generally, the OSA began maintaining records in an electronic format, as well as in the traditional paper format. A Geographic Information System ("GIS") was developed to serve as a sort of "index" to the other substantive materials in the library. The cost of developing and maintaining this system was initially borne by the Kentucky Transportation Cabinet ("KTC"), mainly through the use of federal funds provided to KTC. Plaintiffs contend, and Defendants do not dispute, that these funds have substantially diminished since the initial creation of the GIS. It appears that this state funding has been discontinued altogether in the most recent state budget.

OSA and KHC contend that the GIS system is expensive to maintain and operate, and that while it is a valuable resource which is capable of saving tremendous time in conducting site surveys for construction contractors, the agencies cannot afford to continue operating the system without external funding. In an effort to defray the costs of operating and maintaining the GIS system, the agencies instituted a fee structure for those seeking to use the GIS data for commercial purposes. While there was initially some dispute about whether access to paper records was included within this plan, both parties now agree that access to the library's paper archives is provided without charge, and can be used to accomplish the same result as using the GIS system.

Initially, the OSA/KHC permitted end users to access the GIS system directly in order to run queries and create records. However, since that time, the agencies have restricted access to the GIS system and now require users to submit their requests to authorized staff members, who then create and run the requested queries and provide the results to the requester in exchange for a fee, which is calculated on a per-site basis. A myriad of reasons have been cited for this change. The state agencies contend that some of the records contained in the GIS are protected by federal and state statutes, so that their unrestricted disclosure to end users may violate federal or state law protecting these records. The financial burdens of operating and maintaining this system have also been cited as a reason for the change.

Defendants Charles M. Niquette and his company, Cultural Resource Analysts (“CRA”), are heavily dependent on the records held by OSA/KHC for their livelihood. CRA provides reports on prospective construction sites to public and private clients with whom it contracts, including the Kentucky Transportation Cabinet. CRA provides these services not only in Kentucky, but in a wide range of other states as well. In compiling their reports, CRA is heavily dependent on the data held by OSA/KHC, and essentially must use their facilities to conduct site records searches to provide the data required by their clients.

### **Standard of Review**

#### **I. Appeals of Open Records Decisions by the Office of the Attorney General**

In appeals taken from the rulings of the Attorney General’s office on matters interpreting the Kentucky Open Records Act, the Circuit Court “shall determine the matter *de novo*.” KRS 61.882(3). Thus, the Attorney General’s opinion is given no extra deference by this Court in determining the matter. The Attorney General’s opinion, however, does inform the Court of the issues which were addressed at the administrative review level, and whether those issues

were properly framed for judicial review at that time. While the Attorney General's opinion here is extremely helpful in assisting the Court in understanding the issues presented, the Court, for the reasons stated below, reaches a different conclusion than the Attorney General.

## **II. Summary Judgment**

Summary judgment is granted when the Court concludes that there is no genuine issue of material fact for which the law provides relief. CR 56.03. Only when it appears from the facts that the nonmoving party cannot produce evidence at trial in favor of a judgment on his behalf should summary judgment be granted. Steelevest, Inc. v. Scansteel Services Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). A summary judgment movant has the initial burden of showing that no genuine issue of material fact exists, whereupon the burden shifts, as a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Hibbits v. Cumberland Valley National Bank and Trust Co., 977 S.W.2d 252 (Ky. App. 1998).

### **Analysis**

#### **I. Permissibility of Fees Charged**

CRA contends, *inter alia*, that their use of the GIS system provided by OSA/KHC amounts to the onsite inspection of public records as defined by KRS 61.872(1) and (2), and must be permitted without assessment of fees by KRS 61.874(1). OSA/KHC contend that access to reports generated by GIS software is the functional equivalent of making copies of public records, and thus CRA, like other users of the system, is subject to the assessment of reasonable fees as provided by KRS 61.872(4).

While not binding on this Court, an analysis of similar cases which have been before the Attorney General's office and have been cited by the parties is instructive. It is notable that the

Attorney General has held that a “database is unquestionably a ‘public record’ as that term is defined at KRS 61.870(2).” 00-ORD-214. This Court agrees. The language of that provision indicates that a public record may be in the form of software. KRS 61.870(3)(a) defines the term ‘software’ sufficiently to include databases such as the one at issue here.

However, the relief CRA seeks is the unrestricted use of the GIS without fee, and this proposition is not as straightforward as the simple request for a database in its entirety. The GIS is useful not because of the raw data it contains. In fact, the data in the GIS in its raw format is most likely useless to any party for any purpose, except for using it in connection with another GIS system. The value of the GIS is in the *reports* it produces from the data it contains. In essence, each query to the GIS creates a new record, which is tailored to the specific purposes of the requestors so as to assist them in conducting their research activities. This use of a database and its corresponding GIS interpretation system is more akin to the use contemplated in KRS 61.874(3). Here, the agency is being asked to produce a record which is responsive and tailored in format “to meet the request of an individual or a group.” *Id.* This creation of records in a format requested by the patron from the GIS is discretionary under the Kentucky Open Records Act, and as such, the agencies may “recover staff costs as well as any actual costs incurred” in performing the act. *Id.*

In addition, the Court notes that the information within the GIS database is available in paper format in the library at the University of Kentucky. This information is available for free onsite inspection by the public during normal business hours, a point which is now uncontested by the parties. Since the agency has made this information available to interested parties for their inspection, and this information can be used to cull the same information that is available

from a GIS report, the Court fails to see how the agencies are withholding public records.<sup>1</sup> While it may be true that compiling reports from the paper information is a much more time consuming operation than running a query on the GIS database, the information is available without access to the GIS, and the Court finds no reason why the agencies must provide free access to create reports using the GIS when those reports can be created from reference to freely available materials if the patron is averse to paying the fees required.

In addition, the Kentucky Open Records Act provides that “the minimum standard ... for electronic format ... [is] flat file electronic American Standard Code for Information Interchange (ASCII) format.” KRS 61.874(2)(b). This format, essentially, is a plain-text file which would contain the requested information. The statute further provides that “[i]f the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requester's requirements, the public record may be provided in this alternate electronic format for standard fees as specified by the public agency. Any request for a public record in a form other than the forms described in this section shall be considered a nonstandardized request.” KRS 61.874(2)(b). It is not asserted by the parties that the GIS maintains records in flat-file ASCII format, and in fact the Court is aware of no GIS which maintains its records in this format, as it would be prohibitively inefficient to do so. These provisions of the Open Records Act make clear that CRA may be charged a standard fee as specified by the agency for accessing the GIS, and further make clear that, unless CRA seriously desires access to the raw data, its requests for parsed and formatted GIS information is, in fact, a *nonstandardized* request, which permits the agency to collect staff and actual costs under KRS 61.874(3).

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<sup>1</sup> It should be noted that Mr. Niquette has frequently, since the imposition of the fee structure, used the traditional paper resources of the agencies to compile his reports. There is no evidence to indicate that his efforts were unsuccessful, or that he was any less able to retrieve the necessary information from the paper records than he would have been from the GIS.

Plaintiffs also argue that the records at issue are protected from disclosure to some extent by state and federal statutes, and that as such they are removed from the application of the Kentucky Open Records Act pursuant to the provisions of KRS 61.878. While it is no doubt true that some of the information contained in the GIS may be subject to protection, it cannot be seriously asserted that all of the information is so protected, and thus this argument fails. The same section of the statute clearly provides that "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." KRS 61.878(4). Therefore, the Court finds that this asserted grounds for denying CRA access to the GIS system is moot, in light of the analysis set forth above. The Court finds that the GIS database, in whole or in part, is within the provisions of the Kentucky Open Records Act, and there are ample alternative legal grounds available for Plaintiffs to charge fees for access to the service.

## **II. Reasonableness of Fees Charged**

CRA also argues that the fee structure established by the agencies is unreasonable, in that it is based on the average cost of preparing a site report rather than the cost of preparing each individual report. The Court finds this argument unpersuasive. The agencies have established that the costs imposed on commercial users of GIS reports are below the actual average costs incurred by the agencies in preparing these reports. In addition, as a matter of practice, companies using these records for commercial purposes, such as CRA, run dozens of queries each year. In such circumstances, it seems that using an average cost formula to compute fees is reasonably related to the costs incurred by each commercial patron. Regardless, the parties stipulate that the average cost computed is less than the real cost to the agencies. This Court fails to see the logic in asserting that a formula determining costs on an average basis rather than an

itemized basis is not reasonably related to the costs incurred when the fees remain lower than the agencies' actual costs.

KRS 61.874(4)(a) provides that "if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee." KRS 61.874(4)(c) provides the basis for calculation of this fee, which includes:

1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;
2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

The Court finds that KHC/OSA's computation of fees based on their average costs of producing records, including creation of the records through the GIS and staff time expended in creating the records is well within reasonable limits and the statutory language of the Kentucky Open Records Act. Cases cited by the parties also seem to support this conclusion. In a passage cited by Defendant, the Sixth Circuit concedes that use of average costs might well be permissible under the statute. Amelkin v. McClure, 168 F.3d 182 (6th Cir. 1999). In that case, the fees at issue were calculated in a manner which is not relevant to the case at bar, but the Court noted that "the agency might be utilizing the 'creation' language as a basis to charge more than the agency's marginal or even average costs in producing the records [...]. Any such interpretation of the statute might well be an arbitrary and capricious application sufficient to demonstrate that it is unconstitutional as applied." Id. In this Court's opinion, the language leads to the opposite conclusion than the one Defendant reaches. The Sixth Circuit language, rather than condemning fee calculations such as the one at issue here, notes that a calculation based on an average cost would be likely to fit within the constitutional and statutory bounds of the Kentucky Open

Records Act. To the extent that the Attorney General's decision (04-ORD-054) which cites this language construes it to mean that only an itemized listing of fees is statutorily valid, it is in error and misinterprets the implication of the language of the Court. In any event, the language cited is *dicta*, and not a part of that Court's holding. In the same case, addressing the merits of the issue presented, the Court held that an agency may charge commercial users "for the compilation, storage, and upkeep" of records. *Id.* at 902. The Court's language fails to provide support for Defendants' position, and seems to indicate that, if the issue were presented, the Court would find that fees based on average costs, such as those imposed here, are well within the guidelines of the Kentucky Open Records Act.

The Court notes that any time a public agency imposes fees for services, it is likely that the fee system will not satisfy all members of the public or all users of the service. It is noteworthy that the fee system imposed by OSA seems to be supported by a remarkable consensus of perhaps all users save one, the defendant here. The Court should not attempt to second guess administrative agencies in the structure of such a fee system so long as it meets all requirements of the applicable statutes and has a rational basis. The fee structure imposed by OSA here manifestly meets this test and should be upheld.

### **Conclusion**

Accordingly, the Court finds that summary judgment is appropriate for the Plaintiffs in this case. There is no genuine issue of material fact, as the parties have largely stipulated to the facts in the record. All that remains in this case is the application of the facts to the law. This Court finds that the application of the facts in this case to the relevant law can lead to only one reasonable conclusion, and therefore grants summary judgment in favor of the Plaintiffs/Appellants.

Based on the foregoing reasons, it is HEREBY ORDERED that:

- (1) Plaintiffs/Appellants' Motion for Summary Judgment should be, and the same hereby is, GRANTED;
- (2) Defendants/Appellees' Motion for Summary Judgment should be, and the same hereby is, DENIED;
- (3) The decision of the Attorney General's office in this matter, number 07-ORD-013, is REVERSED insofar as it requires that the agencies in question permit access to records created by the execution and creation of GIS queries without fee to both commercial and non-commercial users. The Court further finds that the fee system imposed by the KHC and OSA is reasonable under the Kentucky Open Records Act.

SO ORDERED this 27<sup>th</sup> day of October, 2008. There being no just cause for delay, this is a final and appealable order.

  
PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

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