COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FIRST DIVISION
CASE NO. 09-CI-00628

COPPAGE CONSTRUCTION CO., INC. PLAINTIFF

VS

SANITATION DISTRICT NO. 1
OF NORTHERN KENTUCKY DEFENDANT

ORDER & JUDGMENT

Procedural Posture:

This matter is before the Court on motions for summary judgment filed by the Plaintiff, Coppage Construction Co., Inc. (Coppage), as well as the Defendant, Sanitation District No. 1 of Northern Kentucky (SD1). These motions were fully briefed previously and an interlocutory order addressing most of the issues raised therein was entered by this Court on August 2, 2010. As part of that previous order this Court indicated that several issues presented therein would remain under submission pending additional briefing by the parties. Pursuant to that order, SD1 filed its supplemental memorandum requested by the Court on September 1, 2010. Coppage filed its response on September 15, 2010. SD1 filed its amended supplemental memorandum on September 27, 2010. Uncharacteristically, Coppage passed on the opportunity to amass another hundred or so billable hours and did not file a response to SD1's amended supplemental memorandum. Additionally, as requested by this Court, Coppage filed its affidavit regarding attorney fees and expenses on September 10, 2010. SD1 filed its response to this affidavit on September 20, 2010. At the request of the Court, Coppage filed a supplemental affidavit regarding attorney fees and expenses on October 4, 2010. SD1 filed its response to this

supplemental affidavit on October 11, 2010. Finally, on September 1, 2010, SD1 filed with the Court, under seal, a copy of an E-mail communication dated May 19, 2008, from Christ Novak to Jeff Eger. SD1 has refused to produce this E-mail in response to Coppage's open records request claiming attorney-client privilege. At the request of the Court, SD1 filed, under seal, its "supplemental memorandum" regarding privileged communication on September 24, 2010. The issues raised by the parties' respective motions for summary judgment which remain under submission are now, at long last, fully briefed and submitted to this Court for a decision.

Findings & Conclusions:

I. Preface

"Just keep bobbing and weaving so he can't get a clear shot at you. Otherwise move out of the way at the last minute and let Imboden take the punch."

- 7/29/08 E-Mail from Chris Novak to James Parsons

This quote provides an appropriate starting point for addressing the remaining issues raised by the current motions. Such quote appears indicative of an institutional mindset which embraces avoidance of responsibility and shifting of blame, an attitude which has seemingly permeated the open records dispute which underlies this action. At the outset of our analysis, it is equally appropriate to quote the statement of legislative intent underlying Kentucky's Open Records Act, to wit;

> The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others. KRS 61.871.

The juxtaposition of these two quotes provides a stark but telling illustration of the contrast between the manner in which SD1 actually approached its obligations under the Open Records Act and the manner in which our legislature intended that such obligations be addressed.

II. The Attorney-Client Privileged E-Mail Dated May 19, 2008

This Court has now had the opportunity to review the content and distribution of the contested E-mail which SD1 refused to produce claiming attorney-client privilege. Upon review of this correspondence, the Court finds that same is not protected by attorney-client privilege. In essence, this E-mail simply summarizes discussions that took place regarding "The Project" between representatives of SD1 and several other individuals interested in the Project. Clearly, the content of discussions with multiple individuals (non-lawyers) simply discussing the Project is not covered by attorney-client privilege. Likewise, Chris Novak's summary of such discussions forwarded to Jeff Eger, Amanda Waters, and others is not covered by the privilege.

As such, SD1's claim of attorney-client privilege was not justified. SD1's refusal to produce this document for inspection constitutes a violation of the Open Records Act.

This Court is not persuaded by the weight of the evidence, however, that SD1's assertion of attorney-client privilege was made in bad faith. As such, this violation cannot be deemed willful. An agency's refusal to furnish records based upon a good faith claim of statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Act. [See Bowling v. Lexington-Fayette Urban Co.

Gov't, 172 S.W. 3d 333, 343 (Ky. 2005). Also, see Blair v. Hendricks, 30 S.W. 3d 802, 807 (Ky. App. 2000).]

III. The Reasonableness of SD1's Search For Responsive E-Mail Communications

As was indicated in this Court's prior order, it is clear that countless E-mails provided to Coppage in response to its 2010 request which were responsive to its earlier 2008 requests but not provided at such time, were in existence and within SD1's possession at the time of SD1's response to the 2008 requests. Thus, this Court found that Coppage had made a prima facie showing that records (E-mails) which SD1 claimed did not exist were in fact in existence at the time of its response.

As such, this Court ordered SD1 to demonstrate that it had made a good faith effort to conduct its search for such E-mails using methods which could have reasonably been expected to produce the requested records. From the evidence presented, this Court is unable to conclude that SD1's search for responsive E-mails satisfied the requirement that same be conducted in a manner reasonably expected to produce the requested records. While SD1's search apparently included the main Project file, the River's Edge folder on the T-Drive and the hard copy files and E-mail folders of Chris Novak, it did not include a search of the hard copy files or E-mail folders of Jeff Eger (SD1 General Manager) or his administrative assistant, Kathy Janisch, an individual whom SD1 acknowledges maintains Mr. Eger's E-mails regarding the Project. Likewise, SD1's search did not include the hard copy files or E-mail folders of several other individuals whom SD1 acknowledges maintain files for the Project, specifically; Darleen McGuire, Mike Vice, and Brandon Vatter. If SD1 knew that six different individuals maintained

hard copy files or E-mail folders regarding the Project (Novak, Eger, Janisch, McGuire, Vice, and Vatter), as it acknowledges, then it appears to this Court that a reasonable search designed to produce the requested records would have included a search of the records of all six individuals, not simply the records maintained by Novak.

Having found that SD1's search fails to satisfy the "reasonableness" requirement, this Court has no option but to find that SD1's failure to produce, or its inordinate delay in producing responsive E-mails constitutes a violation of the Open Records Act.

IV. The Willfulness of the Violations

In order to find that violations of the Open Records Act are willful, it must be established that the agency acted in bad faith with an intent to violate the Open Records Act and without plausible explanation for the alleged errors. [See Sinha v. University of Kentucky, 284 S.W. 3d 159, 162 (Ky. App. 2009). See also Bowling pp. 343-345.)]

It is clear to this Court that SD1's explanations for its violations simply are not plausible. In defending this action, SD1 has adopted what can fairly be described as a "shotgun" approach, asserting any and all explanations for its conduct which it could conjure up. For example, SD1 has repeatedly asserted as a shield to liability the prefatory language used by Coppage in its initial requests which limited the records sought to those related to "the construction project known both as The River's Edge and Manhattan Harbour." Subsequent communications and dealings between the parties, however, clearly indicate that Coppage was seeking certain records beyond those associated with the Project. SD1 was clearly cognizant of this fact as evidenced by its efforts to quash an

identically worded subpoena issued in companion litigation by asserting that the subpoena sought documents beyond the scope of the Project.

Having failed in that defense, SD1 conjured up the defense that open record requests must be in writing and E-mails don't qualify as writings. They conjured up the defense that the requests were misdirected, being served on SD1's counsel instead of the actual records custodian. Unfortunately for SD1, these issues were never presented to Coppage at the time of its records request, but only surfaced for the first time in SD1's motion for reconsideration filed August 12, 2010. As was indicated in this Court's order denying reconsideration, these potential defenses were implicitly waived long ago.

Likewise, SD1's assertion that the requests were over burdensome is negated by its compliance with similar requests by Coppage in 2010.

The explanations SD1 has provided for its non-production or unduly delayed production of records, simply are not plausible.

It is equally clear that SD1 acted in bad faith with an intent to violate the Open Records Act. E-mail communications were destroyed in apparent violation of both a Federal consent decree and KDLA record retention standards. Searches for responsive E-mails were directed to the files of only one individual when SD1 knew there were at least six individuals who maintained files on the Project and should have known that responsive E-mails may have been located in the files of these individuals which were not searched. Documents which any reasonable person would conclude were responsive to the 2008 requests (e.g. the Hazen and Sawyer budget template, and SD1 engineering department's capital budgets for the Project prepared on 4/12/07 and 4/22/08) were not provided to Coppage until 2010. Hundreds of responsive E-mails were not provided until

more than three months after the requests and others were not produced until 2010. Production of the Nine Minimum Controls Plan did not occur until more than 90 days after the requests. Documents related to attorney fees and attorney conflict waivers were not produced until 2010. Responsive minutes from Board of Director meetings were not provided until nearly one year following the requests and without any explanation as to the delay. The list goes on and on.

Upon analysis of the totality of the circumstances, including but not limited to inadequate searches, inordinate delays, implausible explanations, insufficient and incomplete production of records, and possible illegal record destruction, there is but one conclusion that can be reached. SD1 repeatedly and willfully violated the Open Records Act.

SD1's conduct falls woefully short of the standards demanded by the Open Records Act. The Open Records Act exists to provide the public greater access to the government by providing free and open examination of public records of government bodies at all levels, even though such examination may cause inconvenience or embarrassment to public officials or others. It is a means to provide the people with greater access to the government and a means to hold governmental bodies accountable. SD1, however, expended much effort hedging and parsing Coppage's requests, and delaying its responses thereto in an apparent effort to outwit and outlast Coppage and its attorneys in an attempt to circumvent the very purpose of the Act. Such conduct cannot be condoned.

Having decided that SD1 willfully violated the Open Records Act, the Court must now decide whether or not to exercise its discretion to award Coppage its costs, attorney fees, and other permissible statutory sanctions.

In doing so, this Court reiterates its view of the current action as previously stated in its August 2, 2010, order. This action is of a type which is, unfortunately, all too common in the legal profession and which makes one anything but proud to be a member of such profession. While the current action is clothed in the attire of an open records dispute, let's be candid and view it for what it truly is—a discovery dispute. In a pleading evoking images of a gaggle of gluttons at an all you can eat buffet, Coppage has tendered an affidavit indicating total costs and fees herein exceeding $185,000. No doubt SD1's costs and fees are in a similar range. More than an estimated $300,000 has been expended in what amounts to little more than a discovery dispute. That's obscene! One could wonder if the best interests of the clients have been lost in the fog of a battle of wills, ego and legal one-upmanship. One could wonder if the zeal demonstrated by Coppage herein is the product of a true desire to obtain inspection of pertinent records or merely the result of a desire to inflict vengeance upon an ill favored adversary through the fee generating provisions of the Open Records Act.

As a result of the conduct of many attorneys practicing before this Court during its 17 years on the bench, this Court finds itself, with increasing frequency, bemusing and bemoaning the declining civility of our chosen profession. Scorched-earth litigation tactics now reign supreme. Far too often the quest for the almighty billable hours takes precedence over fair and reasoned settlement of disputes entered into in a spirit of courtesy and compromise with an eye on the best interests of the client. The corrosive

effect of such poison is painfully evident in the current dispute. Over $300,000 expended bickering over discovery—incredible! Ludicrous! Obscene!

The expenditure of such inordinate effort and financial resources on discovery matters has a damaging impact upon our system of justice. Parties and their respective lawyers become so entrenched in their positions, and their ill will towards one another becomes so heightened, that amicable settlement is no longer desired. Parties, buried under a mountain of legal fees, often find themselves in a position where amicable settlement is longer even financially feasible. Civil actions deteriorate into an "all or nothing" posture. Quite simply, the practice of law has become tougher and meaner, eroding a core tradition of courtesy and civility and resulting in an increasing loss of public trust and confidence in our system. Unfortunately, that trend is clearly evident in the case at bar.

Be that as it may, this Court must decide the difficult question of whether or not it should exercise its discretion to award, or refuse to award, Coppage its costs, fees, and other permissible statutory sanctions. In doing so, the Court will consider the totality of the circumstances.

There is no doubt SD1 has engaged in a pattern of willful conduct which frustrated Coppage's exercise of its rights under the Open Records Act. As a result, Coppage has incurred needless and significant expenses enforcing its rights. At the same time, we cannot lose sight of the fact that SD1 has devoted hundreds of hours responding to Coppage's multiple requests and has in fact produced, albeit in many cases belatedly, tens of thousands of records. Similarly, the shear volume of records requested by Coppage must be taken into account, as must the language of the original requests, which

was in fact, as it relates to some of its requests, vague and over burdensome. Because of the inartful wording of its original requests, Coppage was compelled, via subsequent communications, to clarify and narrow the scope of its original requests. Thus, at least some of the delay in SD1's production of documents was occasioned by the vague and over burdensome language of Coppage's original requests and its need to subsequently clarify and narrow down such requests.

Likewise, just as Coppage argues that SD1 dodged its responsibilities under the act in order to gain an advantage in the ongoing companion litigation, SD1 can make an argument that Coppage abused its rights under the act in order to gain a similar advantage and circumvent restrictions placed upon discovery in the companion actions. In short, there is blame here that can be shared by both parties.

Additionally, Coppage's request for costs and attorney fees in an open records dispute which exceed $154,000 clearly fails the reasonableness test. Quite simply the request shocks the conscience and is excessive and overreaching in many respects.

First of all, the total amount of billable hours dedicated to a fairly straight forward open records dispute is extraordinary. In fact, it is outrageous. The reasonableness of requested fees must be gauged, in part, by the degree of difficulty of the work. Additionally, the request seeks compensation for duplication of efforts by multiple attorneys. Many of the charges are redundant. The request is so outrageous that it even seeks attorney fees for calculating attorney fees. In awarding fees a court should not exceed the market rate necessary to encourage competent attorneys to undertake the representation in question. As such, equity and justice dictate that Coppage's request for

fees and costs herein be significantly pared back. This Court cannot, in good conscience, place its judicial imprimatur on such gluttony.

Therefore, in light of the totality of the circumstances, this Court concludes that an award of Coppage's full measure of requested compensation and statutory sanctions under the act would not be equitable, reasonable or just. Having found that SD1 repeatedly and willfully violated the act certainly demands some level of relief. The totality of the circumstances and the equities of the case, however, further dictate that such relief be reasoned and measured.

For the reasons stated above, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. SD1's motion for summary judgment is hereby OVERRULED.
2. Coppage's motion for summary judgment is hereby SUSTAINED. The Court hereby declares that SD1 willfully violated Kentucky's Open Records Act in the manners described in detail in this order as well as this Court's prior orders entered on August 2, 2010 and September 23, 2010.
3. Having found that the May 19, 2008, E-mail from Chris Novak to Jeff Eger is not protected by attorney-client privilege, SD1 is hereby ordered to promptly produce for inspection by Coppage a copy of said E-mail correspondence. This isolated violation, however, is not found to have been willful.
4. Pursuant to KRS 61.881(5), the Plaintiff, Coppage Construction Co., Inc., is hereby awarded judgment against the Defendant, Sanitation District Number 1 of Northern Kentucky, in the amount of $25,000.00 as an

equitable and reasonable portion of its attorney fees herein, plus $13,133.78 for its costs expended herein, for a total award of $38,133.78, plus interest at the legal rate from the date of judgment until paid in full.

5. In the exercise of this Court's sound discretion, Coppage's request for relief in the form of additional costs and attorney fees, as well as its request for additional relief in the form of a $25 per diem penalty are hereby denied.

6. Pursuant to CR 54.02(2), this judgment shall be deemed a final re-adjudication of all matters addressed in this Court's prior interlocutory orders entered herein on August 2, 2010 and September 23, 2010.

7. In an effort to curtail the ever increasing and inordinate costs and fees being incurred by the parties herein, the parties are encouraged to forego the filing of any additional motions for reconsideration with this Court and opt instead, should they be so inclined, to express their disagreement with this judgment to the Court of Appeals by way of direct appeal. No doubt that Court will joyfully receive the ten thousand or so pages which will constitute the record designated for such appeal. Prior to filing for such review, however, the parties and their attorneys are strongly encouraged to engage in a cost/benefit analysis of any such appeal. It is painfully evident to this Court that such analysis has been woefully lacking in the herein action to date.

There being no just cause for delay, this is a final and appealable order.

DATED this the 14 day of Oct., 2010.

MARTIN J. SHEEHAN, CIRCUIT JUDGE

Copies:

Original	-	Kenton Circuit Clerk
One Copy	-	Hon. Lynda Hils Mathews
		Hon. Michael Surrey
One Copy	-	Hon. Monica Dias
		Hon. Scott Gurney
One Copy	-	Hon. Cristopher J. Dutton
		Hon. William Robinson, III

I, JOHN C. MIDDLETON, CLERK OF THE KENTON CIRCUIT/DISTRICT COURT, HEREBY CERTIFY THAT I HAVE MAILED A COPY OF THE FOREGOING ORDER/JUDGMENT TO ALL PARTIES HERETO AT THEIR LAST KNOWN ADDRESS OR THEIR COUNSEL OF RECORD THIS THE 15 DAY OF Oct, 2020

JOHN C. MIDDLETON, CLERK
BY: _____ D.C.