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20-ORD-028

February 27, 2020

In re: Courtney L. Graham/Kentucky Department of Veterans Affairs

Summary: Kentucky Department of Veterans Affairs (“KDVA”) violated the Open Records Act (“Act”) by providing summaries rather than copies of the public records and because its response failed to affirmatively state responsive cellphone records did not exist. KDVA’s written response delaying access to complaints and grievances failed to comply with KRS 61.872(5), but the delay was ultimately justified.

Open Records Decision

On October 25, 2019, Courtney L. Graham, Esq. (“Appellant”) submitted a request for copies of four categories of records to KDVA. Appellant requested copies of a former KDVA employee’s emails, their text messages and attachments, and their voice messages from their state government issued cellphone. Appellant also made a broadly framed request for, “[f]ormal and informal complaints and grievances” made by any KDVA employee against a specific former employee, “and all records concerning any such investigation[.]”

On November 7, 2019, KDVA responded to the request for emails by withholding copies of the responsive records, but copying and pasting 19 emails and 6 photographs into its written response. KDVA denied it possessed responsive cellphone records, stating, “if they still exist, [they] are within the AT&T area of responsibility. Until AT&T releases them, I cannot provide these.” In response to

the request for complaints and grievances, KDVA withheld copies of the records, but summarized the content of three complaints in its written response.

On December 9, 2019, Appellant appealed stating, “[t]o date, I have not received any records[.]” Appellant stated that KDVA acknowledged the existence of responsive records, but rather than provide copies, the agency “simply summarized ... the responsive records.” Appellant stated that KDVA did not cite any exception authorizing it to withhold copies, and told her “the records could only be inspected on-site[.]” Appellant stated that when she insisted on copies, KDVA told her she was waiving her right to inspection.¹

On January 10, 2020, KDVA responded to the appeal, stating the specified employees left employment prior to the request and “[t]heir laptops and phones were to be wiped clean and a search of each one was necessarily done by the Commonwealth Office of Technology (COT).” KDVA told Appellant she should direct her requests to AT&T. KDVA provided as evidence an email from the KDVA Office of the Controller advising that if text messages and voice messages had been cleared by the user, those messages “could only be provided through a subpoena to AT&T.” KDVA also provided an email from a COT employee indicating some responsive emails could be located in the employee’s outbox. KDVA stated that its search for responsive complaints and grievances is incomplete because it initially misread the request as pertaining to only three employees. KDVA stated that it was now extending its search “to all KDVA,” but did not provide the earliest date when records would be available.

KDVA Violated the Act by Providing Summaries Rather than Records.

KDVA violated the Act when it responded to the requests for emails with copied and pasted information, and to the request for complaints and grievances with summaries. All public records shall be open for inspection by any person. KRS 61.872(1). The right to inspect public records carries with it the right to obtain copies. KRS 61.874(1). “The purpose of the [Act] is not to provide information but to provide access to public records which are not exempt by law.” 99-ORD-121, p.

¹ There is no provision under the Act that states a member of the public can waive their right to inspection of public records. Records may be exempt under KRS 61.878, and requests may be unduly burdensome under KRS 61.872(6), but there is no general waiver provision in KRS 61.870 *et seq.*

13. "Although information may be gleaned from these records, it is the public agency's duty to make public records available for inspection and copying." *Id.* A summary of the information contained therein or a partial disclosure is not a substitute for inspecting/copying the underlying record. 19-ORD-045, p. 6. Accordingly, KDVA violated the Act when it copied and pasted the records into its written response letter, rather than providing copies of the records requested.

KDVA's Response Regarding Cellphone Records was Deficient.

In its response to the request, KDVA failed to affirmatively state whether responsive cellphone records existed and instead stated that "if they still exist, [they] are within the AT&T area of responsibility." However, in its response on appeal, KDVA stated that the employee's state issued computer and cellphone "were to be wiped clean." It is unclear whether the computer and cellphone were, in fact, "wiped." Regardless, KDVA's implied assertion that responsive records no longer existed was deficient and violated the Act.

Under KRS 61.870(2), a "public record" is one that is "prepared, owned, used, in the possession of or retained by a public agency." When a requester presents a *prima facie* case that responsive records should exist, the burden is on the agency to explain the adequacy of its search in order to maintain its position that no records exist. *See City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013). Here, Appellant requested text messages that her client had sent and received and there is evidence in the record that messages were sent from and received by the device because KDVA produced billing records demonstrating messages were sent to and from the cell phone for which records were requested. Thus, a *prima facie* case has been established. To carry its burden and explain why it did not possess responsive records that should exist, KDVA should have explained to Appellant, for example, that the cellphones had been "wiped clean" pursuant to appropriate policy or custom and that the records no longer exist. Instead, KDVA suggested to the Appellant that AT&T might possess copies of the records. This implied assertion that it did not possess responsive records was deficient.

If the computer and cellphone have been "wiped clean" and records no longer exist, KDVA should affirmatively state as much. If the computer and cellphone have not been "wiped clean," and KDVA possesses copies of the records

requested, it is KDVA's duty to provide them subject to any appropriate exceptions under the Act. Here, KDVA's initial response to Appellant did not adequately meet the agency's responsibility under the Act to state whether it possessed responsive records. For these reasons, KDVA violated the Act

KDVA's Delay in Responding to Appellant's Request for Grievances was Reasonable, but KDVA's Response Failed to Comply with KRS 61.872(5).

KRS 61.880(1) requires that a public agency make a substantive disposition of a request for public records within three business days. Any extension of this deadline must provide a detailed explanation of the cause for delay, and a statement containing the "earliest date on which the public record will be available for inspection." KRS 61.872(5). KDVA's written response, indicating that the agency was still in the process of filling the request, but failing to provide Appellant the reason for delay or when the record could be available, did not meet the requirements of KRS 61.872(5). 07-ORD-158.

Nevertheless, a reasonable delay was justified in this case. It does not appear from the record on appeal that KDVA was attempting to willfully withhold records. Rather, KDVA misunderstood the request for complaints and grievances as being narrower in scope than what the Appellant requested. Once KDVA realized its mistake, it began a more comprehensive search for responsive records. Further, the Act allows a requester to obtain copies by mail, but only "after [she] precisely describes the public records which are readily available within the public agency." KRS 61.872(3)(b). "Any-and-all-records" type requests, like the one here, generally do not meet the standard of precise description for accessing public records by mail. 20-ORD-017. Such a request runs the risk of being, "so nonspecific as to preclude the custodian from determining what, if any, existing records it might encompass." 96-ORD-101. KDVA provided evidence that it is still searching in good faith for responsive grievances and complaints. *See* 95-ORD-96, p. 4. Therefore, a reasonable delay was justified, but KDVA must provide Appellant the earliest date the records will be available, as required by KRS 61.872(5).

Either party aggrieved by this decision may appeal by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

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