



COMMONWEALTH OF KENTUCKY
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20-ORD-049

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In re: Robbie Smither/Office of the Bullitt County Judge/Executive

Summary: The Office of the Bullitt County Judge/Executive ("the Judge/Executive") violated the Open Records Act ("the Act") by failing to make records available for inspection within three business days and failing to meet its burden of proof that some records were not maintained in an electronic format. If some responsive records are maintained in an electronic format, the Judge/Executive must make those records available to Appellant in an electronic form.

Open Records Decision

On February 21, 2020, Robbie Smither ("Appellant") requested "access to, and an electronic copy of" his own personnel file, as well as all records between August 1, 2019, and February 20, 2020, relating to Bullitt County Emergency Medical Services ("EMS") fuel purchases, complaints or disciplinary actions against EMS employees, and EMS employee payroll. On February 26, 2020, the Judge/Executive responded, stating that Appellant would be provided a paper copy of his personnel file; that the payroll records were in the custody of the Bullitt County Treasurer; and that the remaining records were available for inspection during normal business hours and paper copies would be "provided upon inspection and request." In response to the request for records relating to fuel purchases, employee complaints, and employee disciplinary actions, the Judge/Executive stated, "due to the volume of [these] records[,]¹ please contact

¹ According to the Judge/Executive, EMS consists of between 60 and 70 employees.

the Bullitt County Judge/Executive's Office at 502-543-2262 to schedule an appointment to inspect to ensure staff is available to assist with pulling the records and making any requested copies."

On March 3, 2020, Appellant arrived without an appointment to inspect the records. Although the third business day after receipt of the request was February 26, 2020, The Judge/Executive did not have any records ready for Appellant's inspection. The Judge/Executive offered to give Appellant a copy of his personnel file immediately, but stated that the other records had not yet been pulled for his inspection because he had not made an appointment.²

On appeal, Appellant argued that requiring an appointment for inspection is unlawful because "any attempt by a public agency to limit the period of time within which a requester may inspect public records places an unreasonable and illegal restriction upon the requester's right of access." In response, the Judge/Executive argued that the request for an appointment was reasonable due to the volume of records requested and the need "to ensure the records were pulled and available, and that staff would be available to assist."

KRS 61.872(3)(a) provides that "[a] person may inspect . . . public records [d]uring the regular office hours of the public agency." Under KRS 61.880(1), a public agency has three business days to determine whether it will permit or deny inspection of its records. KRS 61.872(5) further provides:

If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.

² Although on appeal the Judge/Executive alleges that Appellant engaged in disruptive behavior while attempting to inspect the records, those allegations are not relevant to the resolution of this matter. Even if true, such behavior did not occur until after the Judge/Executive violated the Act in delaying access.

Therefore, unless the records are “in active use, in storage or not otherwise available,” they must be made available for inspection within “three (3) days from receipt of the application.” KRS 61.872(5).

The Judge/Executive gave no reason for not having the records available for inspection by February 26, 2020. Rather, the Judge/Executive claims that it requested Appellant to make an appointment because of the volume of the records and the need to ensure the availability of staff to assist him. Under the facts presented, however, there is no indication that the subject records were particularly voluminous or “not otherwise available.” *Id.* In effect, the Judge/Executive’s insistence on an appointment merely operated, without sufficient basis, to delay Appellant’s access to records beyond the time prescribed by KRS 61.872(5). Thus, the Judge/Executive violated the Act by failing to allow Appellant to inspect the records after three business days had elapsed from the date his request was received.

Finally, Appellant argued on appeal that the Judge/Executive violated the Act by offering him only paper copies of records he requested in electronic form. KRS 61.874(2)(a) provides:

Nonexempt public records used for noncommercial purposes shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format.

In its response to the appeal, the Judge/Executive asserted that Appellant “was already aware and was advised again that the requested personnel files are maintained in paper form.” While “personnel files” may encompass records relating to complaints and disciplinary actions against EMS employees, the Judge/Executive did not state whether the EMS fuel purchase records were maintained in electronic format or only in paper form. Based on the record before this Office, it is not possible to determine whether the EMS fuel records are maintained in an electronic format because the Judge/Executive failed to state whether the records are physical or electronic. In doing so, the Judge/Executive failed to meet its burden of proof under KRS 61.880(2)(c). If any responsive records are maintained in an electronic format, the Judge/Executive must make those

records available to Appellant in an electronic form, subject to KRS 61.874(2)(a) and (b).

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to 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 proceedings.

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/s/ James M. Herrick

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Distribution:

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