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20-ORD-146

September 10, 2020

In re: ESPN/University of Kentucky

Summary: University of Kentucky ("University") failed to respond to two open records requests within the statutory time period. The University violated the Open Records Act ("the Act") by withholding employee expense reports under KRS 61.878(1)(i) and KRS 61.878(1)(j). The University did not violate the Act by failing to provide records it did not possess.

Open Records Decision

On June 2, 2020, ESPN ("Appellant") requested twelve University employees' "expense report transactions [including] travel reimbursements, credit card and/or purchase card transactions" since July 1, 2015. On the same date, Appellant made a separate request for credit card statements of certain students to whom the University had issued prepaid credit cards. The University initially denied both requests under KRS 61.878(1)(i) and KRS 61.878(1)(j), on grounds that the University's Chief Audit Executive was conducting an ongoing internal investigation of its cheerleading program, to which the records related.

On July 1, 2020, Appellant made a renewed request for the same records, asking the University to reconsider its position. In response, the University reiterated its reliance on KRS 61.878(1)(i) and KRS 61.878(1)(j) as to the employee expense reports. As to the student credit card statements, the University stated that "the Athletics Department has advised [it does] not have any bank records of

spending. Those records are the property of the account holder. The only information the University contains [*sic*] are amounts loaded on the cards." This appeal followed.[1]

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). To address the novel coronavirus public health emergency, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). Under KRS 446.030(1)(a), the computation of a statutory time period does not exclude weekends unless "the period of time prescribed or allowed is less than seven (7) days." Accordingly, under SB 150, a public agency is required to respond to a request to inspect records with ten calendar days.

The University received Appellant's first request on June 3, 2020, but did not respond until June 30, 2020— well beyond the ten-day deadline. Similarly, the University received Appellant's second request on June 2, 2020, and did not respond until June 15, 2020, although the response was due on June 12, 2020. The University violated the Act, as modified by SB 150, by failing to timely respond to Appellant's requests.

The University also violated the Act by withholding records based on exemptions that do not apply here. KRS 61.878(1)(i) excludes from the Act "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency[.]" On appeal, the University does not explain why employee expense reports are purportedly drafts, notes, or correspondence with private individuals. The University merely asserts that the expense reports are relevant to an ongoing internal investigation, and cites this Office's decision in 20-ORD-21. In that appeal, however, the requester expressly sought "any and all records . . . pertaining to" an investigation. Furthermore, this Office determined that those records consisted entirely of either initiating complaints or records generated as part of that

[1] ESPN does not appeal the University's disposition of several other portions of its requests. Accordingly, this decision does not address those portions.

investigation. By contrast, employee expense reports are records generated in the ordinary course of business, not as part of an investigative process. At all times, the public agency bears the burden of proof in an open records appeal. KRS 61.880(2)(c). But here, the University has failed to carry its burden to demonstrate that KRS 61.878(1)(i) permitted its denial of the requested expense reports.

The University also failed to carry its burden of proof that the records are exempt as preliminary recommendations. KRS 61.878(1)(j) excludes from the Act "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." But the University does not explain how an employee expense report constitutes a recommendation, an expression of opinion, or the formulation of policy. Having failed to meet its burden of proof that KRS 61.878(1)(j) applies, the University violated the Act by withholding the requested expense reports.

As to the student credit card statements, the University no longer relies on an exemption from the Act, but asserts that it does not possess those records. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist in the agency's possession. *Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). In this case, Appellant merely states that if the University's auditor is conducting an investigation of its cheerleading program, "one would think" the University is in possession of the students' credit card statements. Appellant's mere speculation does not establish a *prima facie* case that the University possesses the records. Therefore, this Office is unable to find that the University violated the Act as to Appellant's request for student credit card statements.

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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