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20-ORD-196

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In re: Kate Howard/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) violated the Open Records Act (the “Act”) when it invoked KRS 61.872(5) to delay access to certain records and then failed to provide those records for inspection on or before the date it claimed that the records would be available.

Open Records Decision

On July 31, 2020, Kate Howard (“Appellant”) requested from KSP “lists or databases,” as well as all investigative reports or records, related to “any and all” officer-involved shootings, or incidents involving the use of force, that resulted in the deaths of civilians since 2015. Appellant also sought copies of all personnel records for any officers involved in such incidents.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1).¹ But when a record “is in active use, in storage or not otherwise available,” an agency may delay inspection under KRS 61.872(5).

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 dispose of a request to inspect records within ten calendar days.

If the agency delays inspection, it must provide “a detailed explanation of the cause of delay” and the “earliest date upon which the public record will be available for inspection.” KRS 61.872(5).

At some point, repeated delays violate the Act. *See, e.g.,* 07-ORD-047 (finding that the agency’s failure to honor its “self-imposed deadline” and “[i]ts unilateral decision to extend the deadline” subverted the intent of the Act). This appeal provides one example. In its initial, timely response, KSP explained that the records sought were “maintained at six different Kentucky State Police Posts.” Thus, KSP explained that it would require additional time to compile and review the records so that it could redact personal information. Citing KRS 61.872(5), KSP advised that it “intended to comply with [Appellant’s] request on or before September 9, 2020.” On September 9, however, Appellant emailed KSP to verify that the agency would produce the records that day. Appellant’s email went unanswered. Two months later, and after receiving no communication from KSP, Appellant initiated this appeal on November 8.

On appeal, KSP acknowledged its failure to provide copies of the requested records, but attributed its failure to “an accidental clerical oversight.” KSP also admitted that it had not yet completed its search for responsive records. Therefore, KSP yet again requested additional time to fulfill the request, and explained that it would “provide an update on the status of this matter to both the Attorney General and the Appellant on or before November 24, 2020.” That was on November 16. On November 24, however, KSP again requested even more time to produce the records. KSP needed more time, it explained, because its search had revealed over 1,100 responsive records, which the agency needed to review so that it could redact personal information. KSP promised another “status update” on December 9.

By its own admission, KSP not only failed to provide the records on September 9, as it initially promised it would, but it also had not completed its search by that date. In fact, KSP had not completed its search by the time Appellant initiated this appeal on November 8. The Act requires more of an agency than repeated and unexplained delays. While an agency may delay inspection, its obligation to provide “a detailed explanation of the cause of delay” and the “earliest date upon which the public record will be available for inspection,” KRS 61.872(5), requires that the agency say what it means and means what it says. *See,*

e.g., 06-ORD-270 (finding a violation where the agency had failed to produce records by the promised date and still had not produced the records by the time the appeal was initiated).

Four months have now passed since Appellant's initial request. KSP promised that it would make the records available on September 9, 2020, yet it failed to do that. On the eve of this Office's decision, on December 9, KSP produced most, but not all, of the requested records. Despite its recent attempts to correct its past conduct, KSP has repeatedly failed to produce the records sought, it has failed to communicate with Appellant, and it has failed to reasonably identify a date on which it will actually produce the records. This conduct violates the Act.

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.

Daniel Cameron
Attorney General

/s/Marc Manley
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#364

Distributed to:
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Shan Dutta