



COMMONWEALTH OF KENTUCKY
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21-ORD-011

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In re: Randy Slone/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 responsive records and then failed to either provide those records for inspection, or explain why the records were unavailable, on or before the date that it claimed that the records would be made available.

Open Records Decision

On September 14, 2020, KSP received Randy Slone’s (“Appellant”) request for a copy of all documents related to “The Gauntlet,” which “cadets at the Kentucky State Police Academy are or were asked to undertake during their training.” The Appellant explained that the records he sought might include: the beginning and end dates of the training program, the number or types of injuries that occurred during the training, “all assessments made regarding the instructional value of this activity,” and the “reasons” the training was used, and later removed, from the program. KSP responded on September 29, 2020, and claimed that “[d]ue to the volume of these records, they are not immediately available.” Citing KRS 61.872(5), KSP explained that it would produce the records for inspection on October 29, 2020. However, the Appellant received neither any records nor any further communications from KSP on October 29, 2020. This appeal followed.

First, KSP violated the Act when it failed to issue a timely response to the Appellant's request. 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 must respond to a records request within ten calendar days.

Although KSP admitted that it received the request on September 14, 2020, it did not issue a response until September 29, 2020. Because KSP did not issue its initial response until 15 days after its receipt of the request, KSP violated the Act.

KSP's tardiness did not end on September 29, 2020. Although a public agency must issue a response within ten days during the state of emergency, if a record "is in active use, in storage or not otherwise available," the agency may delay inspection under KRS 61.872(5). If the agency delays inspection, its initial response 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, however, 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 such an example. In its late response, KSP claimed to have initiated a search for responsive records. However, due to "the volume of these records," KSP promised "to comply with [the Appellant's] request on October 29, 2020." That day came and went, and the Appellant received neither any records nor any further communication from KSP.¹

On appeal, and after it had already missed its self-imposed deadline, KSP again requested more time to respond. At this point, four months have elapsed since the Appellant's original request. After receiving multiple extensions from the

¹ If this refrain sounds familiar, it should. *See* 20-ORD-196.

Appellant and this Office, KSP has yet to produce a single record. Instead, at the eleventh hour, KSP finally explains that “the Gauntlet” is a skills-based practice drill conducted as part of a larger training regime, similar to drills implemented while practicing sports. KSP claims that it does not possess records referring to this drill, presumably because it is a smaller component of a larger training program.

It should not have taken KSP four months to provide such explanation and assert that KSP does not possess any responsive records. Nevertheless, a public agency cannot produce records that do not exist. Once a public agency states affirmatively that it does not possess a responsive record, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, the agency must provide “a written explanation for their nonexistence.” *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (quoting 10-ORD-078).

Here, KSP never denied the existence of “the Gauntlet,” or responsive records. Instead, KSP initially claimed that there were “voluminous” records and that KSP would require a month to locate all such records. KSP belatedly explains, however, that it never documented when the drill began, it never documented the instructional value of the drill, and it never documented the injuries associated with the drill. This Office is unaware of any statute or regulation that would require KSP to record such information so that any responsive records should exist. Therefore, despite KSP’s confusing statements and behavior, this Office is unable to conclude that KSP possesses records responsive to the request or that KSP is withholding them in violation of 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 proceeding.

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Distributed to:

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