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21-ORD-012

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In re: James Harrison/Department of Public Advocacy

Summary: The Department of Public Advocacy (“Department”) violated the Open Records Act (“the Act”) by failing to respond to an inmate’s request for copies of certain letters he exchanged with the Department.

Open Records Decision

The Department of Public Advocacy is an independent agency of state government, attached for administrative purposes to the Justice and Public Safety Cabinet. KRS 31.010. The General Assembly has assigned the Department the responsibility to represent “indigent persons accused of crimes or mental states which may result in their incarceration or confinement.” KRS 31.010(1). In this context, the Appellate, inmate James Harrison, allegedly communicated with the Department to seek assistance in petitioning for clemency. On December 1, 2020, Harrison requested copies of certain letters between himself and various Department employees regarding his request for clemency assistance. Having received no response from the Department, he initiated this appeal on December 28, 2020.

On appeal, the Department claims that its “records should not and do not come within the purview of an open records request under the Kentucky Open Records Act.” For the reasons that follow, this Office disagrees and concludes that the Department violated the Act because it failed to timely respond to the Appellant’s request.

The Act broadly defines “public agency” to include “[e]very state or local government department, division, bureau, board, commission, and authority.” KRS 61.870(1). The Act also broadly defines “public records” to include “all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency.” KRS 61.870(2). Under KRS 61.870(1), the Department is clearly a public agency. And under KRS 61.870(2), the Department’s files are public records.

Not all public records, however, are subject to inspection. KRS 61.878(1) enumerates several exceptions to the Act. For example, under KRS 61.878(1)(l) and KRE 503, attorney-client communications are not subject to inspection. The Department claims, however, that its client files are protected from disclosure under the attorney-client privilege. But the Department misunderstands the significance of the exceptions to the Act. That an exception applies does not mean that a particular record is no longer a “public record.”

Because the Department is a public agency and the records that Appellant requested are public records, the Department was required to respond to the Appellant’s request within three business days.¹ KRS 61.880(1). Perhaps the Department may invoke the attorney-client privilege to deny a request for client files under KRS 61.878(1)(l) and KRE 503. However, the Department is not relieved of its duty to issue a written response accepting or denying a request to inspect client files within the time required by statute. KRS 61.880(1). Here, the Department issued a response on January 7, 2021, which is well beyond the required time for doing so. Accordingly, the Department violated the Act.

The Department raises two other arguments to suggest that it has no obligation to comply with the Act. First, the Department argues that the Supreme Court’s Rules of Professional Conduct govern its duty to provide a client a copy of his or her records. However, those rules are not exclusive and nothing in the Rules of Professional Conduct operate to exempt the Department from the Act’s requirements.

¹ Or ten calendar days during the current state of emergency. *See* 2020 Ky. Acts Ch. 73 (SB 150).

Next, the Department explains that its attorneys are located throughout the state and that its client files may not be co-located with the records custodian. Thus, the Department argues that it is unreasonable to determine which Department attorney represents the requester, to require copies of the file to be sent to the records custodian for review, and to issue a response all within three business days. Logistical hurdles, however, have no bearing on whether the Department's files meet the definition of "public record" under KRS 61.870.²

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
Marc Manley
Assistant Attorney General

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Distributed to:
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² The General Assembly has considered such logistical hurdles. Because the General Assembly recognizes that an agency may require additional time to respond to a request, KRS 61.872(5) permits a public agency to delay inspection of records that are in "active use, storage, or otherwise unavailable." Moreover, if a request "places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof." KRS 61.872(6). The agency must, however, sustain its refusal by clear and convincing evidence." *Id.*