



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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21-ORD-079

April 27, 2021

In re: Brian Mackey/Department of Fish and Wildlife

Summary: The Department of Fish and Wildlife (the “Department”) violated the Open Records Act (“the Act”) when it failed to issue a timely written response to a request to inspect records.

Open Records Decision

On March 16, 2021, Brian Mackey (“Appellant”) asked the Department to provide copies of certain records. In response to the request, the Department called the Appellant to seek further clarification regarding the scope of the request. However, the Department did not issue a written response to the request until March 29, 2021. On that day, the Department claimed that it was “in the process of locating, inspecting, and redacting documents that are in its possession or in archive that may be responsive to” the request. The Department further stated that “a portion” of the records would be made available on April 9, 2021, and that the remaining records would be made available on May 4, 2021. This appeal followed.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). In response to the public health emergency caused by the novel coronavirus, however, the General Assembly modified that requirement when it enacted Senate Bill 150 (“SB 150”), which became law on March 30, 2020. SB 150 provides, notwithstanding the provisions of the Act, that “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, when the period of time prescribed by statute is seven days or less, weekends and legal holidays are excluded from the computation of time. Therefore, because SB 150 provides ten days to respond,

weekends or holidays are not excluded from the computation of time and a response is due within ten calendar days of receipt.

Here, the Department admits that it failed to issue a written response within ten calendar days. Although the Department claims that it spoke to the Appellant within the ten-day period, that does not excuse the Department from issuing a formal written response within ten calendar days. Accordingly, the Department violated the Act.

The Department also violated the Act in another way. When it issued its tardy response, the Department also failed to provide the requested records. Instead, it claimed that it needed additional time to search for and provide responsive records. 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).

Here, the Department did not cite KRS 61.872(5). And rather than state that the records sought—including emails from February 2021 to the present—were in storage, the Department equivocated and claimed they may be “in its possession,” *i.e.*, readily obtainable, or “in archive.” Moreover, the Department did not explain why it was unable to provide all responsive records until almost two months after the request had been made. Such conduct violates the Act. *See, e.g.*, 20-ORD-137 (the failure to explain the reason for delay violates the Act).¹

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.

¹ The Appellant also claims that his telephone calls with the Department left him with the impression that the Department would require the Appellant to submit future requests for records by first calling the Department. The Department claims that this is a misunderstanding, and that it routinely accepts requests for records via telephone and that these conversations permit the Department to clarify the scope of requests. Regardless of any phone discussion, this Office notes that any person may request to inspect public records by submitting a request in writing, KRS 61.872(2), and public agencies must respond to such requests in writing, KRS 61.880(1).

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