COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

21-ORD-099

May 27, 2021

In re: Jackson Bell/University of Kentucky

Summary: The University of Kentucky ("University") violated the Open Records Act ("the Act") when it failed to explain how an exception to the Act authorized it to deny inspection of a record or to redact portions thereof. The University also subverted the intent of the Act when it unreasonably delayed access to the record.

Open Records Decision

On March 3, 2021, Jackson Bell ("Appellant"), a student, requested copies of the "records relating to his disciplinary process" at the University, including records related to the investigation of the incident that gave rise to the disciplinary process. The Appellant stated that he needed the records "for an appeal with a submission date of" March 9, 2021, because he was challenging the disciplinary action taken against him. In a timely response, the University provided some records, but it withheld the investigative report under KRS 61.878(1)(i) and (j). The University claims that the report was "still preliminary." This appeal followed.

On appeal, the University states that it has now "provided the documents to the requester with redactions as required by federal law." However, the University does not explain what redactions it made or what federal law required those redactions. For his part, the Appellant states that he has "no idea" whether the University has produced all responsive records. The Appellant also complains that the University did not provide the records in time for him to use them in his disciplinary proceeding, but delayed production until after his appeal was taken under submission by the University's disciplinary board.

When a public agency denies a request under the Act, it must give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). Here, the University merely stated that the investigative report was "still preliminary," without further explanation. The Appellant provides proof that, prior to the date of the request, the University took disciplinary action against both him and the fraternity that was involved in the incident which was the subject of the report. Thus, the University violated the Act when it failed to explain how KRS 61.878(1)(i) and (j) applied to withhold the record.

On appeal, the University no longer relies on KRS 61.878(1)(i) or (j) because it has provided the requested investigative report to the Appellant. Thus, whether the report is exempt under KRS 61.878(1)(i) or (j) is now moot. However, under KRS 61.880(4), a person may petition the Attorney General to review an agency's action, short of denial of inspection, if the "person feels the intent of [the Act] is being subverted[.]" One way in which a public agency may subvert the intent of the Act is to delay access to records unreasonably. *See, e.g.*, 20-ORD-137. The Appellant claims that the University subverted the intent of the Act because he believes it intentionally delayed access to records he needed to defend himself at an administrative proceeding being conducted by the University.

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).

Here, although the University issued its response within ten days, the University did not provide the requested investigative report within ten days or provide a brief explanation of how an exception applied to permit the University to deny inspection of the report. KRS 61.880(1).[1] Furthermore, even

[1] The University initially denied access to the report under KRS 61.878(1)(i) and (j), but it did not sufficiently explain how those provisions applied.

though the Appellant had told the University that his purpose for making the request was to use the report at a disciplinary proceeding, the University still delayed its release of the report until after the proceeding had concluded. Under KRS 61.880(2)(c), the burden is on the University to justify its actions, either by explaining how an exception to the Act permitted its initial denial, or that the records were in active use, storage, or were otherwise unavailable and thus a delay was necessary. *See* KRS 61.872(5). It has still not done so. Thus, the University subverted the intent of the Act by denying the Appellant access to the requested record for more than ten calendar days without explaining how an exception authorized it to do so.

Moreover, although the University has now provided the investigative report to the Appellant in redacted form, it has not explained what redactions it made to that document or what provision of "federal law" purportedly required those redactions. Therefore, the University has violated the Act by failing to explain its partial denial of the Appellant's request under KRS 61.880(1) and has not met its burden under KRS 61.880(2)(c) to sustain the redactions.[2]

In sum, the University violated the Act by failing to explain how KRS 61.878(1)(i) or (j) applied to the investigative report and by subsequently failing to explain the legal basis for its redactions to that record. Because the University has not met its burden of proof to sustain its redactions, this Office finds that the University violated the Act by redacting the document without sufficient justification. The University also subverted the intent of the Act by delaying the Appellant's access to the investigative report without justifying its delay.

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

---

[2] The Appellant claims that he has "no idea" whether the University has provided all responsive documents. But the University claims it has provided all responsive records and no others exist. Once a public agency states that it has provided all responsive records, the burden shifts to the requester to present a *prima facie* case that additional records exist. *See Bowling v. Lexington-Fayette Urb. Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not presented a *prima facie* case that any further responsive records exist. And this Office ordinarily declines to adjudicate factual disputes between the parties about whether all responsive records have been located and produced. *See, e.g.*, 19-ORD-234; 19-ORD-083; 03-ORD-61; OAG 89-81.

in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

#134

Distributed to:

Carroll M. Redford III, Esq.
William E. Thro, Esq.
Mr. Eric Monday