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21-ORD-105

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In re: C. Michael Shull/Kentucky Communications Network Authority

Summary: The Kentucky Communications Network Authority ("Authority") violated the Open Records Act ("the Act") when it delayed access to records without initially notifying the requester of the earliest date on which records would be available.

Open Records Decision

Michael Shull ("Appellant") made three requests to the Authority in which he asked to inspect records related to the Kentucky Wired statewide broadband infrastructure plan. The Appellant represents a party to the contract to build the broadband network, and his requests refer to certain terms in his client's contract with the Authority. In his first request on January 7, 2021, in which he divided his request into ten subparts, the Appellant sought all communications in the Authority's possession relating to the "Shared Savings" term of the contract. He also sought records relating to the "Service Migration" plan, including records describing the Authority's "concept of a 'migratable Site,'" records describing "the process or practices to document [the Authority's] deferred Service Migration on the Site Completion Certificate," and other records reflecting the Commonwealth's willingness or ability to migrate any agency's data operations to the new system.

The Authority first denied the request as unduly burdensome. The Authority claimed that the Appellant's request was not limited in temporal scope, and that the Appellant's failure to include the names of employees who may have responsive records would require the Authority to expend "innumerable hours" in searching for all responsive records. The Authority invited the Appellant to resubmit his request and narrow the temporal scope

of the request, and provide the names of employees or third party email accounts to assist the Authority in its search.

In response to that request, the Appellant then resubmitted his request and asked the Authority to begin searching for responsive records created since April 2018. The Appellant also provided the names of employees he believed would have access to the requested records, and insisted that the Authority should "begin" its search using this information. Although he provided specific names, the Appellant insisted that the Authority should not limit its search to just the named employees he had named.

While his first request was pending with the Authority, the Appellant submitted additional requests to inspect records. He submitted his second request on January 21, 2021, in which he sought records relating to "Huts," a term that is used in the parties' contract, and any records describing design or construction defects with such "Huts." The Appellant also provided the names of employees he believed would have access to responsive records, but again insisted that the Authority should not limit its search to just those employees. Despite the Appellant providing the names of employees, the Authority responded to this request on February 1, 2021, and stated that the Appellant's request "failed to identify individuals from Open Fiber and email addresses for any individuals that is not an employee of the Commonwealth of Kentucky. Once this information is received, [the Authority] will request another search for the emails [and] documents requested." The Authority provided no records, even though it had also admitted that "an initial search for [responsive records] has been completed."

On February 5, 2021, the Appellant submitted a third request in which he sought additional records related to the "Huts." Also on that date, the Authority spoke to the Appellant by telephone about all of his outstanding requests. But the Authority did not issue a written response to the Appellant's third request.

The Authority did not issue any further written communications to the Appellant until February 19, 2021, almost six weeks after his initial request. On that day, the Authority emailed the Appellant and stated that the Appellant's request had generated more than 17,000 records.[1] The Authority

[1] It is not clear from this email whether the Authority claimed all three of the Appellant's requests generated 17,000 responsive records, or whether the Appellant's first request, alone, generated so many records.

advised that it believed most of the records were unresponsive to the Appellant's request, but that it would review them and send "the first batch of documents" early next week.

On February 22, the Authority emailed the "first batch" of records to the Appellant. On March 11, the Authority released its "second batch" of records to the Appellant. Then, on March 17, the Appellant demanded that the Authority produce all remaining responsive records within 48 hours. On March 19, the Authority stated that it could not provide all remaining records within 48 hours, but that it could provide all remaining documents within ten days. The Appellant then initiated this appeal.

Ordinarily, upon receiving a request to inspect records a public agency must issue a response within three business days whether it will comply with the request. KRS 61.880(1).[2] During the state of emergency, the period to respond to requests under the Act has been extended to ten days. *See* 2020 SB 150. However, if the records are "in active use, storage, or are otherwise unavailable," a public agency may extend the deadline to provide responsive records by notifying the requester within three business days and stating the earliest date on which the records will be available. KRS 61.872(5). When providing such notification, the public agency must also provide "a detailed explanation of the cause" of the delay. *Id.*

Here, the Authority never notified the Appellant in writing that the records were "in active use, storage, or [were] otherwise unavailable." Instead, the Authority elected to release records that it had identified and reviewed in "batches," but it did not inform the Appellant of the earliest date by which all responsive records would be made available to him. This Office has found that a public agency may show that it is acting in good faith to respond to a request that implicates many records by releasing those records in bathes on an ongoing basis. *See, e.g.*, 21-ORD-045. But such conduct does not relieve a public agency of its initial duty to provide the requester with the "earliest date" on which the records will be made available. Thus, if a public agency commits to releasing *all* responsive records by a certain date, this Office can decide whether such a claimed delay is reasonable. And one factor in considering whether such a delay is reasonable is the public agency's conduct, *e.g.,* whether it is releasing portions of those records in batches up to the agency's self-imposed deadline under KRS 61.872(5). Because the Authority did not issue a

[2] However, effective June 29, 2021, a public agency must respond to such a request within five business days. *See* 2021 House Bill 312 (effective June 29, 2021).

timely response invoking KRS 61.872(5), and because it did not provide the Appellant with the "earliest date" on which all responsive records would be available, it violated the Act.

Ultimately, the Authority provided all responsive records to the Appellant on April 9, 2021. Thus, about three months elapsed between the Appellant's first of three requests and the date on which all responsive records were provided. For brevity, this decision does not fully articulate each of the Appellants three requests, which combined contained 27 subparts that each seek records relating to the Authority's interpretation and implementation of complicated contract terms. The parties are currently engaged in litigation, and part of the Authority's reasoning for taking three months to process the requests was that several records had to be reviewed for confidential attorney-client communications. *See, e.g.*, 21-ORD-045 (recognizing that some delay may be warranted when many records must be reviewed to guard against the inadvertent disclosure of privileged communications). As noted previously, the Appellant's requests required the Authority to review at least 17,000 records. The Authority also committed to releasing records in batches as they were processed, meaning the Appellant had access to some records during the three-month period between the first request and final production of all records. Therefore, this Office does not find such a delay to be unreasonable under these facts. Rather, the Authority's violation was its failure to respond to the requests and state the date on which all responsive records would be available.[3]

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.

[3] Although the Appellant also claims that the Authority violated the Act when it first denied his first request as unreasonably burdensome, the Authority has since provided all records that it claims are responsive. Thus, this issue is moot. 40 KAR 1:030 § 6.

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Distributed to:

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