



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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21-ORD-221

November 18, 2021

In re: Jason Stanford/Kentucky Transportation Cabinet

Summary: The Kentucky Transportation Cabinet (the “Cabinet”) violated the Open Records Act (“Act”) when it did not properly invoke KRS 61.872(5) to delay inspection of records and when it did not provide responsive records by the date it stated such records would be available.

Open Records Decision

Jason Stanford (“Appellant”) submitted a request to the Cabinet to inspect four categories of records generated between 2005 and 2021 that related to a specific contract. In a timely response, the Cabinet invoked KRS 61.872(5) and notified the Appellant that the records would be available for inspection on September 21, 2021. When the Cabinet failed to provide the requested records on the date promised, this appeal followed.

“If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed five (5) days from receipt of the application, unless a *detailed explanation* of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.” KRS 61.872(5) (emphasis added). Historically, this Office has found that an agency fails to comply with KRS 61.872(5) when it merely states a delay is necessary without providing a detailed explanation for the cause of the delay. *See e.g.*, 16-ORD-210 (agency explanation for delay did not claim records sought were in active use, in storage, or not otherwise available). An agency also violates KRS 61.872(5) when it fails to provide responsive records on or before the date

it notifies the requester that such records will be available. *See, e.g.*, 21-ORD-011.

Here, the Cabinet responded and notified the Appellant that the requested public records would be available on September 21, 2021. The Cabinet's stated reason for delay was the "time required for the Cabinet's personnel to identify, retrieve, and copy the records responsive to your inquiry." The Cabinet further stated that, "due to the nature of the work duties of . . . Cabinet personnel, the records will not be available until" September 21, 2021. Even if the Cabinet's stated reason for delay contained the requisite detailed explanation for cause of the delay, and it does not, *see e.g.*, 16-ORD-210, the Cabinet failed to provide the responsive records by September 21, 2021, as promised. In fact, the September 21, 2021 deadline came and went without any further communication from the Cabinet. Thus, the Cabinet violated the Act when it failed to give a detailed explanation for the cause of its delay, and when it failed to provide the responsive records on the date it stated such records would be available.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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

¹ After the appeal was initiated, the Cabinet provided 436 public records to the Appellant. Ordinarily, when a public agency provides all responsive records on appeal then this Office will consider the appeal moot. *See* 40 KAR 1:030 § 6. However, the Appellant claims to have not received an "MS4, 404 or 401" which he claims are required "under state and federal law[.]" The Appellant provides no further explanation. Thus, the appeal is not moot under 40 KAR 1:030 § 6. Nevertheless, this Office cannot resolve factual disputes between parties regarding any disparity between records that have been provided and those records requested but not provided. *See, e.g.*, 19-ORD-083. Thus, this Office cannot state that additional records do or should exist in the Cabinet's possession.

21-ORD-221

Page 3

#326

Distributed to:

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