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**21-ORD-223**

November 18, 2021

In re: Jason Stanford/Louisville Metropolitan Sewer District

***Summary:*** The Louisville Metropolitan Sewer District ("the District") violated the Open Records Act ("the Act") when it did not respond to a request to inspect records within the statutory period required under KRS 61.880(1) or properly invoke KRS 61.872(5) to delay access to records. However, the District did not violate the Act when it provided all responsive records in its possession after conducting an adequate search.

## *Open Records Decision*

On September 3, 2019, Jason Stanford ("the Appellant") emailed a request to the District to inspect records created between January 2018 and September 2019 that related to two specific properties and 26 specific manhole coverings. The District responded on September 12, 2019, and stated that the Appellant's request was "nearly identical" to two previous requests he had submitted in 2017 and 2018. The District stated it had previously provided all responsive records in response to those two earlier requests, but it would search its records again for new records generated since the Appellant's last request in October 2018. The District further stated that it would "follow-up" with the Appellant in three to five business days "with a status update or disclosure of records, if any such records exist." The Appellant then initiated this appeal, two years later.[1]

[1] On appeal, the District provides a detailed history of its interactions with the Appellant over the course of four years, which involved multiple lawsuits and several open records requests. The District also provided its supplemental responses to the Appellant's request, which were issued in September and October 2019, and which the Appellant did not include with his appeal. The District claims that this history shows that the Appellant has been sending identical requests to the District for the purpose of disrupting its normal operations.

At the time of the Appellant's request on September 3, 2019, KRS 61.880(1) required a public agency to respond to requests to inspect records within three business days and either provide responsive records or cite an exemption and state how it applies to deny inspection.[2] However, if requested records are "in active use, storage, or are otherwise unavailable," then a public agency may extend the time to provide such records by notifying the requester within three business days, explaining the cause of delay, and stating the "earliest date" on which records would be available.[3] KRS 61.872(5).

Here, the District did not respond to the Appellant's request until September 12, 2019, well beyond the statutory period to respond under KRS 61.880(1). Moreover, the District did not invoke KRS 61.872(5) to delay inspection of the requested records. Although the District stated it would "follow-up" with the Appellant in three to five business days, the District did not notify the Appellant of the earliest date certain on which he could inspect the records. Nor did the District "follow-up" with the Appellant within three to five business days, as promised, because the District's first supplementation was sent to the Appellant on September 27, 2019. Accordingly, the District's initial response violated the Act.

Although its initial response was deficient, the District nevertheless continued to supplement its response throughout September and October 2019. With each supplementation, the District would either provide responsive records, or claim no such records existed following the searches it took. Each time, the District explained the parameters of its search in detail. The District, however, admitted that it did not search every record in its possession for some mention of one of the 26 different manhole coverings the Appellant had identified. Rather, the District claimed to have searched all of its electronic records for responsive records relating to the manholes because it could search

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*See* KRS 61.872(6). The District also claims that the Appellant's failure to bring this appeal for more than two years is further evidence of his intent to unduly burden the District, because his delay in bringing this appeal indicates that access to public records is not his primary objective. However, the District did not deny the Appellant's request as an improper attempt to intentionally disrupt the normal operations of the District under KRS 61.872(6). Therefore, it is unnecessary to consider further whether the District could have denied the Appellant's request on this basis.

[2] During the 2021 Regular Session of the General Assembly, KRS 61.880(1) was amended to require a public agency to respond within five business days of receiving a request to inspect records. *See* Ky. Acts ch. 160, § 5.

[3] The General Assembly likewise amended KRS 61.872(5) during the 2021 Regular Session such that a public agency must now notify the requester within five business of the cause of delay and the earliest date on which records will be available. 2021 Ky. Acts ch. 160, § 2

using the manhole identification numbers as a search query. That search produced one responsive record, which the Department provided to the Appellant on October 1, 2019.

On appeal, the District claims to have searched all of its electronic records in all of its divisions for responsive records. The District provided all the records it located that related to the two addresses the Appellant had specified. It also searched all of the reasonable locations where physical records responsive to the Appellant's request for manholes were located, but it did not manually search every physical file in the District's possession to determine whether a passing reference to any of the 26 identified manholes was made. The District claims that no additional responsive records exist in its possession.

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant does not even attempt to make a *prima facie* case that additional records should exist. However, even if he had presented a *prima facie* case, the District has adequately explained the method of its search. Accordingly, the District did not violate the Act when it claimed no additional responsive records exist in its possession.

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/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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