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**21-ORD-240**

December 1, 2021

In re: Daniel Mason/Christian County Fiscal Court

**Summary:** The Christian County Fiscal Court (“the Fiscal Court”) violated the Open Records Act (“the Act”) when it failed to provide records within five business days and did not properly invoke KRS 61.872(5). The Fiscal Court further violated the Act when it provided electronic records in hard-copy format instead of the electronic format requested. However, the Act does not require the Fiscal Court to fulfill requests for information.

***Open Records Decision***

On October 4, 2021, Daniel Mason (“Appellant”) requested “live view access and an electronic copy” of certain Fiscal Court records and information. Specifically, the Appellant requested “[t]he current number of Christian County employees including job title (categorized by County division),” under which the Appellant listed as a subheading “County payroll records” for fiscal year 2021; “FY Budget records” from January 1995 to the current year; “records for annual level of County debt” from January 1995 to the current year; the “[n]umber of voted tax increases” from January 1995 to the current year; and a “[l]ist of Christian County Magistrate voting roll records on Fiscal Court Agenda items” from January 2018 to the current year.

In a timely initial response, the Fiscal Court advised the Appellant that “the only documents containing voting records are the Fiscal Court Minutes” and directed him to the webpage containing those minutes. As to the remainder of the request, the Fiscal Court stated that the records would be available on October 29, 2021. In a subsequent discussion with the Appellant, the Fiscal Court informed the Appellant that budget records over five years old were maintained only in hard-copy format. This appeal followed.

A public agency has five business days to fulfill a request for public records or deny such a request and explain why. KRS 61.880(1). This time may be extended if the records are “in active use, in storage or not otherwise available,” but the agency must give “a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection.” KRS 61.872(5). Here, the Fiscal Court responded within five business days and gave the earliest date when records would be available, but it gave no explanation of the reason for further delay. Thus, the Fiscal Court violated the Act.

With regard to the Appellant’s first request, the Act does not require public agencies to provide information. Rather, the Act requires a public agency to make public records available for inspection. KRS 61.872; *Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) (“The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.”). This Office has previously construed requests that seek the “amount” or “number” of various things as requests for information, *i.e.*, a number, as opposed to a request to inspect identifiable public records. *See, e.g.*, 21-ORD-218; 21-ORD-046; 21-ORD-014. Here, the Appellant’s first request was not for records, but rather the “current number of Christian County employees.” This request seeks information, not access to identifiable public records. Accordingly, the Fiscal Court was only obligated to honor the Appellant’s request to the extent that he described an existing record containing the information he requested in the Fiscal Court’s possession.

In response to the Appellant’s request for “County payroll records,” the Fiscal Court provided a salary schedule dated July 1, 2020, which lists county positions and their corresponding salaries. The Appellant complains that the Fiscal Court provided this document in hard copy instead of electronically. Under KRS 61.874(2)(a), public records “shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format.” The Fiscal Court admits that it maintains the salary schedule in electronic format, but states that it provided the hard copy at no charge as a courtesy; however, the Fiscal Court has agreed to make the record available to the Appellant in electronic form. This portion of the appeal is therefore moot. *See* 40 KAR 1:030 § 6.<sup>1</sup>

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<sup>1</sup> The Appellant argues that the information in the salary schedule is inaccurate. However, this Office “is not an arbiter of the veracity of public records.” *See* 09-ORD-144; *see also* 97-ORD-183 (noting that “[d]isclosure of public records under [the] Act does not constitute a guaranty of the accuracy of all information contained therein”).

With regard to the budget records more than five years old, “[a]gencies are not required to convert hard copy format records to electronic formats.” KRS 61.874(2)(a). Thus, a public agency need not create an electronic record where none exists. Accordingly, the Fiscal Court did not violate the Act when it provided hard copies of these records for the Appellant’s review and allowed him to make copies at the standard rate of ten cents per page.

As for the Appellant’s request for “records for annual level of County debt,” the Fiscal Court asserts that “[t]his information is contained in quarterly reports sent by Fiscal Court electronically to the Department [for] Local Government” (“the Department”). The Fiscal Court states that it provided the “final draft” of these reports to the Appellant in hard copy form, but it considers “[t]he raw data sent to [the Department]” to be a “preliminary draft” under KRS 61.878(1)(i) because it “is in an electronic Excel spreadsheet format that is capable of being edited.” However, the Fiscal Court does not claim that the electronic copy it sent to the Department differs in its content from the hard copy it provided to the Appellant. Thus, the Fiscal Court seeks to distinguish a “preliminary draft” from a “final draft” solely on the basis of the format in which it is kept. But the Act recognizes no such distinction. Rather, a document is a preliminary draft when it represents “a tentative version, sketch or outline of a formal and final written product.” See 05-ORD-179. That is, if the record is subject to change *by the public agency* prior to its final adoption, then the record may be considered a preliminary draft. Here, however, the Fiscal Court claims that the electronic record could be edited by the recipient of the record. The Fiscal Court has not explained how the electronic record is subject to future change *by the Fiscal Court*. Therefore, the Fiscal Court failed to carry its burden that KRS 61.878(1)(i) applies to deny the Appellant’s inspection of the responsive record in electronic form, as the Appellant requested.

Next, the Appellant requested the “[n]umber of voted tax increases” since January 1995. As explained previously, however, this request clearly seeks information, not access to identifiable public records. Although the Fiscal Court located some records containing this information and provided them to the Appellant, it was not required to do so under the Act.

Finally, the Appellant requested a “[l]ist of Christian County Magistrate voting roll records on Fiscal Court Agenda items.” The Fiscal Court informed the Appellant that the only such record was contained in the meeting minutes. On appeal, the Appellant states that he is “willing to go through the electronic

files and separate non-related agenda items from voting rolls.” Accordingly, this portion of the appeal is now moot.

In sum, the Fiscal Court violated the Act when it failed to provide the requested records within five business days or properly invoke KRS 61.872(5) to delay the Appellant’s inspection. The Fiscal Court further violated the Act when it provided hard copies of its quarterly reports instead of electronic copies.

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 accepts notice of the complaint through e-mail to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

/s/ James M. Herrick

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Distributed to:

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