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**22-ORD-002**

January 5, 2022

In re: Caleb Vejvoda/University of Louisville

**Summary:** The University of Louisville (the “University”) subverted the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when it delayed access to public records beyond five business days without invoking KRS 61.872(5) or explaining the cause of delay. However, the University did not charge excessive fees in violation of KRS 61.880(4).

***Open Records Decision***

On November 15, 2021, Caleb Vejvoda (“Appellant”) submitted a request with fifteen subparts to the University for records related to various topics ranging from policies of the University and its school of nursing to University contracts and other COVID-19 related topics. On November 16, 2021, the University issued an email response that confirmed receipt of the Appellant’s request and directed him to the policy portion of its website for the first seven subparts of his request. The University also stated that it would provide physical copies of the same policies, at the cost of 10 cents per page, if the Appellant elected to receive physical copies. The University further stated that it “expect[ed] to have a response for [the Appellant] no later than Friday, December 3, 2021.” On that same day, the Appellant replied and asked the University to explain the cause of its delay. On December 1, 2021, having received no further substantive response from the University, the Appellant initiated this appeal.

Under KRS 61.880(4), “[i]f a person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees, delay past the five (5) day period described in [KRS 61.880(1)] . . . the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.” This Office has found that when an agency delays access to public records beyond five business days, without proper explanation under KRS 61.872(5), it subverts the intent of the Act within the meaning of KRS 61.880(4). *See, e.g.*, 21-ORD-099.

The Act requires a public agency to fulfill a request for public records, or deny such a request and explain why, within five business days. 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 University responded within five business days, but it only provided records responsive to the first seven subparts of the Appellant’s request. The University, however, did not deny the remainder of the request or explain why those subparts were denied. Instead, the University stated that that the Appellant could expect its “response” to “the remainder of [his] request” on December 3, 2021—twelve business days after receipt of the request. The Appellant replied and asked the University to explain the cause for the delay. He also expressed other concerns with the University’s response. The University never responded to the Appellant’s request with an explanation for the cause of its delay.<sup>1</sup>

On December 3, 2021, the date on which the University claimed it would respond to the remaining subparts of the Appellant’s request, the University only provided some responsive records. The University stated that the records it had yet to provide required redactions under KRS 61.878(1)(a), such that it could not provide the records until December 7, 2021. Ultimately, the University claims to have completed the redactions a day early, and provided all remaining responsive records on December 6, 2021.

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<sup>1</sup> The Appellant received only what appears to be an automated email response from the University that said, “We’re working on your request – hang tight! We will make every effort to get back to you within 5 business days.”

The Appellant submitted his request on November 15, 2021, but the University did not timely provide all responsive records, deny any portion of the request and explain why, or invoke KRS 61.872(5) and explain to the Appellant the cause of the delay. Accordingly, the University subverted the intent of the Act, within the meaning of KRS 61.880(4), when it delayed the Appellant's inspection of records "past the five (5) day period described in" KRS 61.880(1), without properly invoking KRS 61.872(2) to justify its delay.<sup>2</sup>

The Appellant also alleges that the University subverted the intent of the Act by imposing "excessive fees" when it required the prepayment of a 10 cents a page for physical copies of records. However, the University did not require the payment of fees. The University instead provided the Appellant access to its policies electronically and advised that it would make physical copies of such policies available to the Appellant at the cost of 10 cents per page if he elected to obtain such physical copies.<sup>3</sup> Accordingly, the University did not charge excessive fees under KRS 61.880(4).

Finally, the University claims that the Appellant's "request was technically deficient pursuant to KRS 61.872(2)(b)[]" because the request was not sent to the "University's official custodian of public records[.]" If a public agency requires a written application for records to be sent by email, then the request shall be sent "to the public agency's official custodian of public records or his or her designee at the e-mail address designated in the public agency's rules and regulations adopted pursuant to KRS 61.876." KRS 61.872(2)(b)4. However, if "the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records." KRS 61.872(4). This Office has found that a public

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<sup>2</sup> On appeal, the University claims that the appeal is moot because it provided the responsive records to the Appellant. *See* 40 KAR 1:030 § 6. The Appellant does not dispute the University's claim to have provided all responsive records. Rather, the Appellant claims that the University subverted the intent of the Act, under KRS 61.880(4), when it improperly delayed his access to records beyond five business days. Although the University has now provided all responsive records, it cannot undo the delay that it caused, which is the basis of the Appellant's appeal. Thus, the appeal is not moot.

<sup>3</sup> Generally, a copying fee of ten cents per page is not considered excessive. *Friend v. Rees*, 696 S.W.2d 325 (Ky. App. 1985).

agency can comply with this notice requirement by either directly issuing written notice to the requester with the name and location of the proper records custodian, *see e.g.*, 21-ORD-040, or informally directing the request to the proper custodian to promptly process the request, *see e.g.*, 12-ORD-153. Here, the University chose the latter, and informally directed the request to its records custodian to be processed. Thus, the University has waived any argument that the Appellant's request was directed to the improper person.

In sum, this appeal is not moot because the Appellant requested this Office's review of the University's delay in dispensing with his request beyond five business days under KRS 61.880(4). And the University subverted the Act, within the meaning of KRS 61.880(4), when it failed to properly invoke KRS 61.872(5) to delay its dispensation of the request beyond five business days. However, the University did not charge excessive fees in violation of KRS 61.880(4).

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

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Distributed to:

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