



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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22-ORD-078

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In re: Roger Allcock/Office of Attorney General

Summary: To invoke the Office of Attorney General’s (“the Office”) statutory authority to review an agency’s response to a request submitted under the Open Records Act (“Act”), the requester must provide a copy of his or her original request and the agency’s response.

Open Records Decision

Under KRS 61.880(2)(a), “[i]f a complaining party wishes the Attorney General to review a public agency’s denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection.” This Office’s review of an agency’s response to an open records request is an administrative procedure established under KRS 61.880(2). “In statutory proceedings, the words of the statute are paramount.” *Kenton County Bd. of Adjustment v. Meitzen*, 607 S.W.3d 586, 594 (Ky. 2020). Such statutory procedures are matters of “legislative grace,” and the person seeking to initiate such a procedure must “strictly comply” with the statutes that establish the procedure. *See id.* at 593.

Although this rule is typically invoked in the context of an appeal from an administrative decision to the circuit court, *see id.*, Kentucky courts have also recognized that administrative agencies may only take action that is expressly authorized by statute. For example, administrative agencies lack inherent authority to reconsider their own decisions, and cannot amend a final administrative decision absent express statutory authority. *See, e.g., Phelps v. Salle*, 529 S.W.2d 361, 364 (Ky. 1971) (“The law seems to be settled that in the absence of statutory authority an administrative agency has no authority to

set up a rehearing procedure.”); *see also* 40 KAR 1:030 § 5 (“The Attorney General shall not reconsider a decision rendered under the Open Records Law or the Open Meetings Law.”). Simply put, administrative proceedings are creatures of statute, and an administrative agency has no authority to take action that is not expressly provided by the legislature.

On March 31, 2022, Roger Allcock (“the Appellant”) sought review of this Office’s disposition of an open records request that he had submitted to the Office. The Appellant provided a handwritten note that indicated he was requesting “all communications” about why the Fish and Wildlife Commission (“the Commission”) had issued a specific legal memorandum. He also provided an email from this Office, dated November 12, 2021, in which this Office informed the Appellant that the Office did not possess any responsive records. Because the Appellant attached what appeared to be a request, and what appeared to be the agency’s response, this Office processed the appeal.¹

However, on appeal, the Office notes that the Appellant did not provide a copy of his original request and the Office’s original response. The handwritten note that the Appellant provided also appears to be an attempt to appeal this Office’s response from November 12, 2021, in which the Office stated that it did not possess records responsive to a request that the Appellant had submitted on November 10. The Appellant did not provide a copy of that November 10 request.

The Office explains on appeal that the Appellant submitted his original request on October 13, 2021, and sought all communications related to a January 4, 2019 internal legal memorandum drafted by a staff attorney for the Commission regarding the right of public navigation over lands submerged by floods. The day after the Appellant submitted his request, this Office informed the Appellant that he may wish to submit his request to the Commission because his request involves actions taken by the Commission. Nevertheless, the Office did search for, and located, records that were responsive to the request. The Office asked the Appellant for his mailing address so that the

¹ Usually when a person fails to provide a copy of his original request and the agency’s response, the Office will send notice to the person informing him that his appeal has been unperfected, and instruct him to provide the necessary documents before the appeal will be processed. This screening process occurs before notice of the appeal is issued to the agency. Because the Appellant’s handwritten note appeared to be a request for records, the Office processed the appeal. Only after the appeal was initiated did the Office discover that the Appellant had failed to provide the documents required under KRS 61.880(2)(a).

Office could provide him with the responsive records.² After the Appellant provided his mailing address, the Office mailed sixteen pages of responsive emails to the Appellant.

The Appellant then apparently submitted a second request to the Office on November 10, 2021, but he has not provided a copy of that request on appeal. Instead, he provides only this Office's response from November 12, 2021, in which the Office stated that it had received the Appellant's request from November 10, but the Office did not possess any records responsive to his request. The Office continues to explain on appeal that it has provided the Appellant with all of the Office's communications with the Commission about the legal memorandum in question.

From the record on appeal, the Appellant has not provided this Office with either of his two original requests, and has provided only one of the Office's responses to those two requests. Accordingly, the Appellant has failed to comply with KRS 61.880(2)(a), and has not properly invoked this Office's jurisdiction to review this matter. The Office therefore dismisses the appeal. 40 KAR 1:030 § 1 ("The Attorney General shall not consider a complaint that fails to conform to . . . KRS 61.880(2), requiring the submission of a written request to the public agency and the public agency's written denial, if the agency provided a denial.")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 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 e-mailed to OAGAppeals@ky.gov.

² The records included correspondence between the Office and the Commission about providing information to the Appellant in response to a question he had about the legal memorandum. The Office did not draft the legal memorandum in question.

³ Even if the Appellant had properly invoked this Office's jurisdiction, the Office has explained that it timely responded to both of the Appellant's requests, provided all responsive records in the Office's possession, and informed the Appellant that the Commission is likely to have more records responsive to the Appellant's request. Thus, the Office complied with the Act.

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Distributed to:

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