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OFFICE OF THE ATTORNEY GENERAL

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**22-ORD-165**

August 16, 2022

In re: Lawrence Trageser/Jeffersontown Fire Protection District

**Summary:** Before seeking this Office’s review under KRS 61.880(2) to allege subversion of the Open Records Act (“the Act”) under KRS 61.880(4), a person must first begin enforcement by submitting to a public agency a request to inspect records or a complaint alleging the agency’s failure to comply with the Act. KRS 61.880(1).

***Open Records Decision***

On June 12, 2022, Lawrence Trageser (“Appellant”) attempted to initiate an appeal to this Office and claimed that the District had failed to adopt and make publicly available its rules and regulations for processing requests to inspect records, as required under KRS 61.876. However, the Office notes that the Appellant did not first submit a complaint to the District alleging its violation of KRS 61.876 before bringing this appeal. For that reason, the Office lacks jurisdiction to render a decision in this matter and dismisses the appeal.

The purpose of the Act is “that free and open examination of public records is in the public interest.” KRS 61.871. And under KRS 61.872(2), any resident of the Commonwealth may submit to a public agency a written application to inspect public records. Thus, every dispute under the Act begins with a request to inspect records and the agency’s response thereto—be it a denial, a failure to respond, the imposition of excessive fees, misdirecting the applicant, or unreasonably delaying access to the requested records. KRS 61.880(1); KRS 61.880(4). In other words, disputes under the Act arise when a public agency has done, or failed to do, something in response to a written application properly submitted under KRS 61.872(2). If a person disagrees with what the agency has or has not done in response to that written application, the General Assembly has provided two ways for him to seek redress under the Act.

One option, KRS 61.882(1), provides for a direct petition to Circuit Court. And a “person alleging a violation of the provisions of KRS 61.870 to 61.884 *shall not have to exhaust his remedies under KRS 61.880* before filing suit in a Circuit Court.” KRS 61.882(2) (emphasis added). The Circuit Court’s jurisdiction to enforce the Act is significantly greater than the Office’s. For example, even a person who has not made a request but wishes to object to a public agency providing records about him has standing to seek an injunction prohibiting the release of records. *See Beckham v. Bd. of Educ. Jefferson Cnty.*, 873 S.W.2d 575, 579 (Ky. 1994). And unlike the Office, the Circuit Court has the power to compel the production of documents<sup>1</sup>, take testimony, decide factual disputes, and order the payment of fines, attorney’s fees, and costs if a public agency is found to have willfully violated the Act. *See* KRS 61.882(5).

The second option, KRS 61.880, involves invoking this Office’s jurisdiction. But no person (except a person confined in a correctional facility, KRS 197.025(3)) is required to seek this Office’s review prior to invoking the Circuit Court’s more expansive jurisdiction to enforce the Act. KRS 61.882(2). If, however, a person seeks this Office’s review of a public agency’s response to a request to inspect records, then he must proceed under KRS 61.880. When reviewing a dispute under KRS 61.880, this Office sits as an administrative adjudicative body. Under Kentucky law, administrative proceedings are creatures of statute and are provided as a matter of grace by the General Assembly. *See, e.g., Kenton Cnty. Bd. of Adjustment v. Meitzen*, 607 S.W.3d 586, 594 (Ky. 2020) (administrative appeals are statutory proceedings that require strict compliance with the enabling statutes). Thus, when a person seeks this Office’s review under KRS 61.880, he must strictly comply with that statute. *See, e.g.,* 22-ORD-078 (dismissing an appeal that failed to comply with KRS 61.880).

“If a person enforces KRS 61.870 to 61.884 (*i.e.*, any provision of the Act) pursuant to *this section* (*i.e.*, KRS 61.880), he or she *shall begin enforcement under this subsection* (*i.e.*, KRS 61.880(1)) *before* proceeding to enforcement under subsection (2) of this section (*i.e.*, KRS 61.880(2)).” KRS 61.880(1) (emphasis added). To begin enforcement under “this subsection,” KRS 61.880(1), the person must first submit a request to the agency. That is because an agency’s duty to respond to such a request begins upon receipt of the request. Under KRS 61.880(1), the agency has five business days from receipt of the request to decide whether to grant or deny the request and notify the requester of that decision. If the agency chooses to deny the

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<sup>1</sup> While the Office may demand the agency provide a copy of the disputed records for purposes of confidential review to decide whether a violation has occurred, KRS 61.880(2)(c), the Office cannot compel the agency to provide those same records to the requester even if the Office finds that the records were withheld in error. Rather, if the Office decides that records should have been produced and the agency neither appeals that decision to Circuit Court within 30 days nor provides the records, the requester may petition the Circuit Court to enforce the Attorney General’s decision. KRS 61.880(5).

request, it must cite an exemption and explain why it applies to the records withheld. *Id.*<sup>2</sup>

If a person disputes the agency's response, he may seek the Office's review of the matter by submitting a copy of his original request and the agency's response. KRS 61.880(2)(a). If the agency does not provide a timely response within five business days, the person may also seek the Office's review of that alleged violation. *Id.* ("If the public agency refuses to provide a written response, a complaining party shall provide a copy of the written request.").

There are other potential violations of the Act, short of an agency actually denying a request, which a person may bring to the Office for its review. KRS 61.880(4). Those violations "include[], but [are] not limited to the imposition of excessive fees, delay past the five (5) day period described in [KRS 61.880(1)], excessive extensions of time, or the misdirection of the applicant." *Id.* But even these potential violations contemplate that the requester, or "applicant," first submitted a request to the agency. How can an agency charge excessive fees for records if it did not receive a request for records? *See, e.g.,* 22-ORD-130. How can an agency delay access to records, or seek excessive extensions of time, if no records were requested in the first place? And how can an agency "misdirect[]" "the applicant" when no one has submitted to it a written application to inspect records? Although KRS 61.880(1) requires a person to begin enforcement under that subsection before proceeding to "subsection (2) of this section," it is equally true that a person must comply with KRS 61.880(1) before bringing claims under KRS 61.880(4). That is because, as discussed, the types of subversion listed in KRS 61.880(4) contemplate that the person has first acted under KRS 61.880(1) and the agency has done *something* that is "short of denial." KRS 61.880(4).

Moreover, KRS 61.880(2)—and not KRS 61.880(4)—establishes the Office's duties when deciding open records disputes. *See* KRS 61.880(2)(a) (requiring a decision within twenty business days); KRS 61.880(2)(b) (permitting an extension of time under certain scenarios); KRS 61.880(2)(c) (authorizing the Attorney General to obtain additional documentation, and placing the burden of proof on the agency). Because KRS 61.880(4) does not establish the procedure for bringing appeals to the Office, a person seeking this Office's review is actually invoking KRS 61.880(2). He must therefore first comply with KRS 61.880(1).

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<sup>2</sup> Or, if the records are "in active use, storage, or are otherwise unavailable," an agency may delay access until the records are available. KRS 61.872(5). However, if an agency invokes KRS 61.872(5) to delay access to records, it must still notify the requester of that fact within five business days of receiving the request. The agency must also provide the earliest date on which the records will be available and give a detailed explanation of the cause of the delay. *Id.*

In 21-ORD-061, the requester sought this Office's review of an agency's response to his request and he also complained that the agency did not post its rules and regulations. However, the requester did not complain about the agency's alleged failure to post its rules and regulations in his original request to the agency. This Office considered the question as part of its decision in reviewing the request and agency's response. In other instances when the issue has been presented, the requester has first complained to the agency about its failure to adopt or post rules and regulations before seeking the Office's review. *See, e.g.*, 16-ORD-116; 16-ORD-013; 15-ORD-222; 15-ORD-198; 14-ORD-172.

In each of these decisions, the requester at least presented the Office with a request for records or a complaint about the agency's rules and regulations and the agency's response thereto. Or, in 15-ORD-198, the requester appealed the agency's failure to respond to a complaint that it had not posted its rules and regulations.<sup>3</sup> But unlike those previous decisions, here, the Appellant attempted to initiate this appeal on June 12 without first sending to the District a request for its rules and regulations or a complaint that the District failed to post them. Then, on June 14, just two days after the Appellant's attempt to initiate the appeal, the District adopted rules and regulations and posted them on its website.<sup>4</sup>

If the Appellant had first begun his enforcement of the Act under KRS 61.880(1), as he is required to do, this dispute could have likely been resolved by the District without the need to involve this Office. And if it had not been resolved by the District, then the Appellant could have appealed the District's disposition of his complaint to this Office under KRS 61.880. But the Appellant did not begin his enforcement of the Act by first proceeding under KRS 61.880(1). Accordingly, he did not strictly comply with KRS 61.880, and the Office lacks jurisdiction to consider the appeal. Therefore, the appeal is dismissed.

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

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<sup>3</sup> In a recent footnote, the Office made passing reference to 15-ORD-198 and stated that a person could bring an appeal alleging an agency's failure to post its rules and regulations without first submitting a complaint to the agency. *See* 22-ORD-130 n.3. However, the Office's footnote reference to 15-ORD-198 in its recent decision was mere *dictum*, and upon further review, the requester in 15-ORD-198 did submit a complaint to the agency about its rules and regulations before bringing an appeal. The issue in 22-ORD-130 was that the appellant claimed an agency was charging an excessive fee before the appellant submitted a request to the agency. The Office dismissed the appeal because the appellant had failed to submit a request to inspect records to the agency.

<sup>4</sup> On appeal, the District provides a copy of rules and regulations that it adopted on June 14 and proof that those rules are posted to its website. It is not clear from this record, however, whether the District had previously adopted rules and regulations and its June 14 version constituted an amendment to those rules and regulations.

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.

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

s/Marc Manley  
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Distribution:

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