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24-ORD-129

May 24, 2024

In re: Courtney Graham/Kentucky Board of Cosmetology

Summary: The Kentucky Board of Cosmetology (the “Board”) violated the Open Records Act (“the Act”) when it did not fulfill a request for records within five business days of receiving the request. The Board also subverted the Act, within the meaning of KRS 61.880(4), when it delayed the Appellant’s access to records beyond five business days from the agency’s receipt of the request.

Open Records Decision

On April 22, 2024, Courtney Graham (“Appellant”) submitted a request for records to the Board containing five subparts. On April 26, 2024, the Board responded by stating it was “unable to officially respond at this time due to the [Board’s] current lack of legal counsel or [an] official Open Records Officer.” The Board notified the Appellant that her request would be “present[ed]” at its next board meeting on May 13, 2024.¹ This appeal followed.²

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). A public agency may also delay access to responsive records if such

¹ As of May 24, 2024, the Office has yet to receive any official supplemental response from the Board regarding what transpired during its May 13, 2024, meeting related to this appeal.

² The Appellant claims on appeal that the Board violated the act under “KRS 61.876 by failing to have an official custodian of records.” However, that issue is not properly before the Office. The Office has previously held that a requester must first submit a complaint to the public agency about its alleged failure to post on its website the materials required under KRS 61.876(2). *See, e.g.*, 22-ORD-165. Under KRS 61.880(2)(a) and KRS 61.880(4), the Office only has jurisdiction to review a person’s request and the agency’s response, and then determine whether the agency has complied with the Act. Here, the Appellant’s request to the Board made no mention of its alleged failure to comply with KRS 61.876. As a result, the Board did not have an opportunity to respond to the Appellant’s allegations arising under KRS 61.876 before the appeal was initiated.

records are “in active use, storage, or not otherwise available.” KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must also notify the requester of the earliest date on which the records will be available, and provide a detailed explanation for the cause of the delay.

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 . . . delay past the five (5) [business] day period described in [KRS 61.880(1)] . . . the person may complain in writing to the Attorney General.” Here, the Appellant claims that the Board “subverted the intent of the Act by failing to provide a response required under the Act.” 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 Appellant submitted a request to the Board on April 22, 2024, and the Board issued its response to that request on April 26, 2024. Although the Board responded within five business days, its response was otherwise insufficient under the Act. The Board’s response did not grant or deny the request and explain why. Nor did the Board’s response invoke KRS 61.872(5) to delay access to the requested records.

While the Office may be sympathetic to the Board’s current situation, such a situation does not excuse noncompliance with the Act. The Act does not require an agency only issue responses through “legal counsel.” *See* KRS 61.880(1). Nor does the Board’s present behavior comport with the purpose of the Act “that free and open examination of public records is in the public interest.” KRS 61.871. Failure of the Board to provide responsive records within five business days of receiving his request, as required under KRS 61.880(1), also constitutes subversion of the Act. The Board did not sufficiently explain why it was unable to fulfill the Appellant’s request within five business days. Accordingly, the Board violated the Act under KRS 61.880(1), and also subverted the Act within the meaning of KRS 61.880(4), when it delayed the Appellant’s access to records beyond five business days from the agency’s receipt of the request.³

³ On appeal, in a supplemental response, the Board again claims it is unable to officially respond to the Appellant’s request because it lacks legal counsel. However, the Board denies two subparts of the Appellant’s request under the Family and Medical Leave Act (“FMLA”). The Board also denies one

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

Russell Coleman
Attorney General

/s/ Matthew Ray
Matthew Ray
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Distributed to:

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subpart because there are no records responsive to that subpart of her request. The Board grants two subparts of the Appellant's request but requires the Appellant to inspect the records in person and make copies of the requested records herself at a cost of \$0.10 per page. On May 17, 2024, just eleven days before the Office's statutory deadline to issue its decision in this appeal, the Appellant objected to each portion of the Board's supplemental response. Under KRS 61.880(2)(a), this Office's mandate is to review the request for records and the agency's response to determine whether the agency violated the Act. In finding that the Board's initial response failed to comply with KRS 61.880(1) and subverted the Act, the Office has carried out its mandate. The Office declines to consider the new issues raised on appeal regarding the Board's supplemental response. *See, e.g.*, 23-ORD-333 n.1; 22-ORD-200 n.2; 22-ORD-170 n.2; 22-ORD-142 n.3; 21-ORD-177 (the Office may decline to consider new issues raised by the parties' subsequent correspondence on appeal because such matters encroach upon the Office's statutory deadline to issue a decision within 20 business days and suffer from incomplete briefing by the parties). Rather, the Appellant may initiate this Office's review of any newly alleged violations by initiating a new appeal. She may do so by providing the Office a copy of her original request and the agency's final response. *See* KRS 61.880(2)(a).