



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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24-ORD-192

September 10, 2024

In re: Nicholas Horne/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services (“the Cabinet”) subverted the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when it delayed access to records for three months without proper justification.

Open Records Decision

On May 23, 2024, Nicholas Horne (“Appellant”) submitted a ten-part request to the Cabinet for records relating to federal census data, the Cabinet’s compliance with federal law and the care of children in the Cabinet’s “custody.” In response, the Cabinet cited KRS 61.872(5) and stated that “the records [the Appellant] requested are not readily available because the [Cabinet] is having to manually search its files and records database for responsive records.” The Cabinet informed the Appellant that the records would be made available on June 28, 2024. Subsequently, on July 1, the Appellant requested an update on the status of his request. The next day, July 2, the Cabinet informed the Appellant that it had “been unsuccessful at getting the information from other Departments to fulfill [his] request” and that the records would now be made available on October 31. On August 12, 2024, having received no further response from the Cabinet, the Appellant initiated this appeal, claiming the Cabinet has subverted the Act, within the meaning of KRS 61.880(4), due to its delay in processing his request.

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 records are “in active use, storage, or not otherwise available.” KRS 61.872(5). A public agency invoking KRS 61.872(5) to delay access to responsive records must 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. *Id.*

The Office has previously held that the requirement of KRS 61.872(5) for an agency to notify the requester of the “earliest date” records will be available means what it says. *See, e.g.*, 23-ORD-348; 21-ORD-011; 07-ORD-047. Accordingly, when an agency misses its own deadline for providing responsive records, it subverts the intent of the Act. Regarding its request for additional time, the Cabinet stated only that a particular department could not acquire and provide the requested records until October and explains that its records team is “entirely reliant upon folks from other departments to provide it.” But the Cabinet has not explained that the records are “in active use, storage, or not otherwise available,” or otherwise explained why the additional delay is necessary. *See, e.g.*, 23-ORD-126. Rather, it asserted only that one department within the Cabinet could not acquire the requested records for another three months. Because the Cabinet has not explained why a delay of almost five months after the original request is necessary to comply with the request, it has not met its burden under KRS 61.880(2)(c). *See, e.g.*, 21-ORD-045. Thus, the Cabinet has subverted the intent of the Act by excessively extending the time by which it must provide responsive records under KRS 61.880(4).¹

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/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

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¹ On August 19, 2024, the Cabinet denied the Appellant’s request in its entirety. The Appellant has not challenged that denial.