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24-ORD-197

September 17, 2024

In re: Jeffrey Jobe/Boys and Girls Club of Glasgow/Barren County

Summary: The Boys and Girls Club of Glasgow/Barren County ("the Club") is a public agency subject to the Open Records Act ("the Act") that must produce nonexempt, responsive records from fiscal years in which it meets the KRS 61.870(1)(h) definition of a public agency. Accordingly, it violated the Act when it failed to appropriately respond to a request to inspect records within five business days of receiving it. The Club did not violate the Act when it did not provide records that are not "public records" under KRS 61.870(2). The Club violated the Act when it denied a portion of the request because it had previously provided the requested records. The Club did not violate the Act when it did not provide records it does not possess. The Club did not violate the Act when it denied a request seeking information without describing any public records to be inspected.

Open Records Decision

On August 5, 2024, Jeffrey Jobe ("Appellant"), submitted a request to the Club to inspect various records.[1] On August 7, 2024, the Club responded and stated that it is "researching whether [it is] still subject to" the Act and, "[a]ccordingly, we need more time to respond to the request." On August 19, 2024, having received no further response, the Appellant initiated this appeal.

As an initial matter, the Office must determine whether the Club is a "public agency" subject to the Act. The Club is a private, nonprofit organization. A private

[1] Specifically, the Appellant sought "Copies of [the Club's] Bylaws. Original and current if changed"; "Copies of minutes for each for each board meetings [*sic*] from August 2022, through August 2024. These . . . include bank statement audits"; "a[n]y communications of [two individuals] involving questions regarding needs for audits"; and "Board members by year since [*sic*] for . . . 2022, 2023, and 2024."

organization, however, is deemed to be a "public agency" for purposes of the Act if "within any fiscal year, [it] derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds." KRS 61.870(1)(h). The Club admits it was a "public agency" under KRS 61.870(1)(h) prior to fiscal year 2025.[2] The Appellant also claims the Club was a "public agency" for fiscal year 2023 according to the Office. *See* 23-ORD-070. The Club does not contest the Appellant's assertion regarding fiscal year 2023. Thus, absent any evidence to the contrary, the Office concludes the Club qualifies as a "public agency" under KRS 61.870(1)(h) for fiscal years 2023 and 2024.

However, the Club asserts it is not a "public agency" for fiscal year 2025. According to the Club, its total revenue from state and local authority funds for fiscal year 2025 is projected to be $133,482.20. Neither the Club nor the Appellant provide an estimate of the Club's total revenue from state and local authority funds to date. Nor does either party provide an estimate of funds expended by the Club in the Commonwealth for fiscal year 2025. Accordingly, without knowing the amount of funds expended by the Club in fiscal year 2025, the Office cannot find that the Club qualifies as a "public agency" under KRS 61.870(1)(h) for fiscal year 2025.

However, the Club asserts that because it is not a "public agency" for fiscal year 2025, it is not bound by the Act. Rather, the Club maintains that "once a private entity ceases to meet the 25% threshold, it is no longer required" to comply with the Act and is only bound to do so "during the year(s) in which the private entity satisfied the 25% threshold requirement."

The Club's proposed interpretation, however, is not supported by the text of the statute. And the "the text of the statute is supreme." *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016) (citing Scalia & Garner, *Reading Law* 56 (2012)). Moreover, "nothing requires a statute's subsection to be read in a vacuum rather than in the context of the entire statute." *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671, 674 (Ky. 2009). As the Kentucky Supreme Court has stated:

> In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes. We also

[2] The Commonwealth's fiscal year begins on July 1 and ends on June 30 of the following calendar year. *See* Ky. Const. § 169. Accordingly, July 1, 2023, and June 30, 2024, marked the beginning and end of fiscal year 2024, respectively.

> presume that the General Assembly did not intend an absurd statute or an unconstitutional one.

Shawnee Telecom Res., Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011) (citations omitted).

Under KRS 61.870(1)(h), examination of whether 25% of the funds the private entity expends comes from state or local funds looks at the private entity's finances "within *any* fiscal year" (emphasis added). Further, the Supreme Court has stated that the "logical interpretation [of KRS 61.870(1)(h) is] that if the records sought are for a fiscal year in which the 25% threshold is met, there is an obligation to produce." *Util. Mgmt Grp., LLC v. Pike Cnty. Fiscal Ct.*, 531 S.W.3d 3, 11 (Ky. 2017). Moreover, pursuant to the "any fiscal year" language, the Office has previously held that a private entity can qualify as a public agency under KRS 61.870(1)(h) in some years but not in others. *See e.g.*, 23-ORD-070 n.2 ("[A] determination that a private entity meets the threshold in one fiscal year does not mean that it meets the threshold in another fiscal year"); 09-ORD-192 (finding a private entity was a "public agency" under KRS 61.870(1)(h) in fiscal year 2008, but not in fiscal year 2009). Simply put, the use of "any" in the statute suggest that there are multiple years in which a private entity can be a "public agency" under the Act. *See Pearce v. Univ. of Louisville*, 448 S.W.3d 746, 753 (Ky. 2014) (finding that, "[i]n context, it is clear that the term 'any' is used synonymously with the term 'all'").[3]

This conclusion is supported by the legislative history of KRS 61.870(1)(h). Prior to July 1, 2012, KRS 61.870(1)(h) defined public agency to mean "[a]ny body which derives at least twenty-five percent (25%) of its fund expended by it in the Commonwealth of Kentucky from state or local authority funds." During the 2012 Regular Session, the General Assembly passed House Bill 496 to amend KRS 61.870(1)(h). The amendment added the timeframe of "any fiscal year" for assessing the 25% expenditure threshold. Notably, the original version of the bill would have added the language "the current fiscal year." A House Committee Substitute removed that language of favor of the "any fiscal year" language. The original "current fiscal year" language would support the Club's proposed interpretation, but the General Assembly's rejection of that language suggests the

[3] Consider also a public record created by an entity that met the KRS 61.878(1)(h) definition of "public agency." The General Assembly has declared "that the basic policy of [the Act] is that free and open examination of public records is in the public interest." Thus, the Office has long held that "wherever public funds go, public interest follows." OAG 76-648. Under the Club's construction, a private entity could take public funds such that it becomes subject to the Act but can then opt out of the requirements of the Act within a year by taking no additional public funds. But the public's interest or right to inspect public records related to that distribution of public funds does not dissolve because the private entity has ceased receiving public funds.

General Assembly did not intend for the definition of public agency in KRS 61.870(1)(h) to be limited to only the fiscal year in which a request was made.

At bottom, "if the records sought are for a fiscal year in which the 25% threshold is met, there is an obligation to produce." *Util. Mgmt Grp.*, 531 S.W.3d at 11. Here, the Club admits that it met the KRS 61.870(1)(h) definition of a public agency in fiscal years 2023 and 2024. Accordingly, the Club is obligated under the Act to produce records from those fiscal years.

When a "public agency" receives a request under the Act, it must determine within five business days whether to grant or deny it and notify the requester of its decision. KRS 61.880(1). If the public agency denies any portion of the request, it must also cite the exemption authorizing the denial and briefly explain how it applies to records withheld. *Id*. Or, if the records are "in active use, in storage or not otherwise available," the public agency may delay access to the records if it gives the requester "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 Club received the Appellant's request on August 5, 2024, and stated it was "researching whether [it is] still subject to" the Act and, "[a]ccordingly, [it] need[s] more time to respond to the request." The Club asserts that because it informed the Appellant that it needed more time to respond to the request, it did not violate KRS 61.880(1). But the Club did not determine within five business days whether to grant the request, deny it, or invoke KRS 61.872(5) to delay the Appellant's inspection of the requested records. Accordingly, the Club violated the Act when it failed to respond appropriately to the Appellant's request.

Although the Office has determined that the Club is still a "public agency" obligated to produce records from fiscal years 2023 and 2024, not all its records are "public records" subject to inspection. KRS 61.870(2) broadly defines "public records," but it excludes from that definition "any records owned or maintained by or for a body referred to in [KRS 61.870(1)(h)] that are not related to functions, activities, programs, or operations funded by state or local authority." Regarding the Appellant's request for its bylaws, the Club asserts that its bylaws were created and adopted when it was created, "before it accepted any funding from state or local entities." The Office has previously reasoned that "records relating to the [Agency's] 'functions, activities, programs, or operations funded by' [state or local funds] likely would not have been created until after the expenditure was made." 23-ORD-070. Here, the Club's bylaws, created before it received "state or local funds" are not records related to the Club's "functions, activities, programs, or operations funded by state or local authority." Thus, they are not "public records," and therefore, are not subject to inspection. *See* KRS 61.872(1) (granting Kentucky residents the right to inspect "public records").

Regarding the request for the board's minutes, the Club admits that, "to the extent there are meeting minutes discuss[ing] programs or functions funded by governmental funds, then presumably these minutes would be subject to disclosure." But the Club asserts that it may "redact any non-governmental funded discussions from the minutes." *See* KRS 61.878(4) ("If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination."). As discussed above, records that not related to the Club's "functions, activities, programs, or operations funded by state or local authority" are not "public records," and therefore, are not subject to inspection. Accordingly, such portions of meeting minutes may be redacted.[4]

Regarding the Appellant's request for "bank statement audits," the Club asserts it has a single document responsive to this request that it has previously provided to the Appellant. Thus, the Club argues, it "should not be required to keep providing the same document to him over and over." In essence, the Club claims it is not required to fulfill a request it had previously granted. That argument, however, is grounded upon KRS 61.872(6), which requires the Club to prove by "clear and convincing evidence" that the Appellant intended to disrupt its essential functions by making repeated requests, or that the request is unreasonably burdensome. *See* 23-ORD-180. The Club has not made such a showing here. Thus, the Club failure to provide the responsive audit violated the Act.

Regarding the Appellant's request for additional audits or communications by two individuals "involving questions regarding needs for audits" the Club states that it does not possess any responsive records. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). Here, the Appellant has not made a *prima facie* case that additional audits or the two individuals' communications exist. Accordingly, the Club did not violate the Act when it did not provide records it does not possess.

[4] Regarding the Club's assertion that it will "take time to review and redact the minutes to comply with the request," the Office again notes that the Club has not invoked KRS 61.872(5) to delay the Appellant's inspection of the requested records or explain why a delay is necessary. Thus, to the extent responsive minutes that meet the definition of "public record" under KRS 61.870(2) exist, the Club violated the act when it did not determine within five business days whether to produce the minutes or invoke KRS 61.872(5) to delay the Appellant's inspection of them.

Regarding the request for the Club's "Board members by year" for 2022, 2023, and 2024, the Clubs argues it is "more in the form of an [i]nterrogatory than a request for an existing document." The Appellant's request seeks the identity of the Club's board members in certain years. This request did not describe public records to be inspected, but rather, seeks information. *See, e.g.*, 23-ORD-257 (requester asked for "the full names" of correctional officers on duty at a specific time); 22-ORD-054 (requester asked "who ordered" a letter to be written, how much the author was paid, and "why" the letter "was circulated"). The Act does not require public agencies to answer interrogatories or fulfill requests for information. Rather, it only requires public agencies to *produce public records* for inspection. *See* KRS 61.872(2)(a) (requiring a request to inspect records to include, *inter alia*, a description of "the records to be inspected"); *Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The [Act] does not dictate that public agencies must gather and supply information not regularly kept as part of its records."). Accordingly, the Club did not violate the Act when it denied the Appellant's request because it did not describe any public records to be inspected.

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.

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/s/ Zachary M. Zimmerer
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Distributed to:

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