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**24-ORD-249**

November 26, 2024

In re: Brian Halloran/City of Covington

***Summary:*** The City of Covington ("the City") violated the Open Records Act ("the Act") when it delayed access to a record without initially notifying the requester of the earliest date on which records would be available. On appeal, the City demonstrated that its delay was reasonable.

***Open Records Decision***

On April 25, 2024, Brian Halloran ("the Appellant") submitted a request to the City seeking: (1) all records or communications related to four specific entities; (2) all records or communications between any City employee or elected official that relate to or mention fourteen specific individuals or entities; and (3) any records related to certain expenditures that had been described by the City in its April 23, 2024, City Commission meeting.[1] Having received no further response from the City, the Appellant resubmitted his request on August 28, 2024. In response, on September 3, 2024, the City stated that over 30,000 emails are responsive to the Appellant's request, and it would take at least six months to review responsive emails, make necessary redactions, and provide responsive records. The City further invited the Appellant to modify his request to reduce the scope of responsive records. On September 19, 2024, the City informed the Appellant that, even with his modifications, over 33,000 emails responsive to part one of the request exist and that it was still determining the number of records responsive to part two of the request. Because of the size of the request, the City stated that the request would be completed in rolling batches on or before April 30, 2025. This appeal followed.

On appeal, the City claims it did not receive the Appellant's request when it was originally submitted on April 25, 2024. Under the Act, a public agency "shall determine within five (5) [business] days . . . *after the receipt* of any such request whether to comply with the request and shall notify in writing the person making the

[1] Each request was limited to the previous four years.

request, within the five (5) day period, of its decision." KRS 61.880(1) (emphasis added). Here, the City claims it did not receive the Appellant's request until August 28, 2024. The Office cannot resolve factual disputes, such as whether a public agency actually received a request. *See, e.g.*, 23-ORD-071; 23-ORD-005; 22-ORD-216; 22-ORD-148; 22-ORD-125; 22-ORD-100; 22-ORD-051; 21-ORD-163. Thus, the Office cannot find the City violated the Act when it did not respond to a request it claims it did not receive.

Turning to the City's September 3, 2024, response, a public agency may also delay access to responsive records beyond five business days if such 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. Here, the City responded to the Appellant's request within five business days but stated only that a large number of responsive records existed and invited the Appellant to modify his request. The City neither cited KRS 61.872(5), nor asserted that records were "in active use, in storage, or not otherwise available." Further, the City did not notify the Appellant of the earliest date on which the records would be available. In fact, the City did not state the earliest date on which the records would be available until September 19, 2024.[2] Thus, the City's initial response violated the Act.

If a requester believes the agency's delay is unreasonable, he or she may seek the Attorney General's review by alleging the agency subverted the intent of the Act "past the five (5) day period described in" KRS 61.880(1). *See* KRS 61.880(4). In determining how much delay is reasonable, the Office has considered the number of records the requester has sought, the location of the records, and the content of the records. *See e.g.,* 22-ORD-176; 01-ORD-140; OAG 92-117. Weighing these factors is a fact-intensive analysis. For example, this Office has found that a four-month delay to provide 5,000 emails for inspection was not reasonable under the facts presented. *See, e.g.,* 21-ORD-045. However, the Office has also found that a six-month delay was reasonable to review 22,000 emails for nonexempt information. *See, e.g.*, 12-ORD-097. Further, the Office has recognized that a public agency may show its good faith to respond to a request that implicates many records by releasing those records in batches on a rolling basis. *See, e.g.*, 21-ORD-045. Ultimately, the agency carries the burden of proof to sustain its actions. KRS 61.880(2)(c).

[2] The City explains that it had tried to reach the Appellant by phone to discuss his request and did not reach him until September 19. However, that does not obviate the Act's requirement that an agency state, *in writing*, whether it will grant or deny a request or invoke KRS 61.872(5) within five business days.

On appeal, the City justifies its delay by describing the number of responsive records, where those records were held, and the exemptions applicable to those records. To start, the City explains that it possesses 39,622 records responsive to the Appellant's request. Some of those emails include attachments, but the City is unable to determine exactly how many additional attachments it possesses. The City also explains that records had to be obtained from its cloud archiving service and "it took time to search for responsive emails in the archive, time to export the compressed messages . . . into a format for review, and time to download the exported email files so City staff could begin processing the request." The City further describes the number of records that might be exempt or require redaction. According to the City, roughly 4,000 emails will need to be redacted because they contain "centralized criminal history records." Moreover, roughly 6,000 emails will require attorney review because they may be exempt under several different exemptions under the Act.[3] The City claims it will need to review all 39,622 emails and attachment to identify which materials are nonexempt, which must be redacted, and which are entirely exempt.

In sum, the City has adequately described the large number of records responsive to the Appellant's request and the records' location in its cloud archiving system. Further, the City has precisely stated that, at a minimum, roughly one out of every four responsive records will either be entirely exempt or contain some exempt information necessitating redactions. The Office has previously determined that a six-month delay was reasonable to review 22,000 emails for non-exempt information. *See, e.g.*, 12-ORD-097. Here, the Appellant seeks 17,000 more emails than the appellant sought in 12-ORD-097, but the City has sought only one additional month of delay. Moreover, the City has stated it will provide the Appellant with responsive records in rolling batches, demonstrating its good faith. Thus, the Office does not find the City's delay to be unreasonable under these facts.

At bottom, the Office cannot resolve the factual dispute between the parties regarding whether the City received the Appellant's original request. But, based on the facts and circumstances of this appeal, the Office does not find that the City's delay was unreasonable under the asserted facts. Rather, the City violated the Act when it failed issue a timely response invoking KRS 61.872(5) and stating the earliest date on which all responsive records would be available.

[3] Specifically, the City states that these records may be exempt as "attorney-client communications, preliminary drafts or notes, preliminary recommendations, and other items."

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
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