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25-ORD-066

March 18, 2025

In re: James Wheeler/Clark County Sheriff's Department

Summary: The Clark County Sheriff's Department ("the Department") violated the Open Records Act ("the Act") when it failed to issue a written disposition of a request for records within five business days, as required by KRS 61.880(1), or an explanation for the delay and the earliest date when records would be available, as required by KRS 61.872(5). The Department did not meet its burden under KRS 61.880(2)(c) to sustain its delay in producing the records. However, the Department did not wrongfully withhold records from a deputy's personnel file.

Open Records Decision

On October 25, 2024, James Wheeler ("the Appellant") submitted a multi-part request to the Department for various records related to his arrest on March 15, 2024. On October 28, 2024, the Department sent the Appellant a brief acknowledgment of his request. Subsequently, the Department informed the Appellant by telephone that some of the requested records did not exist. Therefore, the Appellant submitted a revised request on October 30, 2024.¹ The requested records included body camera footage; radio and dispatch logs; reports and notes "regarding the arrest, detention, and handling of the case, including any remarks on the decision to mute body cameras"; personnel and disciplinary files for the deputies involved; records related to traffic enforcement near the Appellant's home; "records of the two previous calls" on March 15, 2024; DUI arrest records for one of the deputies; "incidents and citations issued" on a certain road within two weeks of the Appellant's arrest; the Department's "hiring policies, qualifications and procedures in effect at the time" of his arrest; the Department's standard operating procedures on usage of body cameras in effect on and after the date of his arrest; and the Department's "social media policy and code of conduct" in effect on and after the date of his arrest.

¹ The Appellant indicates it is the October 30, 2024, request to which his appeal relates. Therefore, the disposition of his earlier request is not at issue.

On November 4, 2024, the Department responded that it was “working on making copies of all of the policies and files [the Appellant had] requested on 10/30/24” and he would be notified “[a]s soon as they are done copying.” The Department further advised the body camera footage would be emailed to the Appellant “in a link from evidence.com.” However, the Department gave no date by which any of the records would be available. Having heard nothing further from the Department by November 13, 2024, the Appellant requested “confirmation of a completion date for [his] revised request.” On November 18, 2024, the Department replied that “[t]he policies [were] printed and ready,” but gave no date when the other records would be made available and no explanation for why they were not available yet. Having received no further response by January 6, 2025, the Appellant initiated this appeal.

Under KRS 61.880(1), a public agency must decide within five business days whether to grant a request or deny it and “notify in writing the person making the request, within the five (5) day period, of its decision.” This time may be extended under KRS 61.872(5) when records are “in active use, in storage or not otherwise available,” if the agency “immediately notif[ies] the applicant” and gives “a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record will be available for inspection.” Here, although the Department issued a written response within five business days, it did not provide any records within that time. Accordingly, the Department was obligated to comply with KRS 61.872(5) by including a detailed explanation of the reason for delay and a specific date when records would be made available to the Appellant.

On appeal, the Department does not claim it issued a final written disposition of the Appellant’s request, or a detailed explanation of the reason for delay, within five business days. Nor does it claim it ever stated the earliest date when the records would be available. Rather, the Department claims it is not required to provide that information in writing, and further asserts it notified the Appellant by telephone on January 15, 2025, that certain categories of records did not exist or were in the possession of the Winchester Police Department, and that one personnel file had to be retrieved from archives. However, “[t]he Act consistently requires agencies to respond in writing to open records requests, even when they are unable to supply the records requested.” *Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011). If a record is in active use, in storage, or otherwise unavailable, KRS 61.872(5) “requires a written response, within [five] business days, along with ‘a detailed explanation of the cause . . . for further delay.’” *Cabinet for Health & Fam. Servs. v. Todd Cnty. Standard, Inc.*, 488 S.W.3d 1, 3 (Ky. App. 2016) (quoting 11-ORD-074); *see also* 01-ORD-38 (noting “any extension of [the] deadline for disclosure must be accompanied by a detailed explanation of the cause for delay, and a written commitment to release the records on the earliest date certain”).

This requirement that notifications from the agency be in writing is implicit in the structure of the Act, which requires a written request and a written response. *See* KRS 61.880(2)(a). The statutory appeal process requires review of a written record, in which the agency has the burden of proof under KRS 61.880(2)(c). Therefore, it is incumbent on the agency to document in writing all the steps required by the Act, including the notifications required under KRS 61.872(5), in order to sustain its action on appeal. Moreover, even if notification by telephone were sufficient under the Act, the telephone call cited by the Department as its purported compliance with KRS 61.872(5) only occurred on January 15, 2025, while this appeal was pending, not within five days after the Department received the request.² Thus, the Department violated the Act when it failed to issue, within five business days, a final disposition granting or denying the Appellant's request *or* a response complying with KRS 61.872(5).

Further, any delay under KRS 61.872(5) must be reasonable in light of such factors as “the number of the records, the location of the records, and the content of the records.” 21-ORD-045. Here, although the Department stated that one personnel file had to be retrieved from archives, the Department has not explained how much time that retrieval process required or when the file was ultimately provided to the Appellant. Nor has the Department otherwise met its burden to substantiate the need for delay in providing records in its possession to the Appellant. Therefore, the Department violated the Act when it failed to provide records to the Appellant in a timely manner.³

On January 22, 2025, the Department issued its final written disposition of the Appellant's request.⁴ Although that disposition, for the most part, is not at issue in this appeal, the Appellant does complain that one of the personnel files he received contains very few documents compared to another deputy's personnel file. He therefore claims he did not receive the entire file. However, the Department asserts it provided everything in the personnel file. Once a public agency states affirmatively

² Similarly, the Department attempts to rely on the phone conversation that occurred at some time between the Appellant's October 25 and October 30 requests. However, even if a response by telephone were sufficient under the Act, it would not be responsive to the October 30 request, which clearly occurred *after* the phone call and is the request at issue in this appeal.

³ The Department explains that requests for video footage are referred to the Winchester Police Department, which provides links to footage stored online, and states the footage has been provided to the Appellant in that manner. However, the Department failed to substantiate the need for delay by explaining how much additional time was required by this process.

⁴ In its response, the Department stated the Appellant had been provided with the requested personnel files, body camera footage, reports relating to his arrest, and Department policies. The Department asserted it had no records of communications between the arresting officers or DUI arrests for the deputy in question. With regard to “traffic stops, radio communications, calls for service, etc.,” the Department stated those records must be requested from the Winchester Police Department.

that no further records exist, the burden shifts to the requester to present a *prima facie* case that additional records exist. See *Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant asserts the Department failed to tell him about an ongoing criminal proceeding against the deputy, for which the Appellant subsequently obtained the case file from the court clerk. However, there is nothing in the record to indicate the criminal case file was part of the deputy's personnel file, nor did the Appellant request criminal case records for the deputy. Therefore, the Appellant has not established a *prima facie* case that any additional records were in the personnel file. Accordingly, the Department did not withhold personnel records in violation of the Act.

A party aggrieved by this decision may appeal it by initiating an 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 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
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/s/ James M. Herrick
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