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25-ORD-074

March 24, 2025

In re: William Elkins/Clark County Judge/Executive's Office

Summary: The Clark County Judge/Executive's Office ("the Agency") violated the Open Records Act ("the Act") when it failed to respond to a request for records within five business days and when it failed to display in a prominent place on its website the information required by KRS 61.872(2). The Agency subverted the intent of the Act, within the meaning of KRS 61.880(4), by excessive delay in locating records.

Open Records Decision

On February 12, 2025, Clark County Attorney William Elkins ("the Appellant") submitted a request to the Agency for "[a] copy of the [sic] Clark County's Open Records policy, including the name, address and phone number of the official custodian for such policy," and "[e]ach CSEPP¹ and EOC² agreement, bylaw, memorandums [sic] of understanding/agreement, grant application, grant award acceptance document/binder, grant budget documents and award contracts relating to the purchase of CSEPP and EOC real property, including land and any improvements." Having received no response by February 24, 2025, the Appellant initiated this appeal. The Appellant asserts the Agency failed to respond timely to his request and failed to comply with KRS 61.876(2) with respect to the information posted on its website.

Under KRS 61.878(1), a public agency has five business days after receiving a request for records in which to issue a response either granting or denying the request. Here, the Agency admits it failed to respond within that time because "[s]omehow the email requesting the records was lost in the large number of other emails received during that week." Therefore, the Agency violated the Act by failing to respond timely to the Appellant's request.

¹ Chemical Stockpile Emergency Preparedness Program.

² Emergency Operations Center.

Under KRS 61.876(2), “[e]ach public agency shall display” certain information “in a prominent location accessible to the public, including on its Web site.” That information includes “[a] copy of its rules and regulations pertaining to public records,” “[t]he mailing address, e-mail address, and phone number of the official custodian of the records or his or her designee to which all requests for public records shall be made,” and “[t]he form developed by the Attorney General under subsection (4) of this section that may be used to request public records.” *Id.* Here, the Agency does not deny that its website fails to display the required information in a prominent location. Thus, the Agency violated KRS 61.876(2).

Regarding the records requested by the Appellant, the Agency asserts that on February 25, 2025, it provided copies of the two most recent versions of its rules and regulations pertaining to public records. As to the other records, the Agency stated that “there is no guarantee that the documents in question actually do exist” but it is attempting to schedule “a meeting with all the appropriate players” to determine whether any responsive records exist. The Act, however, contemplates that a public agency must locate and provide the records within five business days unless the records are “in active use, in storage or not otherwise available,” in which case the agency must “immediately notify” the requester and provide “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). Under KRS 61.880(2)(c), the agency has the burden of proving that a delay is reasonable. *See, e.g.*, 21-ORD-045. If the records do not exist, the agency must affirmatively so state within the five-day period provided in KRS 61.880(1). *See* 22-ORD-135; *see also* 20-ORD-041 (finding that a public agency has a “duty to inform the requester in clear terms that it [does] not have the records”). Furthermore, an agency “should not be able to rely on any inefficiency in its own record-keeping system to thwart an otherwise proper open records request.” *Commonwealth v. Chestnut*, 250 S.W.3d 655, 666 (Ky. 2008). Here, the Agency has yet to determine whether any responsive records exist and, if so, who possesses them.

Under KRS 61.880(4), a person may appeal to the Attorney General if he “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) day period described in” KRS 61.880(1). Here, although the Agency has not denied inspection of any records, it has failed to confirm or deny their existence within five business days, or to determine the status of the records to inform the Appellant as required by KRS 61.872(5). Thus, the Agency subverted the intent of the Act, within the meaning of KRS 61.880(4), by its excessive delay in locating records.

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
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distribution:

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