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25-ORD-076

March 24, 2025

In re: Sarah Thomas/University of Kentucky

Summary: The University of Kentucky ("the University") violated the Open Records Act ("the Act") when it failed to grant or deny requests for records within five business days and did not properly invoke KRS 61.872(5). However, the University did not violate the Act when it could not provide records that no longer exist.

Open Records Decision

This appeal concerns three separate requests for public records submitted to the University by Sarah Thomas ("the Appellant"). On October 24, 2024, the Appellant requested all emails sent or received by three physicians in the University's graduate medical education program between July 1, 2023, and October 17, 2014, containing any of the following terms: "Sarah Thomas," "Dr. Thomas," "ACGME," "competency," "review," "performance," "professionalism," "communication," "complaint," "resident," "concern," "safety," "risk," "GMEC," or "appeal." On October 28, 2024, the University replied, without explanation, that it would "need 45 days to respond." Subsequently, on November 27, 2024, the University denied the request as "unreasonably burdensome" under KRS 61.872(6) because it implicated 29,109 records consisting of 776,772 pages, which would have to be reviewed and redacted for "patient-protected information" and other private information under KRS 61.878(1)(a), as well as preliminary materials under KRS 61.878(1)(i) and (j) and attorney-client privileged communications. The University stated it would take an estimated "970.3 hours to review and redact all the potentially responsive records."

On appeal, the Appellant does not argue that the denial was improper, but claims the University violated the Act by taking approximately 20 business days to issue a substantive response to her request. Under KRS 61.880(1), a public agency has five business days to grant or deny a request for public records. This period may be extended if the records are "in active use, in storage or not otherwise available," but the agency must give "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 University responded within five business days. However, it did not grant or deny the request at that time, but merely offered a future date by which it would grant or deny the request. In so responding, the University did not give "a detailed explanation of the cause" for delaying its final response, but merely stated more time was needed. Therefore, the University's initial response to the October 24 request violated the Act.

On December 5, 2024,[1] the Appellant requested "[a]ll evaluation data and/or documentation submitted to MedHub[2] by Dr. Thomas Pittman on 12/14/23." The University responded that it had no responsive records. On appeal, the Appellant claims the requested records either are "being inappropriately withheld" or have been "inappropriately deleted." Once a public agency states affirmatively that records do not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester's bare assertion that an agency possesses requested records is insufficient to establish a *prima facie* case that the agency, in fact, possesses them. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for this contention. *See, e.g.,* 21-ORD-177; 11-ORD-074.

Here, as evidence, the Appellant provides an email dated December 14, 2023, informing her that "[a] performance evaluation was just submitted and is available in MedHub" and indicating Dr. Thomas Pittman was the evaluator. However, the University explains that Dr. Pittman designated another individual as a "scribe," who transcribed Dr. Pittman's comments verbatim into the MedHub system. At Dr. Pittman's request, the scribe revised the comments for clarity in the final evaluation dated December 15, 2023. According to the University, "[w]hen comments are revised and the evaluation is finalized, the old draft comment is not maintained."[3] Thus, to the extent the Appellant may have established a *prima facie* case that the comments submitted on December 14, 2023, once existed, the University has rebutted that

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[1] Although the email containing the request is dated December 5, 2024, both parties to the appeal refer to the date of the request as December 15, 2024. Thus, the timeliness of the University's response on December 17, 2024, has not been raised as an issue.

[2] According to the University, "MedHub is an electronic record system that the University uses for evaluations of medical residents." Although the Appellant's request did not expressly limit her request to documentation relating to her, it is apparent from the context that this was the intent of the request.

[3] On appeal, the Appellant claims the University may have audio recordings of Dr. Pittman's original comments. However, it is not clear that any such recordings exist, nor did the Appellant's request specifically mention them. Furthermore, insofar as those comments were revised for the final evaluation, they would arguably be "preliminary drafts" under KRS 61.878(1)(i).

presumption.[4] Accordingly, the University did not violate the Act when it denied the request dated December 5, 2024.[5]

Finally, on January 9, 2025, the Appellant requested all emails between an Assistant General Counsel and an Equal Opportunity Investigator at the University between June 1, 2024, and January 8, 2025. That same day, the University replied that it would "need 45 days to respond" because it must "(1) gather records that are potentially responsive; (2) evaluate those documents to determine if the records are responsive; (3) determine if the responsive documents are exempt; and (4) if the documents are exempt[,] redact the exempt materials." On appeal, the Appellant asserts the University did not provide a "detailed explanation" under KRS 61.872(5) for extending its response time. The University claims it gave a detailed explanation by stating the records must be gathered, evaluated, reviewed, and redacted. However, the Act contemplates that all those actions should be completed within five business days for every request, unless KRS 61.872(5) applies. The University's response did not claim the records were "in active use, in storage or not otherwise available" under KRS 61.872(5) or explain why delay was necessary beyond the normal five-day period prescribed by KRS 61.880(1).

On appeal, the University argues that the reason for delay should have been obvious because the Appellant's request implicated a large number of records. While it is true that persons requesting large volumes of records may "expect reasonable delays in records production," 12-ORD-228, the reasonableness of such a delay "is a fact-intensive inquiry." 21-ORD-045. Furthermore, even if the University had informed the Appellant that the records were voluminous, that alone would not have been a sufficiently "detailed explanation" under KRS 61.872(5). *See, e.g.,* 21-ORD-248 n.2 (finding insufficient the explanation that a request "covers a large number of records; therefore, additional time is necessary to compile and review the requested records and identify any exempt records or records that otherwise require redaction"). Therefore, the University's initial response did not comply with the Act.

The University further claims this appeal is moot as to the January 9, 2025, request because it issued a final response to the request on January 17, 2025, after this appeal was initiated.[6] However, the University does not claim it has provided all requested records to the Appellant. Under 40 KAR 1:030 § 6, an open records appeal is moot only "[i]f the requested documents are made available to the complaining

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[4] Further, the Appellant has not established that the draft version of the evaluation was "inappropriately deleted."

[5] The University argues that, even if the draft comments still existed, they would be exempt from disclosure as "preliminary drafts" under KRS 61.878(1)(i). Because the nonexistence of the records is dispositive of this issue, it is not necessary to decide whether the University could have denied the request under KRS 61.878(1)(i).

[6] That response is the subject of a separate appeal.

party after a complaint is made." Furthermore, because the University received the Appellant's request on January 9, 2025, its final response was due on January 16, 2025, absent a proper invocation of KRS 61.872(5). Therefore, the University violated the Act when it failed to grant or deny the Appellant's request within five business days.

The Office takes this opportunity to restate the factors it considers when determining whether a delay is reasonable under KRS 61.872(5). In making this determination, 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).

Importantly, the Office has consistently determined that an agency has not adequately explained that records are "in active use, in storage, or not otherwise available" when it only asserts that the request implicates a large number of records. *See, e.g.*, 25-ORD-008; 24-ORD-249; 21-ORD-248; 21-ORD-011. This is because the "detailed explanation" required by KRS 61.872(5) is not achieved by a general assertion that many responsive records exist. Rather, the agency must provide an estimate of the actual number of responsive records.

Finally, the Office directs agencies to 24-ORD-249 as an example of an agency that, on appeal, demonstrated that a seven-month delay to review 39,000 responsive records was reasonable. There, in addition to providing an estimate of the number of responsive records, the agency explained that the records implicated the attorney-client privilege,[7] among other exemptions, and further explained the delay caused by the way the records were stored. *Id.* Moreover, the agency committed to providing the requester with responsive records in rolling batches. *Id.* Thus, under the circumstances as explained by the agency, the Office determined its delay, although lengthy, was reasonable.

[7] The Office has previously recognized that the law governing confidentiality is a factor in determining whether a delay is reasonable. *See, e.g.*, 21-ORD-045 n.2 (recognizing the "tremendous disadvantage to a public agency" that could result from the disclosure of privileged material).

By contrast, here, the University's original response did not identify the number of potentially responsive records, did not describe the content of the records and which exemptions might be implicated, and did not explain any additional cause of delay due to the way the records were stored. The agency always carries the burden of proof to sustain its actions. KRS 61.880(2)(c). At bottom, the Office cannot assume, absent a showing by the University, that its delay is reasonable.

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.

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/s/ James M. Herrick
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