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In re: Stephen McBride/City of Radcliff

Summary: An agency's preliminary correspondence that does not deny a request to inspect records is not a "denial" within the meaning of KRS 61.880 until the statutory deadline to respond has expired.

Open Records Decision

On a Saturday evening, Stephen McBride ("Appellant") sent an email to the Clerk for the City of Radcliff requesting to inspect certain records. Slightly more than two business hours after the request was made, at approximately 10:14 a.m. on the following Monday morning, the City Clerk responded and asked Appellant to "fill out the form on this link[.]" She also advised that if the request was for a commercial purpose, Appellant should complete a specific "addendum." Appellant initiated this appeal to challenge the City Clerk's request that he complete a form.

On appeal, the City argues that it did not intend to deny Appellant's request. Rather, "[w]ith the benefit of hindsight, [the City Clerk] wishes she had explained more fully . . . that an unsigned request sent by email was not acceptable, but that [Appellant] could either submit a signed request on the City's form or on [Appellant's] own form or letterhead or in any other format that complied with the . . . Act, with the choice being [Appellant's]."[1]

[1] This Office notes that an electronic signature in an email is just as valid as a handwritten signature. *See* KRS 369.107(4).

Under KRS 61.880(2)(a), "[i]f a complaining party wishes the Attorney General to review a public agency's denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection." Appellant did not attach the "written response denying inspection" because, at the time he initiated this appeal, the public agency had not denied his request and the statutory deadline to issue a denial or to produce records had not expired. If the statutory deadline had expired, and the only communication from the City had been the email requesting that Appellant complete a form, then it would have been apparent that the City had denied the request *because* it required a specific form. But that is not what happened. And the City asserts that it would have fulfilled the request regardless of whether the Appellant had submitted the requested form. According to the City, it was simply deprived of the opportunity to meet its statutory obligation.

For these reasons, this appeal is premature. *See* KRS 61.880(2)(a). This Office declines to consider an appeal based solely on preliminary correspondence meant to facilitate a request and where there is no suggestion that an agency is subverting the intent of the Act. *See* KRS 61.880(4). In sum, if a public agency responds in this manner and later fails to issue any supplemental correspondence denying inspection, or if an agency fails to produce the records for inspection before the statutory deadline, this Office would then consider such correspondence or action as a denial under KRS 61.880. Here, however, this appeal was premature, and it must be dismissed. The City did not deny Appellant's request and was not provided the opportunity to respond within the statutory period. Nevertheless, if the City has not already done so, it should immediately produce the requested records or provide a written response.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. 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 proceeding.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:
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