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21-ORD-080

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In re: Jimmy Cantrell/The Department of Fish and Wildlife Resources

Summary: The Department of Fish and Wildlife Resources (the "Department") violated the Open Records Act ("the Act") when it did not issue a timely written response to deny a request for records. However, the Department did not subvert the intent of the Act by delaying inspection of voluminous and widely dispersed records for two months.

Open Records Decision

On March 11, 2021, Jimmy Cantrell ("Appellant") asked the Department to provide copies of records related to the Commonwealth's deer population. He specifically sought records containing certain data that the Department relied on to produce a deer population model, records reflecting how the data was gathered, the results of the model, and the software used to render the model. The Appellant also sought all email communications between Department employees and Commissioners in which deer population "issues" had been discussed within the previous 60 days. Finally, the Appellant sought certain data and field research, as well as the methods used in conducting that research in several Kentucky counties.

On March 25, 2021, the Department issued a written response and provided some responsive records. However, the Department claimed that it needed more time to locate, inspect, and redact the remaining records responsive to Appellant's request. The Department stated that a portion of the non-exempt records would be available on April 9, 2021, and that the rest of the records would be made available on May 4, 2021. This appeal followed.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). In response to the public health emergency caused by the novel coronavirus, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020. SB 150 provides, notwithstanding the provisions of the Act, that "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). Under KRS 446.030, when the period of time prescribed by statute is seven days or less, weekends and legal holidays are excluded from the computation of time. Therefore, because SB 150 provides ten days to respond, weekends or holidays are not excluded from the computation of time and a response is due within ten calendar days of receipt.

On appeal, the Department explains that it spoke to the Appellant via telephone on March 18, 2021, about the scope of his request. However, the Act, as modified by SB 150, requires public agencies to issue a *written* response approving or denying a request within ten days. Because the Department did not issue a response in writing within ten days of receipt, it violated the Act.

The Department's written response violated the Act in another way. Under KRS 61.872(5), public agencies may delay the date of inspection if the public records are "in active use, storage, or are otherwise unavailable." To delay inspection under KRS 61.872(5), however, a public agency must issue a timely written response that explains the reason for the delay, and provide the "earliest date" on which the records will be available for inspection. KRS 61.872(5).

Whether or not the Department explained by phone that responsive records were "stored in locations across the state and are quite voluminous and needed to be collected from around the state and reviewed,"[1] the Department's written response did not invoke KRS 61.872(5). Instead, the Department simply claimed that it was "still in the process of locating, inspecting, and redacting the remainder of the documents that are in its possession or in archive that may be responsive to [the Appellant's] request." The Department also stated that a portion of the records would be made available on April 9, 2021, and the remaining records would be available on May 4, 2021. Although the Department claims that it explained the reason for the delay in its phone

[1] The Department also allowed the Appellant to speak with a biologist who answered specific questions related to the deer population that "could not be answered through government documents."

conversation with the Appellant, the Department's written response did not provide this explanation. Instead, the response equivocated and failed to provide adequate detail to justify the delay. Thus, the Department violated the Act.

The Appellant also claims that the Department's proposed two-month delay was unreasonable and that such delay subverts the intent of the Act under KRS 61.880(4) ("If a person feels the intent of [the Act] is being subverted by an agency short of denial of inspection," he or she may appeal to the Attorney General). This Office has found that unreasonable delays in access to records may constitute subversion of the Act, short of denial. KRS 61.880(4). *See*, *e.g.*, 21-ORD-045 (four-month delay to provide 5,000 emails for inspection subverted the Act). To determine whether a delay in access to records is reasonable, this Office considers the number of records, the location of the records, and the content of the records. *See, e.g.*, 01-ORD-140; OAG 92-117. Although not expressly required by the Act, a public agency may show its good faith (and therefore, its lack of subversive intent) by releasing records in batches as they are gathered and reviewed, rather than waiting until all responsive records have been reviewed before permitting inspection. *See, e.g.*, 21-ORD-045.

Although the Department did not initially explain the cause of its delay in its written response to the Appellant, it provides that explanation on appeal. The Department states that most of the records requested are stored throughout various offices across the state. The Department also explains that the request implicates almost 70,000 photographs, and 470 "other documents." Given the volume of records, the Department opted to release the records at two points. Because the request implicates over 70,000 records that are stored in various offices throughout the state, and because the Department has committed to releasing records as they are gathered and reviewed, this Office finds that the Department has carried its burden on appeal to show that the proposed delay is reasonable under these facts.[2]

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action

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[2] It is alleged that the Department told the Appellant that it did not possess certain records responsive to his request. The Department, however, did not make that same statement in its written response to the Appellant's request. The Appellant does not appear to challenge the Department's claim that there are no responsive records to portions of his request, as he has only appealed the Department's delay in providing responsive records.

in circuit court but shall not be named as a party in that action or in any subsequent proceedings.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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