COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

**21-ORD-160**

August 23, 2021

In re: Joseph Brian/University of Louisville

***Summary:*** The University of Louisville ("University") violated the Open Records Act ("the Act") when it failed to issue a timely written response and when it delayed access to records without properly invoking KRS 61.878(5). However, the University did not violate the Act when it did not produce for inspection a record that does not exist in its possession.

## *Open Records Decision*

On Saturday, July 10, 2021, Dr. Joseph Brian ("Appellant") asked the University for records related to a specific hotline complaint and subsequent investigation that resulted in the University police taking action against him. The University sent what appears to have been an automated response shortly thereafter, which thanked the Appellant for his correspondence, and stated it will "get back to [him] within 3 business days." On July 21, 2021, having received no further response from the University, the Appellant appealed to this Office.

Under KRS 61.880(1), upon a request for records under the Act, a public agency "shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision." Here, the Appellant submitted his request on Saturday, July 10, 2021. Although the University immediately responded with a generic (and likely automated) acknowledgment of receipt, the records custodian most likely did not receive the request until Monday, July 12, 2021, which was the first business day after the Appellant submitted his request. Therefore, the

University was required to issue a written response on or before Friday, July 16, 2021.

The University argues that its July 21 response was timely under SB 150. During the 2020 Regular Session, the legislature enacted SB 150, which made temporary changes to the Act during the public health state of emergency. *See, e.g.*, 20-ORD-194. The Appellant correctly notes that on June 24, 2021, this Office advised all public agencies to no longer rely on the provisions of SB 150 when responding to requests under the Act, following legislative changes made during the 2021 Regular Session. On August 21, 2021, the Kentucky Supreme Court agreed with this Office that the state of emergency expired on June 28, 2021, following the lawful enactment of House Joint Resolution 77. *Cameron v. Beshear*, Case No. 21-SC-0107-1, *4-5 (Ky. Aug. 21, 2021). Therefore, because SB 150 was no longer in effect when the University received the Appellant's request, it was required to issue its written response within five business days. Because the University did not respond to the Appellant's request within five business days it violated the Act.

On July 21, 2021, shortly after the Appellant initiated this appeal but prior to this Office issuing notice to the University, the University issued its response to the Appellant. The University stated it had assigned the Appellant's request a case number, that it had asked various officials "to determine what, if any, records exist" and that once the records were found it would "conclude the time needed to respond."

The University's July 21, 2021, response did not comply with the Act. A public agency can delay the inspection of public records if the public records are "in active use, storage, or are otherwise unavailable." KRS 61.872(5). To delay inspection under KRS 61.872(5), however, a public agency must issue a timely written response that explains in detail the cause of the delay and provide the "earliest date" on which the records will be available for inspection. KRS 61.872(5).

The University's initial response on July 10, 2021 merely thanked the Appellant for contacting it and stated that it would "get back" to him within three business days. The University's July 21, 2021 response fairs no better, as it simply acknowledged receipt of the Appellant's request and stated once the records custodian had the "records in-hand [she] can better conclude the time needed to respond." Because the University did not provide any explanation about the nature or the cause of delay to produce responsive records, or notify the Appellant of the earliest date on which records would be available, it violated the Act.

Ultimately, on July 29, 2021, the University provided responsive records. However, it did not provide any records containing the identity of the complainant who initiated the specific hotline complaint against the Appellant to the University. The Appellant seeks to inspect a record that reveals the identity of the complainant, but the University claims that "all responsive records were provided[.]"

A public agency cannot grant a requester access to a record that does not exist. *Bowling v. Lexington Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist in the agency's possession. *Id.* at 341. If the requester can make a *prima facie* case that records do or should exist, then the agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (*citing Bowling*, 172 S.W.3d at 341). This Office has found that an agency is not required to create a record to discharge its duty under the Act and the failure to do so is not a violation of the Act. *See, e.g.*, 19-ORD-051; 19-ORD-218.

According to the University's online student complaint process, complainants are required to provide an identity if submitting an "online complaint form."[1] However, the University does provide a mechanism for anonymous complaints to be submitted via email. Because, according to the Appellant, the complaint was made via a "hotline," it is unclear if the complainant ever submitted a written complaint or otherwise provided the University his or her identity. On this record, the Appellant has not made a *prima facie* case that the requested records—a written record containing the identity of the complainant who utilized a "hotline"—do exist in the agency's possession. Thus, this Office cannot find that the University violated the Act when it did not provide a record that does not exist within its possession.

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

---

[1] The University of Louisville's Student Complaint Process, available at http://louisville.edu/dos/help/student-complaint-procedure (last accessed Aug 18, 2021).

**Daniel Cameron**
**Attorney General**

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

#236

Distributed to:

Dr. Joseph Brian
Sherri Pawson