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21-ORD-211

November 9, 2021

In re: Roger Hester/Transportation Cabinet

Summary: The Transportation Cabinet (“the Cabinet”) subverted the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when it unreasonably delayed access to records. The Cabinet also violated the Act when it failed to explain how an exception to the Act authorized it to deny inspection of records.

Open Records Decision

On June 10, 2021, Roger Hester (“Appellant”) requested to inspect or obtain copies of various Cabinet records pertaining to the cleaning and painting of a certain bridge in Cumberland County. Having received no records by October 12, 2021, the Appellant initiated this appeal.

Under KRS 61.880(4), a person may petition the Attorney General to review an agency’s action if the “person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including . . . delay past the five (5) day period described in [KRS 61.880(1) or] excessive extensions of time[.]” KRS 61.880(1) requires a public agency to grant or deny a request for records within five business days, unless it properly invokes KRS 61.872(5) to delay inspection of records that are “in active use, in storage or not otherwise available.” When a public agency delays inspection of records under KRS 61.872(5), it must also explain the reason for the delay and notify the requester of the earliest date on which records will be available for inspection. However, during the state of emergency that was in effect at the time of the Appellant’s request, public agencies were permitted up to ten calendar days to respond to requests to inspect public records. *See* 2020 Senate Bill 150 §1(8). Here, it is

undisputed that the Cabinet did not provide any records to the Appellant with ten days, nor did it invoke the provisions of KRS 61.872(5).

After this appeal was initiated, the Cabinet provided the Appellant with most of the requested records. But the Cabinet has not explained why it provided no records to the Appellant in four months. At all times, a public agency must substantiate the need for any delay and that it is acting in good faith. *See* KRS 61.880(2)(c) (placing the burden on the public agency to substantiate its actions). Because it has not substantiated the reasonableness of its delay, this Office finds the Cabinet subverted the intent of the Act, within the meaning of KRS 61.880(4), by unreasonably delaying the production of records.

Ultimately, the Cabinet withheld two items from the items it did provide. The Cabinet stated that it had “identified two documents involving the proposed containment plan confidentially disclosed by the contractor completing the work which are responsive to [the] request but which [the Cabinet] believe[s] are exempt from disclosure pursuant to KRS 61.878(1)(c).” However, the Cabinet never explained how this exemption applied to the records withheld.

When a public agency denies a request under the Act, in whole or in part, it must give “a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). The agency’s explanation must “provide particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). This information “must be detailed enough to permit [a reviewing] court to assess [the agency’s] claim and the opposing party to challenge it.” *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013).

KRS 61.878(1)(c) exempts from public disclosure:

1. Records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records;
2. Records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

- a. In conjunction with an application for or the administration of a loan or grant;
- b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;
- c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or
- d. For the grant or review of a license to do business.

Although the Cabinet asserted that the withheld records were “confidentially disclosed” to it, it gave no explanation as to whether such records are “generally recognized as confidential or proprietary.” Furthermore, the Cabinet did not state whether it was withholding the records under subsection 1 or 2 of KRS 61.878(1)(c), nor did it explain how the specific provisions of those subsections apply to the withheld records. By failing to provide particular or detailed information regarding the application of KRS 61.878(1)(c), the Cabinet violated the Act. Moreover, because it failed to articulate its basis for withholding the documents under KRS 61.878(1)(c), the Cabinet has not met its burden under KRS 61.880(2)(c) to sustain its partial denial of the Appellant’s request. Accordingly, this Office finds that the Cabinet violated the Act by withholding the records without sufficient justification. *See, e.g.,* 21-ORD-099.

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 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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
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/s/ James M. Herrick

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