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22-ORD-047

March 10, 2022

In re: Kelly Bush/City of Frankfort

Summary: The City of Frankfort (“the City”) did not violate the Open Records Act (“the Act”) when it properly invoked KRS 61.872(5) to delay access to records that were not readily available at the time of the request.

Open Records Decision

On Monday, February 14, 2022, Kelly Bush (“the Appellant”) emailed the City a request to inspect records. The Appellant’s request contained 50 subparts and encompassed numerous topics, ranging from water usage in the City, police use of drones, City annexation plans, personnel records of various employees for the past seven years, legal bills, employee compensation records, accounting records of various funds, and other records. On Friday, February 18, 2022, the City responded and, noting the breadth of the Appellant’s request, stated that many records were in active use, storage, or were not readily available. The City advised that it was providing the Appellant with the City’s “response as soon as practicable upon determining that the records are unavailable at this time.” Citing KRS 61.872(5), the City further notified the Appellant that the records would be available for inspection at the City’s headquarters on March 2, 2022, at 10:00 a.m. The Appellant initiated this appeal within five minutes of receiving the City’s response.

On February 21, 2022, which was after the Appellant appealed but was the fifth business day after the City received the Appellant’s request, the City supplemented its initial response and addressed 33 of the 50 categories of records she sought. For those 33 categories, the City either provided responsive records or stated responsive records did not exist. The City further advised that it was continuing to gather the remaining records and would make any

responsive records that existed available on March 2, as the City had previously advised.

Under KRS 61.880(1), a public agency must respond to a request to inspect records within five business days of receiving the request and either provide responsive records or deny the request and explain why. The day on which the request is received does not count towards the statutory period of five business days to respond.¹ See KRS 466.030(1). Moreover, a public agency may extend the statutory period by invoking KRS 61.872(5) in its initial response. Under KRS 61.872(5), if responsive records are “in active use, storage, or are otherwise unavailable,” a public agency must notify the requester of the earliest date on which the records will be available and explain the cause of the delay.

Here, the Appellant sought several categories of records ranging across multiple aspects of City governance. The City provided the majority of responsive records on February 21, 2022, the fifth business day after the City received the request. Still, other categories of records the Appellant sought covered a period of seven years. As the City explained, some of these records were so old that they were no longer covered under the applicable records retention policy, but the City would need to check storage before claiming such records did not exist. The City anticipated that, if such records did exist in storage, then they would be available for the Appellant’s inspection on March 2. Thus, the City adequately explained the cause of delay for those records not produced by the fifth business day. The City therefore did not violate the Act when it properly invoked KRS 61.872(5) to delay inspection of the remaining records.

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

¹ On appeal, the City claims that this appeal is premature, as the City’s response was not due until February 21, 2022, which was the fifth business day after receiving the request. This Office has previously found that an appeal is premature when a public agency issues a preliminary response before the deadline to respond when that preliminary correspondence is “meant to facilitate a request.” 20-ORD-175. Here, however, the City’s response on February 21 did not completely dispense with the Appellant’s request, and it reaffirmed its position that additional responsive records would not be available until March 2. Thus, the appeal was not premature.

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Attorney General will accept notice of the complaint e-mailed to
OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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