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22-ORD-126

June 7, 2022

In re: Lawrence Trageser/Jeffersontown Fire Protection District

Summary: The Jeffersontown Fire Protection District (“the District”) was not required under the Open Records Act (“the Act”) to provide records in a specified electronic format when they did not exist in that format. The District subverted the intent of the Act, within the meaning of KRS 61.880(4), when it limited the inspection of public records to a 90-minute period at a facility that was not “suitable” under KRS 61.872(1).

Open Records Decision

On April 4, 2022, Lawrence Trageser (“Appellant”) requested electronic copies, “in a PDF or similar format,” of “the documents that identify the retirement” of the District’s assistant chief, the assistant chief’s personnel file, and the personnel file of a certain EMS employee of the District. The Appellant added that, if electronic copies were unavailable, he wished to inspect the records in-person pursuant to KRS 61.872(3)(a). In its initial response, the District denied the Appellant’s request under KRS 61.878(1)(h) because the District was conducting an investigation and “release of records with information at this time might harm the agency by revealing the identity of the complainant, who has requested anonymity.”

On April 21, 2022, the District issued an amended response, reversing its prior position and stating that it would make the records available for inspection. However, citing KRS 61.872(5), the District claimed that the records were “in active use, in storage or not otherwise available.” The District explained that the records “consist of hundreds of pieces of irregular paper and must be immediately reviewed in detail to redact personal information.” The District indicated that the records would be available for inspection at one of its fire stations on May 4, 2022, at 9:30 a.m.

On May 4, 2022, the District's records custodian delivered the requested records to the fire station at the announced time, waited there for 90 minutes, and then departed, removing the records from the site. Later that day, the District issued a letter informing the Appellant that the records had been "returned to active use, storage or otherwise" [*sic*] because he had "failed or refused to inspect the public records at the designed [*sic*] date, place and time." The District informed the Appellant that he could obtain copies of the records by mail for a fee of \$44.85. This appeal followed.

The District argues that this appeal is unperfected because the Appellant did not provide the Attorney General with a copy of the letter dated April 21, 2022, in which the District granted inspection of the records. However, KRS 61.880(2)(a) requires only that "[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." The Appellant complied with this requirement by providing copies of his written request, the District's initial denial of inspection, and the District's subsequent letter indicating that the Appellant would have to pay for copies because he had "failed" to inspect the records at the designated time and place. Accordingly, this appeal is perfected.

The Appellant argues that the District has not explained why the requested records could not be provided to him in PDF form. Under KRS 61.874(2)(a), "[a]gencies are not required to convert hard copy format records to electronic formats." However, when records are available in the electronic format sought by the requester, the requester is entitled to obtain the records in that format. *See, e.g.*, 21-ORD-240; 19-ORD-080; 99-ORD-12. Here, the District informed the Appellant that the requested records "consist of hundreds of pieces of irregular paper," and there is no evidence that the records exist in the "PDF or similar format" sought by the Appellant. Therefore, because the District was not required to convert its records into a nonstandard electronic format, the District did not violate the Act when it instead granted the Appellant's alternative request to inspect the records in person under KRS 61.872(3)(a). *See, e.g.*, 21-ORD-129.

Additionally, the Appellant also claims that the District subverted the intent of the Act by prescribing and limiting his right of inspection. The Appellant asserts that he never agreed to inspect the records at the specific time announced by the District in its April 21 letter. Consequently, he argues that the District violated the Act when it unilaterally imposed a 90-minute period for him to inspect the records at a fire station and then removed the records from the premises. This Office is authorized to review a complaint that "the intent of [the Act] is being subverted by an agency short of denial of inspection." KRS 61.880(4). Under KRS 61.872(3)(a), a Kentucky resident may inspect public records "[d]uring the regular office hours of the

public agency.” When a public agency limits its hours of inspection to a shorter time, or uses specific appointment times for inspection as “a restrictive requirement or a cause of delay,” it subverts the intent of the Act.¹ See 20-ORD-013; 15-ORD-182; 93-ORD-48.

Here, the District argues that it had authority under KRS 61.872(5) to require the Appellant to inspect the records at a specific time and place of its choosing. Under KRS 61.872(5), “[i]f the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed five (5) days from receipt of the application, unless *a detailed explanation of the cause is given for further delay* and the place, time, and earliest date on which the public record will be available for inspection” (emphasis added). However, in its notification to the Appellant, the District stated only that the records were unavailable because a delay was necessary “to redact personal information” from the personnel files. The redaction process required under KRS 61.878(4) is an ordinary part of fulfilling an open records request. Although extensive redactions may take so much time that the records cannot be produced for inspection within the five business-day period, the agency must explain why the stated length of the delay is necessary. See, e.g., 21-ORD-045 (finding that, although an agency could invoke KRS 61.872(5) to review and redact 4,000 emails, the agency failed to explain why the process would take four months). Here, the District failed to give a “detailed explanation of the cause” for why it required an additional two weeks to make the redactions, as required under KRS 61.872(5).

However, even if the District had properly invoked KRS 61.872(5), it would not have had the authority to require the Appellant to inspect the records at any specific time and place it chose. When a Kentucky resident seeks to inspect public records, “suitable facilities shall be made available by each public agency for the exercise of that right.” KRS 61.872(1). In 21-ORD-210, this Office found that “the fact that some records may be ‘in active use, in storage or not otherwise available’ does not relieve a public agency of its obligation under KRS 61.872(1) to provide ‘suitable facilities’ for inspection.” For similar reasons, an agency is not relieved of its obligation under KRS 61.872(3)(a) to make its records available for inspection at any time “[d]uring [its] regular office hours.” And KRS 61.872(5), in cases where it applies, requires an agency to state “the earliest date,” not “the only date,” when records will be available for inspection. Here, however, the District took the records from the place where they were regularly maintained and held them at a fire station for an arbitrary period of 90 minutes, designating this time and place as the Appellant’s only opportunity to inspect them.

¹ However, the Act “does not prohibit an agency from coordinating with a requester for a mutually convenient time [as] a means of facilitating inspection.” See 20-ORD-013.

In its letter of April 21, 2022, the District attempted to explain this limitation in time and place by stating that it had “exceptionally limited and restricted administrative staff and the possibility of emergency response assistance for the Fire and Emergency Medical Services staff and services” [*sic*]. But potential emergency response needs, which are by their very nature unpredictable, cannot justify the District’s unilateral scheduling of a specific time on a particular day as the only time when the Appellant could inspect its records.

Furthermore, the District has made no attempt to show that the designated fire station was a “suitable facility” for inspection. In 15-ORD-195, this Office found that a small municipality, which had no City Hall or other central administrative location, was justified under KRS 61.872(1) in offering inspection of its records at its police station or its attorney’s office. But that is not the case here. A page from the District’s website submitted by the Appellant indicates that the District maintains an “Administrative Office,” which is located next door to the fire station where the District took the records for the Appellant’s inspection. The District has not explained why it chose a fire station, which is subject to “the possibility of emergency response assistance,” as the site for inspection in preference to its administrative office, located next door. Thus, the District subverted the intent of the Act, within the meaning of KRS 61.880(4), when it failed to provide “suitable facilities” for inspection and improperly limited the Appellant’s inspection time to 90 minutes on a specific day.

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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Distribution:

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