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**22-ORD-133**

June 20, 2022

In re: Lawrence Trageser/Jeffersontown Fire Protection District

***Summary:*** The Jeffersontown Fire Protection District ("the District") subverted the intent of the Open Records Act ("the Act"), within the meaning of KRS 61.880(4), when it invoked KRS 61.872(5) but did not explain why a delay of eighteen days was necessary to provide one page of responsive records.

## *Open Records Decision*

On May 7, 2022, Lawrence Trageser ("Appellant") submitted a request to the District for "[t]he termination letter, resignation letter and or retirement letter of" a specific District employee. In a timely response, on May 15, 2022, the District invoked KRS 61.872(5) and notified the Appellant that the "documents requested in item 1 is [*sic*] in active use, in storage or not otherwise available" but that the records would be available to the Appellant on May 27, 2022.[1] The District stated the reason for delay is because "a single human resource employee is responsible for handling all human resources' needs . . . in addition to the other . . . nine (9) requests" it had received from the Appellant. On May 19, 2022, the Appellant initiated this appeal.

[1] May 7, 2022, was a Saturday. Thus, the District did not receive the request until Monday, May 9, 2022, which was the first business day after the request was submitted. Under KRS 61.880(1), the District had five business days from the date of receipt to respond. However, the day *of* receipt does not count towards the five-business day period. *See* KRS 446.030(1)(a) ("In computing any period of time prescribed . . . by any applicable statute . . . the day of the act, event or default after which the designated period of time begins to run is not to be included"). Because the District received the request on May 9, its response was due no later than May 16, 2022, which was the fifth business day after receipt of the request. Thus, the District's May 15 response was timely.

On May 24, 2022, after the appeal was initiated, the District provided the Appellant with one page of responsive records. The District now claims that the appeal is moot under 40 KAR 1:030 §6. Under 40 KAR 1:030 §6, "[i]f the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter." However, "[i]f a person feels the intent of KRS 61.870 to 61.884 is being subverted by an agency short of denial of inspection, including but not limited to . . . delay past the five (5) day period described in [KRS 61.880(1)] . . . the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied." A public agency carries the burden of proof to substantiate its actions on appeal. *See* KRS 61.880(2)(c). The Appellant initiated this appeal because he believed the District did not explain why a delay of eighteen days was necessary to provide one page of responsive records when it invoked KRS 61.872(5). Therefore, this appeal is not moot.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). A public agency may also delay access to responsive records beyond five business days if such records are "in active use, storage, or not otherwise available." KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must also notify the requester of the earliest date on which the records will be available, and provide a detailed explanation for the cause of the delay. This Office has consistently found that when a public agency delays access to a public record beyond five business days, without proper explanation under KRS 61.872(5), it subverts the intent of the Act within the meaning of KRS 61.880(4). *See, e.g.*, 22-ORD-002; 21-ORD-099.

In determining how much delay is reasonable, this Office has considered the number of records, the location of the records, and the content of the records. *See e.g.*, 21-ORD-045; 01-ORD-140; OAG 92-117. Weighing these factors is a fact-intensive analysis. For example, this Office has found that a four-month delay to provide 5,000 emails for inspection was not reasonable under the facts presented. *See, e.g.*, 21-ORD-045.

Here, the District responded to the Appellant's request within five business days, invoked KRS 61.872(5), and stated the earliest date on which the requested records would be available to the Appellant. However, the District's only explanation to support its claim that eighteen additional days were necessary to provide responsive records was that only one District employee can access the types of records

the Appellant requested. The District claimed that employee was unable to process this request in addition to the nine other requests for records that the Appellant had recently submitted to the District.[2]

While it may be true that several simultaneous requests to inspect records may place a strain on a public agency, this Office has previously noted that "[n]either the volume of unrelated requests nor staffing issues justifies a delayed response." *See*, 19-ORD-188 n.1. Similarly, here, the District has not carried its burden under KRS 61.880(2)(c) to explain why a delay of eighteen days was necessary under KRS 61.872(5) to provide access to one page of responsive records. Accordingly, the District subverted the intent of the Act, within the meaning of KRS 61.880(4).

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

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

s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Lawrence Trageser
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[2] In some instances, a series of simultaneous requests sent by the same requester might cause the custodian of records to have "reason to believe that repeated requests are intended to disrupt other essential functions of the public agency," if other facts indicative of such an intent are also present. *See* KRS 61.872(6). But the District has not claimed that the Appellant's requests were intended to disrupt the essential functions of the District, and the District would have to prove such a claim by clear and convincing evidence. *Id*.