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22-ORD-166

August 23, 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 failed to make public records available for inspection within five business days and then limited inspection to a specific time instead of making the records available during regular business hours. However, under the facts of this appeal, the District did not subvert the intent of the Act by designating a facility that was not "suitable" under KRS 61.872(1).

Open Records Decision

On April 18, 2022, Lawrence Trageser ("Appellant") requested electronic copies, "in a PDF or similar format," of certain records encompassing District activity over the preceding five years. Specifically, the Appellant requested "documents that identify [District] 'Volunteers,'" records of expenditures for employees who attended conferences outside Kentucky, training records from a certain conference in Florida, documents identifying "civilians" who attended that conference, and policies relating to paying expenses for family members of employees attending conferences. 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 stated that the records were not in electronic format, but 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[ed] 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 12, 2022, at 9:30 a.m.

On May 13, 2022, after the Appellant had not reported to the fire station to inspect the records at the designated time, the District issued a letter informing the Appellant that the records had been "returned to active use, storage or otherwise [*sic*]" because he had "absolutely waived the KRS 61.872(3) right to inspect the documents requested." The District informed the Appellant that he could obtain copies of the records by mail for a fee of $36.08; that the records consisted of a one-page document identifying District "volunteers" and 261 pages of records documenting expenditures for conferences outside Kentucky; and that postage would amount to $9.98. The District indicated that no records existed that were responsive to the other portions of the Appellant's request.

On June 7, 2022, this Office issued 22-ORD-126, a decision involving the same parties and a similar set of facts, in which this Office found that the District did not have authority under KRS 61.872(5) to require the Appellant to show up at a time designated unilaterally by the District or else waive his right to inspect records. This Office further found that the fire station was not a "suitable facility" for inspection under KRS 61.872(1) because the District's website indicated that an "Administrative Office" was located next door to the fire station.

On the same date, in an apparent effort to comply with the reasoning of 22-ORD-126, the District offered to make the records available to the Appellant for inspection at the offices of its legal counsel "at a date and time coordinated by the [Appellant] for a mutually convenient time." The Appellant alleges that on the following day, June 8, 2022, he attempted to inspect the records at the fire station but was refused admittance. On July 25, 2022, the Appellant initiated this appeal.

KRS 61.880(4) authorizes this Office to review a complaint that "the intent of [the Act] 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) or] excessive extensions of time." In 22-ORD-126, this Office found that the District subverted the intent of the Act by delaying inspection and by limiting the Appellant's inspection of records to a time predetermined by the District. Here, the District initially subverted the intent of the Act in the same manner.

"If 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." KRS 61.872(5) (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

records. 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).[1]

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 it chose. Under KRS 61.872(3)(a), a public agency must 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. *See* 22-ORD-126. Here, the District subverted the intent of the Act when it unilaterally set a time for inspection of the records and then declared that the Appellant had "waived" his right to inspection by failing to appear at that time.

Subsequently, however, the District has agreed to make the records available for inspection at the offices of its attorney at "a mutually convenient time." The Appellant argues that this is not a suitable location. Under KRS 61.872(1), a public agency must provide "suitable facilities" for inspection of public records. This Office has previously found that, in ordinary circumstances, the term "suitable facilities" refers to a location on government premises. *See, e.g.,* 10-ORD-042. In general, a private law office does not constitute "suitable facilities" for inspection of public records. *See, e.g.,* 09-ORD-048; 04-ORD-123. However, this Office has found that an attorney's office is not "inherently unsuitable" in extraordinary circumstances, as in the case of a small city with no central administrative facility. *See* 15-ORD-195.[2]

Here, the Appellant argues that the office of the District's attorney is not a "suitable facility" for inspection because the fire station in which the District offered inspection on May 12, 2022, "houses the offices of the administrative staff" and therefore is a suitable facility. The Appellant also claims that the District's other fire

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[1] The District's initial response to the request listed 13 categories of material that the District claimed it needed to redact. However, many of those categories do not, on their face, apply to the types of records requested by the Appellant.

[2] *See also* 21-ORD-210 (finding that an attorney's office constituted suitable facilities for inspection of detention center records when visitation at all detention centers had been suspended by the Department of Corrections due to a public health emergency).

stations contain rooms "above and beyond the use of firefighters or apparatus," which would constitute suitable facilities for inspection.[3]

On July 26, 2022, the District issued a further response to the Appellant's request, in which it disclosed the fact that the "Administrative Office" referenced in 22-ORD-126 was demolished in January 2022 and that its new administrative office is still under construction. Thus, contrary to this Office's finding in 22-ORD-126, the District currently has no separate administration building.

In response to this appeal, the District explains that it offered to let the Appellant inspect the records at its attorney's office because of this Office's finding in 22-ORD-126 that the fire station designated by the District was not a "suitable facility" under KRS 61.872(1). However, there was no basis in the administrative record presented in 22-ORD-126 for the Office to find that the District's former administration building, next door to the fire station, no longer existed.[4] Here, the District has explained that it initially offered inspection at the fire station because it is the temporary location of the District's administrative office. And the Appellant agrees that the fire station contains a suitable space for inspection of the records.

Under these facts, the District's proposal to allow inspection at its attorney's office, as opposed to the administrative office located within the fire station, did not constitute a subversion of the Act, as the District was merely attempting to comply with this Office's findings in 22-ORD-126 with regard to "suitable facilities." However, as it has now been clarified that the District's current administrative office is in the fire station, the District should make the records available for the Appellant's inspection in the administrative office at a mutually convenient time.

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.

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[3] The Appellant further alleges that the City of Jeffersontown possesses a city hall and a police station that would also be suitable facilities for inspection. However, these buildings do not belong to the District because the District is not an agency of the City of Jeffersontown, but a special taxing district established under KRS 65.182.

[4] The fact that "emergency response needs [are] unpredictable" was not, as the District argues, the reason why this Office found the fire station an unsuitable facility in 22-ORD-126. Rather, this Office found that the District could not rely on emergency response needs as a pretext to limit, in advance, the Appellant's inspection at a specific *time* the District unilaterally chose because emergencies are inherently unpredictable.

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