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**22-ORD-167**

August 24, 2022

In re: The Courier-Journal/Louisville/Jefferson County Metro Government

**Summary:** Louisville/Jefferson County Metro Government (“Metro”) subverted the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), six times when it failed to respond to requests to inspect records within five business days, or when it delayed access to records under KRS 61.872(5) without informing the requester of the earliest date on which requested records would be available. The Act does not prohibit Metro from creating an internal administrative system to centralize its responses to requests submitted to various Metro departments. The Act prohibits Metro from requiring requesters to submit a request to inspect records using Metro’s NextRequest program.

***Open Records Decision***

On behalf of multiple of its employees, the Courier-Journal (the “Appellant”) initiated this appeal against Metro on June 17, 2022. Attached to its appeal were six requests to inspect records that journalists had submitted to Metro on various dates using Metro’s “NextRequest” program. For all but one of those requests, request no. 22-2937, Metro had failed to respond within five business days. *See* KRS 61.880(1). When Metro did respond to these requests, Metro would often invoke KRS 61.872(5) to delay inspection of requested records without notifying the requester of the earliest date on which the records would be available or providing a detailed explanation for the cause of delay. The Appellant claims these failures are the result of Metro’s adoption of the “NextRequest” program. For the following reasons, the Office finds that Metro has subverted the intent of the Act within the meaning of KRS 61.880(4).

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 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 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. *Id.* This Office has routinely held that a public agency violated the Act when it failed to respond within five business days, *see, e.g.*, 22-ORD-060; 22-ORD-044; 22-ORD-041; or when it failed to properly invoke KRS 61.872(5) to delay access to records, *see, e.g.*, 22-ORD-134; 22-ORD-008; 21-ORD-211.

When a person believes a public agency is subverting the intent of the Act, short of denying the person’s request for inspection, that person may appeal to this Office as if his or her request had been denied. KRS 61.880(4) establishes those potential violations, which “include[ ], but [are] not limited to the imposition of excessive fees, delay past the five (5) day period described in [KRS 61.880(1)], excessive extensions of time, or the misdirection of the applicant.”

This appeal, however, presents a unique question. When a person submits a request to inspect records to one of Metro’s departments, *which* public agency must respond within five business days, or invoke KRS 61.872(5) to delay inspection—Metro or its subordinate department? And if no response has been timely issued, *which* public agency subverted the Act by “delay past the five (5) day period described in” KRS 61.880(1)? The Appellant argues that it is the duty of each of Metro’s subordinate departments to respond to requests submitted directly to those departments. Metro argues that it may respond to such requests on behalf of its departments. The Office finds that the Act permits Metro to designate a single person to serve as the official custodian of records for all its subordinate departments. However, having assumed such responsibility, it is Metro’s duty to comply with KRS 61.880(1). It is therefore Metro, and not its departments, that subverted the Act when: (1) Metro required the Appellant’s employees to use Metro’s NextRequest system; (2) Metro failed to respond to the Appellant’s employees’ requests within five business days; and (3) Metro invoked KRS 61.872(5) to delay inspection of records without providing the earliest date on which records would be available for inspection or explaining the cause of the delay.

### **I. Metro may designate a single person to serve as the official custodian of all its public records.**

As an initial matter, the Office notes the Appellant brought this appeal against Metro specifically, and not against any of Metro’s subordinate departments.<sup>1</sup> Of the

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<sup>1</sup> In *University of Kentucky v. Hatemi*, 636 S.W.3d 857 (Ky. App. 2021), the Court of Appeals explained the Office’s role in adjudicating disputes under the Act. In the decision under review, *In re: Lachin Hatemi/Univ. of Ky. Healthcare Compensation Planning Committee*, 16-ORD-101, the Office

six requests that are the subject of this appeal, five involved requests for records from the Louisville Metro Department of Corrections (“LMDC”).<sup>2</sup> One involved a request for records from the Louisville Metro Police Department (“LMPD”).<sup>3</sup> The Appellant argues Metro is improperly interfering with the official custodians of records for each of Metro’s departments because Metro has assumed complete command over whether and when responsive records are provided to requesters.

The Act defines “public agency” to include, among other things, “[e]very state or local government department, division, bureau, board, commission, and authority.” KRS 61.870(1)(b). LMDC<sup>4</sup> and LMPD<sup>5</sup> are “local government department[s]” and, therefore, each of them is a “public agency.” KRS 61.870(1)(b).

Under KRS 61.880(1), when a “public agency,” such as LMDC and LMPD, receives a request, it has five business days to issue a response. That “response shall be issued by the official custodian *or under his or her authority*, and it shall constitute final agency action.” *Id.* (emphasis added). Thus, the response may be issued by either the official records custodian of the public agency, or a person acting “under his or her authority.” *Id.* Moreover, under KRS 61.876, every public agency must adopt rules and regulations that designate the agency’s official records custodian and describe how a resident of the Commonwealth may apply to inspect public records. Neither the Appellant nor Metro has provided the adopted rules and regulations, required under KRS 61.876, of either LMDC or LMPD. But it is clear from this administrative record that if either of those departments has an official custodian of records, that custodian did not issue responses to the Appellant’s employees’ requests. Metro did. Thus, the questions presented in this appeal are whether Metro may respond under the authority of the official custodians of each of Metro’s divisions or

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erroneously named a sub-agency of the University of Kentucky as the party responsible for an open meetings violation that had not been properly presented to the Office. The Court of Appeals noted the problems such a designation caused, including the difficulty of the University of Kentucky, the proper public agency defendant, to appeal the Office’s erroneous decision. *Id.* at 862 (“UK, claiming status as the aggrieved party, invoked the Fayette Circuit Court’s subject matter jurisdiction” under KRS 61.882). To avoid that confusion here, this Office notes the Appellant has specifically brought this appeal against Metro, Metro has responded as if it is the real party in interest, and the defending party in interest is Metro.

<sup>2</sup> Metro identified and logged these requests as 22-1816, 22-1823, 22-1931, 22-2937, and 22-4179.

<sup>3</sup> As will be explained below, journalist Deborah Yetter first attempted to email this request directly to staff at LMPD. She was told to resubmit her request using the NextRequest program. After doing so, Metro logged this request as 22-3279.

<sup>4</sup> LMDC is a metropolitan correctional services department first established by the Jefferson County Fiscal Court under KRS Chapter 67B. Upon the merger of the City of Louisville and Jefferson County under KRS Chapter 67C, LMDC became a “division[] of” Metro. KRS 67B.010; *see also* KRS 67C.115(3); LMCO § 30.20(F).

<sup>5</sup> Upon the merger of the City of Louisville and Jefferson County under KRS Chapter 67C, Metro merged the Louisville Division of Police and the Jefferson County Police Department to form LMPD. KRS 67C.115(3); *see also* LMCO § 36.02.

departments, and, if answered in the affirmative, whether Metro properly discharged the duty it has elected to assume.

Metro is a consolidated local government established under KRS Chapter 67C. Under KRS 67C.105(1), “[a]ll executive and administrative power of the government shall be vested in the office of the mayor. The term ‘executive and administrative power’ shall be construed broadly. The mayor shall be the chief executive of a consolidated local government. . . .” And the Metro mayor “is authorized to supervise, administer, and control all departments and agencies as may be created by KRS 67C.101 to 67C.137 or created by ordinance. The mayor shall appoint all department and agency directors. The appointees shall serve at the pleasure of the mayor.” KRS 67C.105(5). Thus, whatever power the official records custodians of Metro’s various departments have, that power is subordinate to the mayor. In other words, each department’s official custodian of records designated under KRS 61.876 acts “under” the “authority” of the mayor.

While the Appellant argues that KRS 61.880(1) gives each public agency’s official custodian of records the absolute authority to decide whether and how to respond to a request, that argument does not square with the form of government created by KRS Chapter 67C. The official custodians of records, like all Metro department employees, serve in a structure headed by Metro’s elected chief executive, the mayor. KRS 67C.105(5). The mayor can give them broad authority, or he can make those official records custodians act under the authority of another designee. As demonstrated by Metro’s adopted rules and regulations, which it provided to this Office on appeal, Metro has chosen the latter course, and has subordinated its departments’ records custodians to one official custodian with ultimate decision making authority on behalf of all of Metro.<sup>6</sup> That person is Metro’s Chief Financial Officer, Monica Harmon. She, in turn, has delegated her authority to Metro’s “Director of Open Records Compliance,” Robin Berry. Thus, under Metro’s system, there is one official custodian of records, Ms. Harmon. Her designee is Ms. Berry, and all other official custodians of records belonging to various Metro departments are subordinated to that command and control. The Act does not forbid this structure. But having elected to adopt this structure, Metro’s official custodian of records or her

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<sup>6</sup> Because Metro’s mayor has the authority to designate the official records custodians of each of its subordinate departments, KRS 67C.105(5), he could designate the same person to be the official records custodian in each department. Thus, in practical terms, whether each subordinate department’s official records custodian is subordinate to Metro’s official custodian of records or whether each of those department’s official records custodian *is* the same person is somewhat of a distinction without a difference. It is not clear, though, whether each of Metro’s subordinate departments have adopted regulations and procedures designating the same person because neither party has provided the rules and regulations for LMDC, LMPD, or any other department. Regardless, if Metro’s official records custodian has assumed command over all of Metro’s subordinate department’s public records, then each of Metro’s subordinate departments should publish to the public policies that reflect that fact. KRS 61.876(1).

designee is responsible for timely responding to every request submitted to any of Metro's various departments.

## **II. Metro's rules and regulations subvert the Act by misdirecting applicants to its "NextRequest" program.**

Every public agency must adopt rules and regulations "to provide full access to public records, to protect public records from damage and disorganization, to prevent excessive disruption of its essential functions, to provide assistance and information upon request and to ensure efficient and timely action in response to application for inspection." KRS 61.876(1).

Among the information required to be included in those rules and regulations are the principal office of the public agency and its regular office hours; the title, mailing address, and e-mail address of the official custodian of the public agency's records; the fees, to the extent authorized by KRS 61.874 or other statute, charged for copies; and the procedures to be followed in requesting public records. *Id.* Most significant here is the e-mail address of the official records custodian. KRS 61.876(1)(b). That is because under KRS 61.872(2), the statute establishing the right of a resident of the Commonwealth to request to inspect records, a request may be submitted "via e-mail to the public agency's official custodian of public records or his or her designee at the e-mail address designated in the public agency's rules and regulations adopted pursuant to KRS 61.876." KRS 61.872(2)(b)4. Moreover, under KRS 61.872(2)(c), "[a] public agency shall not require the use of any particular form for the submission of an open records request."

The "NextRequest" program is a particular, online "form for the submission of an open records request" to Metro. *See id.* Under the express terms of KRS 61.872(2)(c), Metro cannot "require" any requester to use this online form. Rather, Metro must permit a requester to e-mail a request to the e-mail address of its official records custodian. Under Metro's rules and regulations, that e-mail address is "openrecords2@louisvilleky.gov." However, Metro's rules and regulations further provide that "[t]he email address where Director Berry receives open records requests is openrecords2@louisvilleky.gov, which *shall be reached by submitting your request on this website*: <https://louisvillemetroky.gov/nextrequest.com/>." (Metro Resp. Ex. 1, emphasis added).

KRS 61.872(2)(c) prohibits Metro, or any other agency, from requiring the use of a specific form. Accordingly, Metro's rules and regulations misdirect applicants by stating they "shall" submit their requests using NextRequest. Metro applied this requirement to one of the requests at issue in this appeal. Ms. Deborah Yetter

attempted to submit a request to LMPD staff,<sup>7</sup> but instead of notifying Ms. Yetter of the correct e-mail address, which according to Metro's rules and regulations is "openrecords2@louisvilleky.gov", she was told to submit her request using NextRequest. This exchange misdirected Ms. Yetter to an online form that the Act does not require her to complete. *See* KRS 61.872(2)(c). Because Metro's rules and regulations require the use of NextRequest in lieu of e-mailing the records custodian's official e-mail address, Metro's rules and regulations misdirect applicants to a form the Act does not require them to complete, which subverts the Act within the meaning of KRS 61.880(4).

For all the reasons stated, Metro may appoint a single official custodian of records to respond on behalf of all of its departments, but that person may not require a request under the Act to be submitted using the NextRequest form.

### **III. Metro subverted the Act on six occasions.**

Turning to the merits of the Appellant's appeal, the Appellant claims Metro failed to respond to its requests within five business days. And when Metro did respond to such requests, the Appellant alleges Metro invoked KRS 61.872(5) without providing the earliest date on which records would be available or explaining the cause of delay.

In response to the Appellant's claim, Metro does not deny it failed to respond within five business days. Nor does it claim to have complied with KRS 61.872(5), which requires a public agency to notify the requester of the earliest date on which responsive records will be available and a detailed explanation for the cause of that delay. Instead, Metro merely claims it does not have the resources to comply with KRS 61.880(1). Metro advises that in calendar year 2021 it received 8,240 requests to inspect records. As of July 1, 2022, Metro has received 6,322 such requests, putting it on pace to have received over 12,000 requests by the end of the year. Metro states that it has roughly five employees, some managers and others not, to process all these requests. Metro further asks this Office to consider the "totality of the circumstances," weighing Metro's need to provide other governmental services to the people of Jefferson County in addition to having to comply with the Act.

While the Office understands Metro's position, it is not this Office to which Metro should direct its pleas. "It is elementary that the legislative branch of government has the prerogative of declaring public policy and that the mere wisdom of its choice in that respect is not subject to the judgment of a court" or this Office. *Fann v. McGuffey*, 534 S.W.2d 770, 779 (Ky. 1975); *see also Commonwealth v.*

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<sup>7</sup> There is no indication that the staff members to whom Ms. Yetter sent her request were official records custodians, or that their e-mail addresses were the proper e-mail addresses to which she could submit an open records request.

*Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008) (recognizing the “tedious and time-consuming work” associated with complying with the Act, and that “[a]ny relief here must come from the General Assembly”). The General Assembly has required all public agencies, including Metro and its subordinate departments, to comply with the Act in the short timeframes provided therein. And Metro must comply with that legislative command. Further, it is Metro itself that decided to centralize all its responsibilities for complying with the Act on behalf of all its departments. This Office will not judge the wisdom of that policy choice. But, having made that choice, Metro is not excused from having to comply with the Act in all its particulars. This Office’s mandate is limited to “review[ing] the request and denial and issu[ing] . . . a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884.” KRS 61.880(2)(a).

Having reviewed the administrative record, the Office finds that Metro subverted the Act on March 3, 2022, when it failed to respond to request no. 22-1816 within five business days of its receipt on February 23, 2022.<sup>8</sup> However, when Metro did respond on March 14, more than two weeks after receipt of the request, it invoked KRS 61.872(5) to delay inspection until April 8, 2022. Metro explained that the cause of delay was that the request implicated 661 emails, and it would take three to five minutes to review each, plus “additional time to prepare redactions or privileges.” Metro did not adequately explain why it would take nearly a month to review 661 emails, so it subverted the Act. *See, e.g.*, 21-ORD-045 (finding a delay of four months to process 5,000 emails constituted unreasonable delay under the facts presented).

Metro subverted the Act on March 3, 2022, when it failed to respond to request no. 22-1823 within five business days of its receipt on February 23, 2022. When Metro did respond on March 10, it said only that “[t]he public records [the journalist sought] are in active use, storage or not otherwise available. A response will be available on or before the close of business on 04/15/2022.” This response failed to properly invoke KRS 61.872(5), because it did not provide a date on which records would be available, but the date on which Metro would issue a response to the request. Moreover, Metro failed to explain the cause of the delay. Then, Metro missed its own deadline of April 15 and did not issue a final response until April 27, two months after receiving the request.

Metro subverted the Act on March 5, 2022, when it failed to respond to request no. 22-1931 within five business days of its receipt on February 25, 2022. When Metro did respond on March 8, it said only that “[t]he public records [the journalist sought] are in active use, storage or not otherwise available. A response will be available on or before the close of business on 04/08/2022.” This response failed to properly invoke

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<sup>8</sup> Metro was required to respond by March 2, which was the fifth business day after receipt of the request on February 23, 2022. Thus, it subverted the Act on March 3, which was the first day after its five-business day deadline.

KRS 61.872(5), because it did not provide a date on which records would be available, but the date on which Metro would issue a response to the request. Moreover, it failed to explain the cause of the delay.

With respect to request no. 22-2937, Metro received the request on March 25, 2022, and in a timely response on April 1 stated the requested records were in active use, in storage or not otherwise readily available, and explained the causes of delay included the relevant department's need to "gather and research" the request, that the request involved multiple agencies, that redactions needed to be made, and legal review was necessary. Metro stated it would provide a response on April 15. To this extent, Metro complied with the Act. But then, Metro's self-imposed deadline of April 15 came and went with no further communication. On April 26, a week and a half after its own deadline, Metro provided responsive records. This Office has found that when an agency invokes KRS 61.872(5) and provides the earliest date on which records will be available, but then fails to meet that deadline and fails to further communicate why the deadline can no longer be achieved, it subverts the Act. *See, e.g.,* 22-ORD-158; 21-ORD-011. Metro's disposition of request no. 22-2937 subverted the Act by imposing excessive extensions of time without explanation. KRS 61.880(4).

Metro subverted the Act on May 7, 2022, when it failed to respond to request no. 22-4179 within five business days of its receipt on April 29, 2022. It appears as though Metro never responded to this request until after this appeal was initiated on June 17.

Finally, as discussed previously, Metro subverted the Act when it misdirected Ms. Yetter to the NextRequest online form to facilitate what ultimately became request no. 22-3279. When Ms. Yetter did as Metro asked, and resubmitted her request on April 5, 2022, Metro did not respond until April 18, or nine business days later. Thus, Metro also subverted the Act with respect to this request by failing to respond within five business days. KRS 61.880(1).

In sum, Metro may designate one person to serve as the official custodian of all the public records in the possession of each of Metro's departments. But having made that choice, Metro is responsible for fully complying with the Act. That means Metro must respond to each and every request it receives within five business days. KRS 61.880(1). Moreover, the NextRequest program is a particular online form, which the Act prohibits Metro from requiring requesters to use. KRS 61.872(2)(c).

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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s/Marc Manley  
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