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23-ORD-001

January 3, 2023

In re: Nick Wallingford/Finance and Administration Cabinet

Summary: The Finance and Administration Cabinet (“the Cabinet”) violated the Open Records Act (“the Act”) when it partially denied a request for records without citing the specific exemption on which it relied to deny the request. However, the Cabinet did not violate the Act when it withheld records pertaining to the state procurement process under KRS 61.878(1)(o) because the contract had not yet been awarded at the time of the request.

Open Records Decision

Nick Wallingford (“Appellant”) submitted a request to the Cabinet for the “full solicitation file” related to a specified Request for Proposal (“RFP”). The Cabinet granted the request in part and denied it in part. The Cabinet produced records of its solicitation for bids but denied inspection of submitted bids “in accordance with the provisions of [KRS] 61.878” because “the contract award was not yet final.” This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant or deny the request. KRS 61.880(1). If it denies the request, the agency’s response “shall include a statement of *the specific exception authorizing the withholding of the record* and a brief explanation of how the exception applies to the record withheld.” *Id.* (emphasis added). However, the Cabinet’s response did not cite the specific exemption on which it relied and merely cited KRS 61.878 without citing which of the 18 listed exemptions applied. Moreover, the Cabinet’s initial response failed to explain how any of the exemptions in KRS 61.878 applied to the records it withheld. Accordingly, the Cabinet’s initial response failed to comply with KRS 61.880(1). It therefore violated the Act.

On appeal, the Cabinet cites KRS 61.878(1)(o) as the particular exemption on which it relied to withhold the submitted bids. Under KRS 61.878(1)(o), “[r]ecords of a procurement process under KRS Chapter 45A or 56” are exempt from disclosure until “[a] contract is awarded” or “[t]he procurement process is canceled without award of a contract and there is a determination that the contract will not be resolicited.”

Here, the Appellant appeals the Cabinet’s denial of bids submitted in response to a specific RFP.¹ Both parties agree the Appellant submitted his request approximately one hour after the bids had been submitted. Clearly, the Cabinet could not have reviewed the bids and awarded the contract in one hour. Indeed, the Cabinet continues to assert on appeal that the contract still has not been awarded. Once the contract is awarded, the requested records will be subject to inspection unless another exemption applies. But because the contract had not yet been awarded at the time of the Appellant’s request, the Cabinet properly withheld the submitted bids under KRS 61.878(1)(o).

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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Attorney General

s/ Zachary M. Zimmerer
Zachary M. Zimmerer
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Distributed to:

Nick Wallingford
Cary B. Bishop

¹ The Appellant relies on FAP 111-35-00(11), which states, “At the time designated for bid closing, online and paper copy bids shall be opened and made available to the public by reading, if practical.” However, that policy applies to a “Competitive Sealed Bidding” procurement which is initiated by a “Request for Bids” (RFB). *See* FAP 111-35-00(1). Here, the Appellant has requested records related to a competitive negotiation procurement initiated by an RFP. *See* FAP 111-57-00. Thus, FAP 111-35-00(11) does not require disclosure of the requested records.