



COMMONWEALTH OF KENTUCKY
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23-ORD-013

January 26, 2023

In re: Lisa Gannoe/Eastern Kentucky University

Summary: Eastern Kentucky University (“the University”) violated the Open Records Act (“the Act”) when it delayed access to public records on the basis that its employees, as opposed to the requested records, were unavailable.

Open Records Decision

On December 9, 2022, Lisa Gannoe (“Appellant”) submitted a request to the University to inspect a variety of records related to the University’s travel policies.¹ On December 14, 2022, the University responded, cited KRS 61.872(5), and notified the Appellant the records were “not otherwise available” because it “ha[d] several time sensitive matters that require[d] immediate attention of staff” and it would be “closed for business from December 16, 2022 through January 2, 2023.” The University further stated it would respond to the Appellant’s request by January 12, 2023. The Appellant then initiated this appeal on December 22, 2022, claiming the University’s response violated the Act and its delay was unreasonable.²

¹ Specifically, she requested “the travel approval amounts and names of those approved for travel in the 2022-2023 school year for the College of Education,” the “[p]olicy for revocation of travel after budget approval,” the budgets and actual amounts paid for the international travel of two specific University employees, the identities of University employees who were approved for international travel in the 2022-2023 school year, and the identity of the employee in the College of Education who “received an email in December 2022 saying that they only had \$300.00 of professional development to use.”

² The Appellant also sent an “amended” request to the University on December 16, 2022, in which she essentially rephrased her original request to more precisely describe the travel policies and records she sought. However, the University’s disposition of the Appellant’s “amended” request is not properly before the Office because the Appellant initiated her appeal before the University’s deadline to respond to the amended request had expired. *See, e.g.*, 20-ORD-175 (holding that, because KRS 61.880(2)(a) requires a person to provide a copy of her request and the agency’s response, or a copy of the request and an assertion that the agency failed to timely respond, the Office lacks jurisdiction to adjudicate

Upon receiving a request to inspect records, a public agency “shall determine within five (5) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” 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.

Here, the University responded to the Appellant’s request within five business days. For its response, the University cited KRS 61.872(5) and stated it would not respond further to the Appellant’s request until January 12, 2023, because of “several time sensitive matters,” including a court ordered deadline to comply in unrelated litigation, and because the records were “not otherwise available” while the University was closed for winter break. However, the fact that an agency is understaffed or busy during a particular time of year does not constitute a proper basis for delaying production of the requested records. *See, e.g.,* 22-ORD-257; 22-ORD-134; 22-ORD-133; 19-ORD-188 n.1. While the Office understands employee absences and other constraints on an agency may make it difficult to produce records in response to requests under the Act, the agency must nevertheless comply with the Act in all its particulars. The Act tolls an agency’s duty to “determine . . . whether to comply with the request” only on “Saturdays, Sundays, and legal holidays.” KRS 61.880(1). Here, the University did not “determine” whether it would comply within five business days, but rather, stated it would “respond” to the request on or before January 12, 2023.

While the University may consider itself “closed” during winter break, such closures are not “legal holidays.” *See* KRS 2.110 (establishing “holidays, on which all the public offices of this Commonwealth may be closed”); KRS 18A.190(1) (listing days on which “[s]tate offices shall be closed and state employees shall be given a holiday”); *see also* 01-ORD-94 (finding “spring break” for public schools did not qualify as a “legal holiday” under the Act).³ Accordingly, the requested records were not

appeals brought before the statutory deadline for the agency to respond). Accordingly, the Office can only consider the dispute regarding the Appellant’s request submitted on December 9, 2022, and the agency’s December 14, 2022 response thereto. Now that the University’s deadline to respond to the December 16, 2022 request has expired (and the University has in fact responded to that request), the Appellant may initiate a separate appeal of the University’s disposition of her “amended” request by providing the Office a copy of it and the University’s response. KRS 61.880(2)(a).

³ The public agency carries the burden of proof to sustain its actions. KRS 61.880(2)(c). However, the University does not cite any statute making breaks in a public university’s academic calendar “legal holidays.” Instead, the University cites KRS 446.030, which states that if the day on which a legal act is to be completed falls on “a day on which the public office in which the act is required to be

“unavailable” during the University’s winter break, and the University could not rely on its self-declared break to postpone its disposition of the request.⁴ The University therefore violated the Act by improperly relying on employee absences to delay access to responsive records.

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
Attorney General

s/ Zachary M. Zimmerer
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Distributed to:

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completed is actually and legally closed the act may be done on the next day which is none of the days just mentioned.” Thus, the University must prove it was “actually *and legally* closed.” *Id.* (emphasis added). While the University may have been “actually” closed, it has not carried its burden of proving it was “legally closed,” *i.e.*, that it was closed pursuant to some legal authority such as a statute, executive order, or court order to be closed.

⁴ There is no dispute that the University received the Appellant’s request before it closed for winter break. There may be instances in which an agency is actually closed, and therefore, does not receive a request because no employees are present to receive it. The time for an agency to respond to a request does not begin until after receipt of the request. KRS 61.880(1). But here, the University actually received the request, and then attempted to extend its time to respond beyond five business days because it would be closed.