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23-ORD-070

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In re: Jeffrey Jobe/Boys and Girls Club of Glasgow

Summary: In the absence of evidence to the contrary, the Boys and Girls Club of Glasgow ("the Club") is a "public agency" subject to the Open Records Act ("the Act") under KRS 61.870(1)(h) for fiscal year 2023. Accordingly, it violated the Act when it failed to respond to two requests to inspect records within five business days of receiving them. However, the Office cannot resolve the factual dispute of whether the requested records are "public records" under KRS 61.870(2).

Open Records Decision

On November 16, 2022, Jeffrey Jobe ("the Appellant") submitted to the Club a request to inspect various records. On December 15, 2022, the Club responded and provided some records responsive to the request. However, it denied the Appellant's request for "[a]ny communication between members of the board, employees or those associated with friends of the board specifically referenced by" two individuals because the "request [was] not sufficiently clear as to allow a meaningful response." The Club also stated that "much (if not all) of what [the Appellant] may be seeking would be exempt from inspection" under KRS 61.878(1)(i) and (r) "as correspondence with private individuals [or] communications of a purely personal nature."

The Club also denied the Appellant's request for it to "identify" the donors who contributed $800,000 to construct a kitchen for the Club because the request was an "interrogator[y]" and not a request to inspect public records. Finally, the Club denied the Appellant's request for a copy of invoices for legal services billed in 2022 because it claimed such records were exempt under the attorney-client privilege and attorney work product doctrine.

On January 13, 2023, the Appellant responded and objected to the Club's partial denial. First, he claimed his initial request for communications between the Club's board members and two individuals precisely described records sought. Nevertheless, he revised his request and clarified that he sought "communications between members of the Board . . . concerning the contract dispute with the Housing Authority." He stated these communications were not of a "purely personal nature" because they involved "the business of the organization." With respect to his request to "identify" the donors who donated $800,000 to construct a kitchen, he revised it to include "all records concerning the $800,000 [in] donations that [was] repeatedly referenced." He also disputed the Club's claim that legal invoices are protected by the attorney-client privilege or attorney work product doctrine. Finally, the Appellant made a "new request" for a copy of an invoice detailing a $5,000 payment to a specific person in December 2021 regarding a "Christmas shopping fund" that was referenced in documents the Club provided in response to his original request.

On January 20, 2023, the Club's attorney responded to the Appellant's subsequent request and confirmed receiving it on January 13, 2023. However, the Club's attorney advised he was "out of the office" and would be returning on January 23, 2023. The Club's attorney stated he would review the Appellant's "correspondence in further detail at that time and will be responding accordingly." Having received no further communication from the Club, the Appellant initiated this appeal on February 27, 2023.

As an initial matter, the Office must determine whether the Club is a "public agency" subject to the Act. The Club is a private, nonprofit organization. A private organization, however, is considered to be a "public agency" for purposes of the Act if "within any fiscal year, [it] derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds." KRS 61.870(1)(h). The Appellant claims the Club meets the 25% threshold, and provides as proof a news article reporting a $1 million donation to the Club from the Commonwealth's Capital Project Fund on November 22, 2022. In its response to his request, the Club stated it "reserve[d] the right to contest" whether it was a public agency under KRS 61.870(1)(h), but "in the interests of transparency and cooperation" it would nevertheless respond to his request. On appeal, the Club does not argue it is not subject to the Act, or provide any evidence to suggest the $1 million it received from state funds constitutes less than 25% of the funds it has expended, or may expend, in fiscal year 2023.[1] In the absence of evidence to the contrary, the

[1] The Commonwealth's fiscal year begins on July 1 and ends on June 30 of the following calendar year. *See* Ky. Const. § 169. Accordingly, July 1, 2022 marked the beginning of fiscal year 2023. The Commonwealth's donation was made on November 22, 2022, and therefore, the record contains evidence that the Club may be considered a "public agency" in fiscal year 2023. But there is no evidence in the record that, under KRS 61.870(1)(h), the Club was a "public agency" in prior fiscal years.

Office concludes the Club qualifies as a "public agency" under KRS 61.870(1)(h) for fiscal year 2023.[2]

When a "public agency" receives a request under the Act, it must determine within five business days whether to grant or deny it and notify the requester of its decision. KRS 61.880(1). If the public agency denies any portion of the request, it must also cite the exemption authorizing the denial and briefly explain how it applies to records withheld. *Id*. Or, if the records are "in active use, in storage or not otherwise available," the public agency may delay access to the records if it gives the requester "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection." KRS 61.872(5). Here, the Club received the Appellant's first request on November 16, 2022, but did not respond to it until December 15, 2022, well beyond the statutory deadline of five business days. Moreover, the Club received the Appellant's "revised" and "new" requests on January 13, but did not determine within five business days whether to grant them, deny them, or invoke KRS 61.872(5) to delay the Appellant's inspection of the requested records. Accordingly, the Club violated the Act twice when it failed to respond timely to the Appellant's requests.

Although the Club may be considered a "public agency" under KRS 61.870(1)(h) for fiscal year 2023, and is therefore subject to the Act's procedural requirements during this fiscal year, not all of its records are "public records" subject to inspection. KRS 61.870(2) broadly defines "public records," but it excludes from that definition "any records owned or maintained by or for a body referred to in [KRS 61.870(1)(h)] that are not related to functions, activities, programs, or operations funded by state or local authority." Thus, the Club's records that relate to its activities funded by the Commonwealth's $1 million expenditure, or pursuant to other expenditures of state or local funds, are "public records" under KRS 61.870(2). The rest of its records are not "public records," and therefore, are not subject to inspection. *See* KRS 61.872(1) (granting Kentucky residents the right to inspect "public records").

Because it is a "public agency," the Club carries the burden of sustaining its action. KRS 61.880(2)(c). But from the face of the Appellant's request and supporting evidence, it does not appear he requested records "related to [the Club's] functions,

[2] Because a private entity does not become a "public agency" under KRS 61.870(1)(h) until it receives state or local funds amounting to more than 25% of its expenditures "within any fiscal year," a determination that a private entity meets the threshold in one fiscal year does not mean that it meets the threshold in another fiscal year. *See, e.g.*, 09-ORD-192 (finding a private entity was a "public agency" under KRS 61.870(1)(h) in fiscal year 2008, but not in fiscal year 2009 when only 20.57% of its expenditures in fiscal year 2009 were attributable to state funds). The evidence presented here only supports a conclusion that the Club qualifies as a "public agency" under KRS 61.870(1)(h) in fiscal year 2023. The Office makes no finding as to whether the Club qualified as a public agency in any other fiscal year.

activities, programs, or operations funded by state or local authority." KRS 61.870(2). First, the Commonwealth made the expenditure after his initial request on November 16, 2022, and thus, records relating to the Club's "functions, activities, programs, or operations funded by" that donation likely would not have been created until after the expenditure was made. According to the article the Appellant provides, the Commonwealth's $1 million expenditure was made to "fund two major projects. Those include ongoing construction of a satellite club location in Cave City and transportation needs."[3] Thus, it appears this state expenditure is not connected with the Club's construction of a kitchen or the $800,000 allegedly donated to it for that purpose. It is not clear from this record whether any of the $800,000 in donations for a kitchen came from state or local funds. If, however, a portion of the $800,000 did come from state or local funds, then records documenting the expenses to construct the kitchen would be public records subject to inspection.[4] Simply put, the Office cannot resolve the factual dispute of whether its construction of a kitchen is related to the Club's "functions, activities, programs, or operations funded by state or local authority." *See, e.g.*, 22-ORD-274 (noting the Office could not resolve a factual dispute about whether the cost for a road project fell within the agency's discretionary spending limit such that no bids for the project were required under the Model Procurement Code).

The Appellant also claims the Club receives "free rent" from the "Housing Authority," and this in-kind contribution should be considered with respect to his request for communications related to the Club's contract dispute with the Housing Authority. However, a private entity is considered a "public agency" under KRS 61.870(1)(h) when 25% of the funds it expends in any fiscal year comes from state or local *funds*. This Office has previously found that in-kind contributions made by state or local agencies to private entities are not "funds" within the meaning of KRS 61.870(1)(h). *See, e.g.*, 13-ORD-105. There is no evidence in this record that the Club expended state or local "funds" in connection with its dispute with the Housing Authority. As such, the Club's records related to that dispute are not "public records" under KRS 61.870(2).[5]

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[3] Brennan D. Crain, *Local Boys and Girls Club Awarded $1M to Further Vision*, WCLU RADIO Nov. 22, 2022, available at https://www.wcluradio.com/2022/11/22/local-boys-and-girls-club-awarded-1m-to-further-vision/ (last accessed Mar. 27, 2023).

[4] The Appellant also requested records documenting the "donors" of the $800,000, but records relating to private donations to a private, nonprofit organization are not related to the expenditure of state or local funds. Only those records documenting donations by state or local authorities, and records documenting any expenditures to construct the kitchen if such publicly funded donations were made for that purpose, would be subject to inspection.

[5] Presumably, the Appellant is referring to the Housing Authority of Glasgow, a local housing authority established under KRS 80.020. Such housing authorities are "public agencies" under KRS 61.870(1)(b). *See, e.g.*, 18-ORD-174 (finding a local housing authority violated the Act by delaying access to public records).

The same is true with respect to the Appellant's request for legal invoices generated in 2022. As stated previously, the Club received $1 million in state funds on November 22, 2022, after the Appellant submitted his initial request for legal services billed "in 2022." There is no indication that the Club incurred legal fees as a result of receiving the state funds, or as a result of its activities related to pursuing the purpose of those funds, in calendar year 2022, which ended less than 40 days later. And because there is no evidence the Club expended state or local funds with respect to its alleged dispute with the Housing Authority, the legal invoices associated with that dispute, if any exist, also are not "public records" under KRS 61.870(2).[6]

Finally, the Club never responded to the Appellant's "new request" on January 13, 2023, seeking a copy of the invoice paying $5,000 to a specific person in December 2021 "regarding the Christmas shopping fund." But as noted previously, the only evidence here to support a finding that the Club is a public agency under KRS 61.870(1)(h) is the $1 million in state funds received in fiscal year 2023. No evidence has been presented that the Club qualified as a public agency in fiscal year 2022, which would encompass records created in December 2021. Thus, while the Office previously explained that the Club's failure to respond to this request violated the Act, the Office cannot find that these records are "public records" under KRS 61.870(2), and therefore, subject to inspection.

In sum, the Club does not contest the Appellant's claim that it qualifies as a "public agency" under KRS 61.870(1)(h) in fiscal year 2023. Because it is a "public agency," it was required to respond to the Appellant's requests within five business days. KRS 61.880(1). The Club failed to do so, twice, and it therefore violated the Act. But the Appellant has presented no evidence that any of the records he requested were "related to [the Club's] functions, activities, programs, or operations funded by state or local authority." KRS 61.870(2). As such, the Office cannot determine whether the requested records are "public records" within the meaning of KRS 61.870(2). The Office therefore cannot conclude the Club violated the Act when it denied the Appellant's request.

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

[6] However, to the extent legal fees were incurred as a result of the Club's activities related to its expenditure of state or local funds, invoices documenting those legal services would not be exempt in their entirety as privileged attorney-client communications or attorney work product. *See Monin v. Monin*, 156 S.W.3d 309, 318 (Ky. App. 2004) (noting, without deciding, that "the itemization of a legal services invoice" would not fall within the ambit of the attorney-client privilege or attorney work product doctrine); *see also* 97-ORD-066. However, any portion of legal invoices containing descriptions of the services performed that could shed light on the attorney's mental impressions, or which contain actual communications for the purpose of obtaining legal services, could be redacted from the invoices as privileged communications or attorney work product. *See, e.g.*, 09-ORD-055.

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/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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