



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITAL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

**23-ORD-079**

April 4, 2023

In re: David McAnally/Cabinet for Health and Family Services

**Summary:** The Cabinet for Health and Family Services (“the Cabinet”) subverted the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when it did not respond to a request within five business days, and when it invoked KRS 61.872(5) but failed to give a detailed explanation of the reason for delay and failed to dispense with the request on the date by which it had said records would be available for inspection.

***Open Records Decision***

On February 12, 2023, David McAnally (“Appellant”) requested records relating to the selection and hiring process for seven positions in the Cabinet for which he had applied and was not selected. In a response dated February 21, 2023, the Cabinet stated that “the files [the Appellant] requested [were] not readily available” and it would “need until February 27, 2023[,]” to make the records available to the Appellant. Having received no records by March 6, 2023, the Appellant initiated this appeal.

Under KRS 61.880(1), a public agency has five business days to fulfill or deny a request for public records. This period may be extended if the records are “in active use, in storage or not otherwise available,” but the agency must give “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, because the Appellant submitted his request electronically on a Sunday, it was received by the Cabinet the following day, Monday, February 13, 2023. Thus, the

Cabinet was required to respond by February 20, 2023.<sup>1</sup> Therefore, the Cabinet failed to issue a timely response to the Appellant's request.

Under KRS 61.880(4), a person may petition the Attorney General to review an agency's action if the "person feels 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." Here, the Cabinet did not respond to the request within five business days. Nor did the Cabinet give a detailed explanation of the cause for further delay when it invoked KRS 61.872(5). Furthermore, although the Cabinet stated the earliest date on which the records would be available for inspection, it did not make any records available by that date.<sup>2</sup> This Office has found that a public agency does not comply with KRS 61.872(5) when it notifies the requester of the earliest date on which requested records would be available but then misses its self-imposed deadline. *See, e.g.*, 21-ORD-011. Therefore, the Cabinet subverted the intent of the Act by delay and excessive extensions of time, within the meaning of KRS 61.880(4), when it failed to issue a timely response and did not make a final disposition of the Appellant's request on the date to which it committed when it invoked KRS 61.872(5).

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 emailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

s/ James M. Herrick  
James M. Herrick  
Assistant Attorney General

#107

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<sup>1</sup> Although KRS 2.110(1) recognizes the third Monday in February as the public observance of Washington's Birthday, state offices were not closed on February 20, 2023. *See* <https://personnel.ky.gov/holidays-and-leave> (last accessed April 4, 2023). Thus, February 20 was a normal business day, not a "legal holiday" for purposes of KRS 61.880(1).

<sup>2</sup> On appeal, the Cabinet claims it mailed responsive records to the Appellant on March 11, 2023. However, the Appellant disputes having received any records. This Office cannot resolve disputed issues of fact between the parties. *See, e.g.*, 22-ORD-010.

Distributed to:

Mr. David McAnally  
David T. Lovely, Esq.  
Elyssa S. Morris, Esq.