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23-ORD-134

June 13, 2023

In re: J. Brooken Smith/Louisville/Jefferson County Metro Government &
Louisville/Jefferson County Metro
Government Ethics Commission

Summary: Louisville/Jefferson County Metro Government (“Metro”) and the Louisville/Jefferson County Metro Ethics Commission (“the Commission”) violated the Open Records Act (“the Act”) when they invoked KRS 61.872(5) to delay access to records and failed to provide the records by the date promised. Neither agency has carried its burden that a delay of one month to provide requested records is reasonable.

Open Records Decision

On April 24, 2023, J. Brooken Smith (“Appellant”) submitted to Metro a request to obtain copies of records related to another open records request it had received. The requested records can be divided into two categories—records belonging to Metro, and records belonging to the Commission. With respect to Metro’s records, the Appellant sought a copy of “[a]ny and all requests” from a specific news-gathering organization and a reporter on March 28, 2023, in which the organization or reporter sought to inspect a councilman’s response to an ethics complaint. The Appellant also sought any written communications “sent or received by Louisville Metro Government” regarding its response to that request, as well as a copy of Metro’s response to that request and all documents it produced. With respect to the Commission’s records, the Appellant sought any written communications sent or received by members of the Commission regarding its disposition of that same open records request.

On May 3, 2023, Metro responded to the request by stating the requested records were “in active use, storage, or not otherwise available” because it needed additional time to gather and review responsive records and the records required

“legal review.” Citing KRS 61.872(5), Metro stated it would provide the responsive records “on or before the close of business on May 10, 2023.” However, on May 10, Metro again cited KRS 61.872(5), and again stated that it needed to search for responsive records and that the records would require “legal review.” This time, it advised the Appellant the responsive records would be available “on or before the close of business June 7, 2023.” This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny it and explain why. KRS 61.880(1). Or, if responsive records are “in active use, in storage or not otherwise available,” a public agency may delay access to them by stating the earliest date on which they will be available and a detailed explanation of the cause of the delay. KRS 61.872(5). This Office has previously found that an agency violates the Act when it invokes KRS 61.872(5) to delay access to records and then fails to produce the records by the date to which it committed itself. *See, e.g.*, 23-ORD-079; 21-ORD-011.

While no party to this appeal disputes what KRS 61.872(5) requires a public agency to do if it delays access to records that are “in active use, storage, or not otherwise available,” Metro argues it is not the agency responsible for complying with the Appellant’s request. Previously, this Office has recognized that Metro serves as the official records custodian for all records in the possession of Metro’s various departments and divisions, pursuant to Metro’s rules and regulations adopted under KRS 61.876. *See, e.g.*, 22-ORD-167. However, the Commission was established by Louisville/Jefferson County Metro Government Code of Ordinances (“LMCO”) § 21.05(A)(1). Its members are appointed by the Mayor and confirmed by the Metro Council. LMCO § 21.05(C)(1). “All files, records, and documents maintained by, or in the possession of any ethics board, agency, or office under the jurisdiction of Jefferson County or the former City of Louisville shall be delivered to the Ethics Commission and thereafter *maintained by the Ethics Commission.*” LMCO § 21.10 (emphasis added). Moreover, the Commission is required to obtain legal counsel who “shall not be employed counsel or under contract in any capacity with Metro Government, or associated with an attorney employed by or under contract in any capacity with Metro Government.” LMCO § 21.05(E).

It therefore appears the Commission is the official custodian of its own records.¹ Nevertheless, the Office concludes Metro is also a proper party to this appeal because most of the Appellant’s request sought Metro’s records, not the Commission’s records. Moreover, the Commission has authorized Metro to respond on its behalf to requests seeking to inspect the Commission’s records, as its website directs

¹ The distinction is important because there appears to have been a miscommunication between Metro and the Commission with respect to Metro’s disposition of the news-gathering organization’s request, which led the Appellant to submit his request for records responsive to Metro’s disposition of that request.

requesters to use Metro's NextRequest system, through which Metro processes requests to inspect records. *See, e.g.*, 22-ORD-167. Here, the Appellant sought records regarding the way *Metro* handled a previous request *on behalf of* the Commission. Specifically, he sought the request to inspect records submitted by the news-gathering organization, which would have been routed to Metro per the Commission's authorization for Metro to process any requests directed to it through NextRequest. He also sought written communications "sent or received by *employees of Louisville Metro Government* regarding" the news-gathering organization's request. Finally, he sought the response Metro issued to the news-gathering organization's request and all the responsive records it sent to the news-gathering organization. All these records would be in the possession of Metro, which it admits is "the processing agent for the Commission's open records requests."

Metro claims it invoked KRS 61.872(5) on behalf of the Commission, and committed to the original May 10 deadline based on the Commission's instructions. When it later became apparent to the Commission that it could not produce responsive records by then, Metro issued a second response, again invoking KRS 61.872(5) and delaying inspection until June 7, 2023. While Metro is apparently at the Commission's mercy with respect to producing the Commission's records, it has not explained why it could not produce, at a minimum, a copy of the news-gathering organization's request or Metro's response to it. Neither the Commission nor Metro have explained why it would take more than a month to produce copies of records that have allegedly been produced once before and for which no exception to inspection is readily apparent. Therefore, Metro violated the Act by delaying access to those records and then missing its own deadline for production.

Similarly, Metro and the Commission missed their self-imposed deadline to produce copies of the Metro employees' and the Commission members' written communications regarding the request. For that, both agencies violated the Act. Moreover, the Commission explains on appeal it is currently involved in litigation against the Appellant's client, in which some of these communications may be relevant but are otherwise protected by the attorney-client privilege. The Commission argues that, against the backdrop of this litigation, it was not unreasonable to delay access until June 7 to ensure no privileged communications were released. The Commission is correct that privileged communications between attorneys and their clients are exempt from inspection. KRS 61.878(1)(l); KRE 503. But the Commission also carries the burden of proof in sustaining its action. KRS 61.880(2)(c). Neither the Commission nor Metro have stated the number of potentially responsive records that are in issue, nor how many are be protected by the attorney-client privilege. To determine whether any delay under KRS 61.872(5) is reasonable, the agency must, at a minimum, quantify or estimate the total number or potentially responsive records. *See, e.g.*, 22-ORD-176. The Office can then compare the number of records and the claimed exemptions at issue against the length of delay the agency claims is

required. Without knowing the number of records at issue here, the Office cannot find that a delay of more than a month was reasonable. Accordingly, both the Commission and Metro violated the Act.

A party aggrieved by this decision may appeal it by initiating an 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
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s/ Marc Manley
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