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23-ORD-135

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In re: J. Brooken Smith/Louisville Metro Government

Summary: The Louisville Metro Government (“Metro”) violated the Open Records Act (“the Act”) when it failed to make a timely response to two open records requests.

Open Records Decision

On May 3, 2023, J. Brooken Smith (“Appellant”) submitted to Metro two requests to obtain copies of records. First, he requested copies of all audio and video recordings of the March 29, 2023, and April 26, 2023, meetings of the Louisville Metro Ethics Commission (“the Commission”). Second, the Appellant requested various records related to the hiring of the Commission’s legal counsel, including “solicitations or requests for proposal issued,” “responses or bids submitted,” “documents relating to or evidencing the review and/or evaluation of the responses or bids,” “communications . . . sent or received by any member of [the] Commission which mention or refer to [the attorney]” from the date of the solicitation to the date of the hiring decision, “[a]ny and all documents relating to the selection of” counsel prior to the date of the hiring decision, and “[t]he contract or agreement . . . to provide legal services.” Having received no response to either request by May 22, 2023, the Appellant initiated this appeal.

After the appeal was initiated, Metro responded to both requests. In its response to the first request for meeting recordings, Metro provided the Appellant a recording of an April Commission meeting¹ but stated no recording was made of the

¹ Although Metro identified the meeting as having occurred on April 16, 2023, the Commission’s website indicates the April meeting dates were April 13 and 26, 2023. See <https://louisvilleky.gov/government/ethics-commission/agendas-minutes> (last accessed June 1, 2023). The recording is presumably from the April 26 meeting, as this was the one the Appellant requested.

meeting on March 29, 2023.² Metro also provided the Appellant with records responsive to his second request, but withheld or redacted certain items on the basis of KRS 61.878(1)(i) and (j) and the attorney-client privilege.³

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 “immediately notify[ing]” the requester by stating the earliest date on which they will be available and giving a detailed explanation of the cause of the delay. KRS 61.872(5).

Here, Metro has not explained why it failed to issue a timely response to the first request for meeting recordings. With regard to the second request, Metro claims it “was unable to provide a response, including responsive records, until the necessary information was provided to it from [the] Commission.” But Metro did not “immediately notify” the Appellant of that explanation within five business days, or inform him of the earliest date on which the records would be available.⁴ KRS 61.872(5); KRS 61.880(1). Accordingly, Metro violated the Act by failing to respond to the Appellant’s requests in a timely manner.⁵

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.

² Metro claims this response renders the appeal moot as to the Appellant’s first request. Because Metro has not provided all the requested records, but claims some do not exist, this portion of the appeal is not moot. *See* 40 KAR 1:030 § 6. However, the issues on appeal are limited to the timeliness of Metro’s responses.

³ Because the Appellant brought this appeal solely on the basis of Metro’s failure to respond, the redactions and partial denial of the request are not ripe for review.

⁴ To the extent Metro claims it did not have access to the requested records because it is not the official custodian of the Commission’s records, *see, e.g.*, 23-ORD-134, Metro still failed to deny the request on that basis within five business days of receiving the request. *See* KRS 61.872(4) (“If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency’s public records.”).

⁵ The Appellant asks that Metro “be required” by this Office “to produce the requested documents within twenty-four (24) hours after any determination that the Act has been violated.” Under KRS 61.880(2)(a), this Office cannot grant injunctive relief, but can only “issue . . . a written decision stating whether the agency violated provisions of” the Act.

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s/ James M. Herrick
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