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23-ORD-167

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In re: Nick Clark/Louisville Metro Police Department

Summary: The Louisville Metro Police Department (“the Department”) violated the Open Records Act (“the Act”) by failing to issue timely responses to requests. The Department subverted the intent of the Act within the meaning of KRS 61.880(4) through delay and excessive extensions of time.

Open Records Decision

On September 9, 2022, Nick Clark (“Appellant”) requested “the cell phone records” of a private individual who had been the subject of a homicide investigation. On September 28, 2022, the Department¹ denied the request under KRS 61.878(1)(a) on the grounds that cell phone extraction reports contain “very personal information,” the disclosure of which “would create an unwarranted invasion of personal privacy,” and the information in the reports “is extensive and commingled with exempt information such that . . . there is a significantly increased potential for inadvertent disclosure of protected matters.”

Immediately after receiving the Department’s response, the Appellant narrowed his request to include only “the text message records” from the cell phone for a nine-hour period on a specific night. On October 6, 2022, having received no response to his amended request, the Appellant followed up with the Department. On October 11, 2022, the Department apologized for failing to monitor the request and stated it would “need to see how long it would take . . . to pull that specific information from the entire cell phone extraction, see how much data it is, and determine how long it would take . . . to review and possibly produce responsive records to the more

¹ Because the Louisville Metro Government (“Metro”) processes open records requests submitted to the Department through the “NextRequest” internet portal, responses on behalf of the Department are actually issued by another division of Metro. *See generally* 22-ORD-167.

narrowed request.” The Department promised to “send another message in the next five (5) business days regarding whether these responsive records can be produced, and how long it will take to release these records if responsive records do exist.”

Also on October 11, 2022, the Appellant asked the Department to expand the range of requested text messages from a 9-hour period to a 36-hour period. The Department did not respond. On November 10, December 4, and December 7, 2022, the Appellant asked the Department for a status report on his request. Finally, on December 7, 2022, the Department confirmed “that these records do exist [but] are not yet in a form where they can be transferred to Open Records so that they can be reviewed according to Metro policy.” The Department further stated that “[c]ell phone extraction information [is] contained in files that are quite large, so it will take some time to narrow the information in a way that is responsive [and] will take more time to review the responsive files to make sure [of] not releasing anything that would be legally exempt from public disclosure.”

On the same day, December 7, 2022, the Appellant requested “an ETA” on the fulfillment of his request. Again, the Department did not respond. On January 31, February 13, February 24, and March 13, 2023, the Appellant requested an update on the status of his request. Finally, on March 22, 2023, the Department advised the Appellant that officers were “dealing with some sort of technological issue with the cell phone extraction file where they are unable to get the file to open, which also means that they are unable to upload it to the NextRequest portal or transfer it over to Open Records.” On March 29, 2023, the Appellant asked for further information concerning the handling of his request. Having received no additional reply by June 14, 2023, the Appellant initiated this appeal.

Under the Act, a public agency has five business days to issue a response to a request for public records, either granting the request or denying it and explaining why. KRS 61.880(1). Here, the Department did not respond to the Appellant’s original request for over two weeks. The Department similarly took nine business days to respond to the Appellant’s first modified request. It then took nearly two months to respond to his second modified request. Thus, the Department violated the Act.

An agency’s time to make a final disposition of an open records request may be extended if “the public record is in active use, in storage or not otherwise available” and the agency gives “a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record will be available for inspection.” KRS 61.872(5). Here, although the Department attempted to explain why it was having difficulty retrieving the text messages, it never provided a date by which the records would be made available, despite numerous inquiries from the Appellant.

After receiving this appeal in June 2023, the Department finally revealed that in April 2023 it “determined that the 35-gigabyte file was corrupted and that no hardcopies of the requested data existed,” so no records could be retrieved. The Department acknowledges it “violated [the] Act by failing to communicate that final determination to” the Appellant.

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 Department repeatedly ignored the Appellant’s requests for status updates and for the Department’s estimation of the date when the records would be available. Finally, when it concluded no records were available, the Department failed to issue a denial of the request on that basis. These delays resulted in the Appellant appealing to this Office, only to learn—nine months after his original request—that no records exist. Thus, the Department subverted the intent of the Act within the meaning of KRS 61.880(4) by its pattern of repeated delay and by failing to issue a timely denial of the request.²

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
Attorney General

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

² Under KRS 61.878(1)(s), “[c]ommunications of a purely personal nature unrelated to any governmental function” are exempt from disclosure. Although the Department did not rely on that exception, it presumably could have denied the request for a private individual’s text messages on that basis as early as September 2022.

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Distributed to:

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