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**23-ORD-232**

August 29, 2023

In re: David Selby/City of Fox Chase

**Summary:** The City of Fox Chase (“the City”) violated the Open Records Act (“the Act”) when it failed to respond to requests for records within five business days and did not properly invoke KRS 61.872(5). The City subverted the intent of the Act within the meaning of KRS 61.880(4) when it failed to justify its delays and further delayed the fulfillment of a request by demanding a requester state whether he wanted copies when he had already done so.

***Open Records Decision***

On May 9, 2023, David Selby (“Appellant”) requested copies of the City’s emails from January 1, 2022, to May 1, 2023. In response, the City sent the Appellant 16 emails with dates between August 2022 and May 2023, which it represented to be the requested records. The City did not indicate that any emails had been withheld. Based on the small number of records provided, the Appellant concluded “that private emails were being used for the majority of city business.”

Therefore, on May 20, 2023, the Appellant requested copies of “[o]fficial [City emails] and attachments which include” eight specified email addresses between January 1, 2022, and May 20, 2023. He stated he was not “requesting any personal email information” and asked the City to “contact [him] before proceeding with this request” if “fees are estimated to exceed \$55.00.” Having received no response to this request, the Appellant mailed a duplicate request on June 5, 2023.

On June 8, 2023, the City Attorney responded to the Appellant’s May 20 and June 5 requests, stating “the City does not maintain any individual city council members['] e-mails so [he had] requested they provide that information to [him] at the next City Council meeting.” As to emails of “the City, the Mayor, and City Clerk,”

the City Attorney stated he had “requested those be forwarded to [his] office for [his] response.” He indicated that “[i]f everyone promptly replies, these items should be furnished no later than June 19, 2023.” On June 16, the City updated its response by stating that “[c]urrently the page count is 327 with two (2) council members not yet responding.” The City asked the Appellant to “advise if [he] wish[ed] copies of these emails and any others that may subsequently be tendered.”

On June 20, 2023, the Appellant sent the City a fourth request that duplicated the substance of his original request from May 9, 2023. From the record on appeal, it does not appear that the City responded to this request.

On July 19, 2023, in response to the May 20 and June 5 requests, the City advised the Appellant that all the requested emails “concerning the City of Fox Chase issues and business” were now available and consisted of 270 pages.<sup>1</sup> The City again asked the Appellant to “advise if [he] wish[ed] copies at 10 cents per page.” This appeal followed.<sup>2</sup>

After receiving a request for public records, a public agency has five business days to fulfill the request or to deny it and explain why. KRS 61.880(1). Here, the City failed to issue timely responses to the Appellant’s requests dated May 20, 2023, and June 20, 2023. Therefore, the City violated the Act.

The time under KRS 61.880(1) 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, in its initial response to the request dated June 5, 2023, the City explained that some records were not immediately available because they were not in its possession. The City said June 19, 2023, was the earliest date on which the records would be available. However, the records were not made available by that date. Instead, on June 16, 2023, the City explained that two council members had not yet responded. When an agency fails to provide records on the “earliest” date it has previously identified and fails to explain why additional delay is necessary, it violates the Act. *See, e.g.*, 21-ORD-228; 21-ORD-011. Here, the City explained that two members had failed to respond, but it did not give a new date when the records would be available.

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<sup>1</sup> Although the City did not explain how the page count decreased from 327 to 270, it is reasonable to assume this was the result of eliminating personal emails that did not concern City business and therefore were not responsive to the request. The Appellant has not alleged that the number of pages produced by the City is insufficient.

<sup>2</sup> The Appellant included with his appeal a fifth request dated July 25, 2023, which he said he mailed to the City on August 3, 2023. This request was a duplicate of the Appellant’s request dated June 20, 2023. Because the Appellant initiated this appeal on August 7, 2023, before the City’s time to respond had expired, the August 3 request is not properly before the Office and is not within the scope of this appeal.

Instead, it extended its time to respond indefinitely. Thus, the City violated the Act by failing to comply with the requirements of KRS 61.872(5).

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." A public agency has the burden of proof in an open records appeal. KRS 61.880(2)(c). As such, the agency has the burden of showing its delay in fulfilling a request is justified. *See, e.g.*, 21-ORD-045. Here, the City did not give a "detailed explanation of the cause" for taking nearly two months to obtain 270 pages of records. *See* KRS 61.872(5). In addition, the City further delayed its fulfillment of the request by asking the Appellant whether he wanted copies at the cost of \$27.00. In every request he made to the City, the Appellant specified that he wanted copies unless the cost would be more than \$55.00. When a public agency delays access to records by demanding information the requester has already provided, it subverts the intent of the Act. *See* 23-ORD-202.

The Appellant initiated this appeal because his request had not been fulfilled after more than two months. Despite having the opportunity to respond to this appeal, the City has not done so. Thus, it appears the Appellant has waited over three months without receiving the records he requested.<sup>3</sup> Accordingly, the City subverted the intent of the Act within the meaning of KRS 61.880(4) through delay and excessive extensions of time.

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

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<sup>3</sup> Under KRS 61.874(1), a public agency may require advance payment for copies. Here, however, the City did not request advance payment, but merely asked him whether he wanted the copies at the quoted rate.

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Distributed to:

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