



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

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**23-ORD-243**

September 15, 2023

In re: Jeremiah Wolfork/Louisville-Jefferson County  
Public Defender Corporation

**Summary:** The response of the Louisville–Jefferson County Public Defender Corporation (“the Public Defender”) technically was deficient under KRS 61.872(5) because it did not notify the Appellant of the earliest date on which the requested records would be available. But the Office declines to find that the Public Defender violated the Open Records Act (“the Act”) because the records the Appellant requested are all exempt under KRS 61.878(1)(p). In addition, this Office has no jurisdiction to adjudicate the Appellant’s request for records made pursuant to authority other than the Act.

***Open Records Decision***

On July 24, 2023, inmate Jeremiah Wolfork (“Appellant”) submitted two requests to the Public Defender for his counsel’s work product and his client file. The first request was submitted on a standardized Department of Corrections form. The top of the form stated it was a “request to inspect public records” and cited as authority “KRS [Chapter] 61.” The same day, the Appellant made a second request for the same records, this time citing “DPA policy 14.04” as authority for the request, and asked the Public Defender to “fulfill[ ] the request at [its] earliest convenience.”

In response to both requests, on July 27, 2023, the Public Defender acknowledged it “was informed [the Appellant is] requesting copies of certain materials relating to a case” the Public Defender had litigated. The Public Defender further stated it was “in the process of determining whether [it] possess[es] any of the materials that [the Appellant] requested.” Finally, the Public Defender stated it

would provide “all the documents [the Appellant’s attorney] indicates are needed to properly represent” him after the attorney reviews the file.<sup>1</sup> After receiving no further response from the Public Defender by August 15, 2023, the Appellant initiated this appeal.

“Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” KRS 61.880(1). Thus, the first issue to be decided is whether either of the Appellant’s requests was “made under KRS 61.870 to 61.844,” *i.e.*, under the Act. The Appellant’s first request, for which he used the Department of Corrections form, specifically cited KRS Chapter 61 as authority. The Public Defender therefore should have been aware that the first request was made under the Act.

If records responsive to a request made under the Act 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 providing a detailed explanation of the cause of the delay. KRS 61.872(5). Here, the Public Defender responded to the request within five business days and indicated it would grant the request. However, the Public Defender did not either provide responsive records within five business days or invoke KRS 61.872(5) and notify the Appellant of the earliest date on which the records would be available. Therefore, its response was deficient under KRS 61.872(5).

Ordinarily, a finding that the Public Defender’s response was deficient would be the end of the inquiry. But on appeal, the Public Defender asserts that the requested records are exempt under KRS 61.878(1)(p), which exempts from inspection “[c]lient and case files maintained by the Department of Public Advocacy or any person or entity contracting with the Department of Public Advocacy for the provision of legal representation under KRS Chapter 31.” Because the Public Defender contracts with the Department of Public Advocacy to provide legal representation to criminal defendants under KRS Chapter 31, the exemption in KRS 61.878(1)(p) applies, and the records requested by the Appellant are properly withheld under the Act. Thus, the Office declines to find that the Public Defender violated the Act under these unique circumstances.

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<sup>1</sup> The Public Defender also provided contact information for the Jefferson County Circuit Court Clerk and advised the Appellant he could obtain circuit court and district court records from the clerk.

This finding about the Appellant's first request does not dispose of the appeal as it relates to the Appellant's second request. The second request made no reference to KRS Chapter 61 generally, or to the Act specifically. Instead, it cited DPA Policy 14.04 as authority.

Although the Act is the predominant vehicle by which members of the public may obtain public records, it is not the only means of accessing a record in the possession of a public agency. In the absence of evidence to the contrary, a request to inspect records submitted to a public agency is presumably being "made under KRS 61.870 to KRS 61.884," or more specifically, under KRS 61.872(2). Therefore, a public agency receiving a request that makes no reference to *any* legal authority should assume the request is being "made under KRS 61.870 to 61.884" and that it must respond to the request within five business days. KRS 61.880(1). But when the requester specifically informs the agency his request is being made under *different* legal authority, it is reasonable for the public agency to assume the procedures specified by the requester control.<sup>2</sup>

With respect to a client's litigation file, attorneys are bound by the Rules of Professional Conduct, SCR 3.130(1.16(d)), which requires an attorney to take "steps to the extent reasonably practicable" in "surrendering papers" to the client upon the termination of representation. DPA Policy 14.04, cited by the Appellant in his request, appears to recognize this ethical rule and apparently provides the process by which a client's file can be made available to him. *Cf.* 06-ORD-263 (mentioning DPA Policy 14.04 in passing as the basis for why a former client was entitled to a copy of his file).<sup>3</sup> So here, the Appellant's second request, made under a policy of the Department of Public Advocacy, is not "made under KRS 61.870 to 61.844." Therefore, the Office lacks jurisdiction to determine whether the Public Defender's response to the Appellant's second request complied with DPA policy or the Rules of Professional Conduct.

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<sup>2</sup> However, if the requester makes specific reference to the Freedom of Information Act or "FOIA," which is the federal law equivalent to Kentucky's Open Records Act, a public agency should assume the requester intended to make the request under KRS 61.872(2). While it is true that FOIA would constitute authority "different" than the Act, and that the Office does not have jurisdiction to determine whether an agency has complied with the procedure set forth in FOIA, it is colloquially understood that a "FOIA request" is a request to inspect public records. This decision is limited to a situation where, like here, a requester makes specific reference to legal authority other than the Act that permits access to records in the possession of a public agency, but does not put the public agency on notice that the Act's procedural requirements have been invoked.

<sup>3</sup> A copy of DPA Policy 14.04 has not been provided on appeal, nor could the Office locate a copy of the policy on the Department of Public Advocacy's website.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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/ Zachary M. Zimmerer  
Zachary M. Zimmerer  
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