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23-ORD-273

October 17, 2023

In re: Julius Catlett Jr./Department of Public Advocacy

Summary: The Department of Public Advocacy (“the Department”) violated the Act when it did not respond to a request to inspect records within five business days of receiving it.

Open Records Decision

On August 18, 2023, inmate Julius Catlett Jr. (“Appellant”) submitted a request to his former Department attorney seeking a copy of the “audio and/or transcript copy of the Grand Jury hearing” from his criminal case. The Appellant submitted the request on a form promulgated by the Department of Corrections for inmates to use when submitting requests to inspect records, which states at the top, “Request to Inspect Public Records RE: KRS Ch. 61.” After receiving no response from the Department by September 19, 2023, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “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.” Moreover, “[i]f 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.” KRS 61.872(4).

On appeal, the Department admits the Appellant’s former attorney received the request at his office in Hopkinsville, but treated it as a request by a client for a copy of his case file. *See* SCR 3.130(1.16(d)) (the Kentucky Rule of Professional

Conduct governing client access to his case file); *see also* 23-ORD-243. The Department states the Appellant's attorney did not forward the request to the Department's official custodian of records, and therefore, the Department did not know the Appellant had requested to inspect any records. The Department argues it did not violate the Act, despite its failure to respond, because the records are exempt under KRS 61.878(1)(p).

In 23-ORD-243, the Office found that an agency under contract with the Department to provide legal services violated the Act when its response to a request made under KRS 61.872 failed to either grant the request or deny it and explain why, as required under KRS 61.880(1). Although the contractor's decision to treat the request as one made by a client for his case file under SCR 3.130(1.16(d)) was reasonable, the request specifically stated it was made under the Act. Nevertheless, in that case, the agency at least responded to the request within five business days, even though its response failed to fully comply with KRS 61.880(1). As such, the Office found the agency's response was "deficient." But the Office declined to find the contractor had violated the Act because its timely response indicated a willingness to work with the requester to obtain the records. Moreover, the records were exempt under KRS 61.878(1)(p). In other words, the contractor endeavored to supply the records, albeit under authority different from the Act, and *communicated* that intent to the requester in writing within five business days.

Here, in contrast to 23-ORD-243, the Department did not respond at all to the Appellant's request. Nor did the Appellant's attorney forward the request to the Department's records custodian or personally respond to the Appellant's request and provide him with the contact information for the Department's official custodian, as required under KRS 61.872(4).¹ *See, e.g.*, 12-ORD-153 (finding a violation when a public official or employee other than the agency's official custodian receives a request and fails to respond to the request with the contact information of the official custodian or otherwise forward the request directly to the official custodian). The Appellant initiated this appeal because he received no response of any kind to his request. The fact the requested records are exempt from inspection under the Act does not alleviate the Department of its duty under KRS 61.880(1) to respond within five business days to each and every request to inspect records made under the Act. *See, e.g.*, 23-ORD-096 (finding a Commonwealth's Attorney violated the Act when he

¹ However, the Department has provided proof that, on August 28, 2023, the Appellant's attorney emailed the Commonwealth's Attorney in an attempt to obtain the requested grand jury transcript on behalf of the Appellant. The Department states on appeal that, as of September 22, 2023, it still has not received the requested transcript from the Commonwealth's Attorney.

failed to respond within five business days, notwithstanding the fact the records were exempt under KRS 61.878(1)(h)). As such, the Department violated the Act when it failed to timely respond to the Appellant's request.

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
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s/ Zachary M. Zimmerer
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Distributed to:

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