



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITAL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

**22-ORD-295**

November 3, 2023

In re: Kim Whitley/Kentucky Department of Insurance

**Summary:** The Kentucky Department of Insurance’s (“the Department”) initial response to a request to inspect records violated the Open Records Act (“the Act”) because it failed to invoke KRS 61.872(5), state whether requested records were in active use, storage, or were not otherwise available, or give a detailed explanation of the cause of delay. However, the Department’s delay of 30 days in providing access to voluminous records, some of which were in storage, was not unreasonable.

***Open Records Decision***

On September 19, 2023, Kim Whitley (“Appellant”) submitted a request to the Department for copies of all “[q]uarterly dividends filed with the Kentucky Department of Insurance regarding all health insurers from 2000-2023.” In a timely response on September 26, the Department stated it was “complying” with the request. However, it had identified over 1,000 potentially responsive records and, “[b]ecause of the size of this production,” it required “an additional thirty (30) days to properly review and redact” the requested records “to ensure that all confidential information is redacted pursuant to KRS 304.2-250.” The Department did not explain how KRS 304.2-250 may apply to the requested records. The Department further stated the records would be made available on or before October 26, 2023, but claimed to “expressly reserve[ ] its right to take an additional extension if needed.”

The next day, the Appellant replied to the Department’s initial response and asked it to confirm the records would consist of “the quarterly dividends health insurers pay out to shareholders” that have “to be approved by the Commissioner” of the Department. She further asked the Department to specify what, if any, copying

fee would be charged. The Department immediately replied, informing the Appellant the records would be provided electronically, free of charge, and would contain “portions of quarterly financial statements for domestic health insurers and HMOS that reflect the amount of dividends paid to shareholders each quarter.”

On October 5, the Appellant asked the Department “to cite the statute, exemptions, and a legal basis for not providing all of the documents.” She also asked the Department to “state a date for when the documents will be released” to her. The next day, the Department replied and, for the first time, specifically cited KRS 61.872(5) as authority for its delay. It further reiterated that the records would be available on October 26, but it declined to “speculate” what exemptions would apply to the records until it had time to review them all. The Appellant then initiated this appeal, alleging the Department’s delay of 30 days to produce responsive records was unreasonable.

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). A public agency may also delay access to responsive records if they are “in active use, storage, or not otherwise available.” KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must, within five business days of receipt of the request, notify the requester of the earliest date on which the records will be available and provide a detailed explanation for the cause of the delay. *Id.*

Here, however, the Department’s initial response on September 26 did not cite KRS 61.872(5), did not notify the Appellant whether the records were in active use, storage, or were not otherwise available, and did not give a detailed explanation for the cause of delay. Rather, the Department implied the records were not otherwise available because the request implicated over 1,000 documents that it needed to review and redact. While it may be true that records are “not otherwise available,” within the meaning of KRS 61.872(5), if portions of them must be redacted to comply with confidentiality laws, the “detailed explanation” that is required must include an explanation of how those confidentiality laws actually apply to the records to be redacted. *Cf.* KRS 61.880(1) (requiring any denial, even a partial denial, to include a citation to the exception and a brief description of how it applies). As such, if the delay will, in part, be caused by the need to redact exempt information, the agency must explain how the exemptions delaying production apply to the records temporarily withheld. But here, the Department refused to “speculate” about which exemptions

may be applicable, and failed to explain how the only exemption it cited, KRS 304.2-250, might apply.

Moreover, the Department's initial response also claimed to "reserve[ ] its right to take an additional extension if necessary." But the Act does not grant agencies a "right" to "take an additional extension." KRS 61.872(5) requires the agency to state the earliest date on which the records will be available. The Office has previously found an agency violates the Act when it fails to produce records by the date on which it initially commits to produce records when invoking KRS 61.872(5). *See, e.g.*, 21-ORD-011. Thus, the Department's initial response failed to properly invoke KRS 61.872(5) and abide by its requirements.

Although the Department's initial response attempted to hedge against its duty to notify the Appellant of the earliest date on which records would be available, it nevertheless produced the requested records on October 26.<sup>1</sup> Thus, the only issue remaining on appeal is whether the Department's delay of 30 days was reasonable.

Under KRS 61.880(4), a person who feels the intent of the Act has been subverted, short of denial, may seek the Attorney General's review. Such violations include "delay past the five (5) day period described in [KRS 61.880(1) and] excessive extensions of time." *Id.* Given that a public agency may delay access to records beyond five business days if it provides the requester the earliest date on which records will be available and a detailed explanation for the cause of delay, KRS 61.872(5), this Office has recognized that the length of delay is a question of reasonableness in light of the request at issue and the agency's explanations. *See, e.g.*, 22-ORD-176. In determining whether a delay is reasonable, this Office has previously considered the number, location, and content of the records. *See, e.g.*, 01-ORD-140; OAG 92-117. In this analysis, the content of the records may be relevant if the records contain both exempt and nonexempt information because the law governing the confidentiality of the records is also an important factor. *Id.* Some laws require confidentiality, and can carry consequences for public agencies that fail to adhere to strict confidentiality. Others do not. *Compare* 20 U.S.C. § 1232g (tying continued federal funding to confidentiality compliance) *with* KRS 61.878(1)(a) (exempting personally private information from inspection, but imposing no consequences for the failure to protect that information).<sup>2</sup> Weighing these factors is a fact-intensive inquiry. Some delays

---

<sup>1</sup> However, the Appellant has had difficulty opening the electronic file the Department sent to her. The Department has since mailed the responsive records to her on a CD.

<sup>2</sup> Consider also the attorney-client privilege, KRE 503, which is incorporated into the Act by KRS 61.878(1)(l). Although there may be no loss of federal funding because of an inadvertent

are warranted. *See, e.g.*, 12-ORD-097 (finding a six-month delay to review over 22,000 emails to be reasonable). Some delays are not. *See, e.g.*, 01-ORD-140 (finding a two-week delay to produce three documents to be unreasonable). At all times, however, a public agency must substantiate the need for any delay and that it is acting in good faith. *See* KRS 61.880(2)(c) (placing the burden on the public agency to substantiate its actions).

On appeal, the Department argues its delay was reasonable because the request implicated “approximately 1,000 responsive files” and it later determined that responsive records from 2000 to 2005 were in storage with the Kentucky Department for Library and Archives.<sup>3</sup> The Department also claims it was required to redact from the files information that is exempt under KRS 304.2-250(3) and KRS 304.2-270. Moreover, for the first time, the Department now claims KRS 61.878(1)(c)1. also applies to some of the records withheld. Because the request implicated nearly 1,000 records, some of which were in storage, and each were required to be reviewed for confidential business information that may be prohibited to disclose under the cited exemptions, the Office does not find the Department’s delay of 30 days to be unreasonable.<sup>4</sup>

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](mailto:OAGAppeals@ky.gov).

---

disclosure of privileged material, such disclosure could result in tremendous disadvantage to a public agency engaged in litigation.

<sup>3</sup> Ultimately, the Department produced 938 files in PDF format.

<sup>4</sup> In reaching this determination, the Office expresses no opinion as to whether the claimed exemptions actually apply to the information the Department has withheld. Indeed, at no point during this appeal has the Department actually explained how any of the claimed exemptions apply. As such, the Department has fallen woefully short of its burden under KRS 61.880(2)(c). But the Office also recognizes that these records could indeed potentially contain confidential business information. The Office declines to hold that the records are subject to inspection simply because of the Department’s disregard of its responsibility under the Act. Such a result could harm the insurers who have had no role in the Department’s failure to comply with the Act’s requirements. The only issue presently before the Office is whether a delay of 30 days was reasonable, and under the totality of the circumstances, the Office finds that it was. The Appellant is free to challenge the Department’s claimed exemptions after she is able to actually review the records, which likely will not be in her possession until shortly before this decision is rendered.

**Daniel Cameron**  
**Attorney General**

s/ Marc Manley  
Marc Manley  
Assistant Attorney General

#445

Distributed to:

Kim Whitley  
John N. Evans