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23-ORD-313

November 27, 2023

In re: Ben J. Wyatt/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) subverted the intent of the Open Records Act (“the Act”) when it invoked KRS 61.872(5) but did not explain why it was necessary to delay access to requested records by more than a month, and then subsequently failed to make the records available on the earliest date by which it said the records would be made available.

Open Records Decision

On April 10, 2023, inmate Ben Wyatt (“Appellant”) submitted a request to KSP for copies of all records in its possession related to the incident resulting in his arrest. On April 20, 2023, KSP issued a response indicating it would comply with his request, but it invoked KRS 61.872(5) because it needed “additional time” to “review the voluminous investigative file” containing “44 files; [sic] 9 folders” and to “perform the necessary redactions pursuant to KRS 61.878(1) and (4).”¹ KSP stated it “anticipate[d] being able to complete this review and redaction process on or before May 23, 2023.” On October 23, 2023, having received no further communication from KSP, the Appellant initiated this appeal.

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 also

¹ It is not clear whether the responsive records included 44 total files stored in 9 different folders, or if the responsive records included 44 files plus 9 additional folders.

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. However, “[i]f a 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)] . . . the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.” KRS 61.880(4).

When the Office determines how much delay is reasonable, it considers the number of records, the location of the records, and the content of the records. *See e.g.*, 21-ORD-045; 01-ORD-140; OAG 92-117. Analyzing these factors is a fact-intensive endeavor. For example, the Office has found that a four-month delay to provide 5,000 emails for inspection was not reasonable under the facts presented. *See, e.g.*, 21-ORD-045. The Office has previously found that when a public agency delays access to public records beyond five business days, without providing the detailed explanation required under KRS 61.872(5), it subverts the intent of the Act within the meaning of KRS 61.880(4). *See, e.g.*, 22-ORD-133; 22-ORD-002; 21-ORD-099.

Here, the Appellant submitted a request on April 10, 2023, and KSP received it on April 13, 2023. As such, KSP’s April 20, 2023, response was timely. However, KSP invoked KRS 61.872(5) to delay access to the responsive records until May 23, 2023. KSP did not state whether the records were in active use or storage. Rather, it stated only that it needed additional time to review the “voluminous” records and redact them, presumably meaning the records were “not otherwise available” until that process was complete. But KSP did not explain what material it anticipated needing to redact. While KSP stated the request involved “44 files; [sic] 9 folders,” it is not clear from KSP’s initial response or the record on appeal how voluminous the responsive records are. A “file” could be one page or hundreds. Likewise, an audio or video file could be a few minutes long or several hours. Nor is it readily apparent what exempt information needed to be separated from the responsive records, other than perhaps addresses and phone numbers that are routinely redacted under KRS 61.878(1)(a). *See Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013) (allowing the “categorical” redaction of Social Security Numbers, addresses, phone numbers, and driver’s license numbers from police records under KRS 61.878(1)(a)). It may be that the content of the responsive records is indeed voluminous, despite the relatively small number of “files” or “folders,” such that a one-month delay was reasonable. But KSP carries the burden of sustaining its actions, KRS 61.880(2)(c), and the lack of detail in its initial response or on appeal does not demonstrate that its delay was reasonable.

Moreover, even if KSP's initial delay of one month could have been justified, its actual delay in providing the responsive records was much longer. KSP did not provide the responsive records until November 6, 2023, more than six months after they were requested and after this appeal was initiated.² The Office has found that a public agency does not comply with KRS 61.872(5) when it notifies the requester of the earliest date on which requested records would be available and then misses its self-imposed deadline without explaining why additional delay is necessary. *See, e.g.*, 23-ORD-079; 21-ORD-011. Accordingly, even if KSP's delay of one month was reasonable notwithstanding its deficient explanation, it has certainly failed to explain why a delay of more than six months was necessary. Accordingly, KSP subverted the intent of the Act, within the meaning of KRS 61.880(4), when it delayed access to records beyond the period established under KRS 61.880(1).

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.

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s/ Matthew Ray
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² KSP asked the Office to find the appeal moot under 40 KAR 1:030 § 6 because it had provided the records. However, KSP also admitted that redactions were made to the records, meaning it did not provide all responsive records. *See, e.g.*, 20-ORD-078; 12-ORD-046 (providing redacted copies of requested records does not moot an appeal). The Appellant has not disputed the redactions KSP has made, and therefore, it is unnecessary to address them here. Regardless, the Appellant initiated this appeal alleging KSP's delay violated the Act, which the Office construes as a claim of subversion under KRS 61.880(4). As such, the appeal is not moot.

Ben J. Wyatt #213524

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