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**23-ORD-320**

December 5, 2023

In re: Courtney Graham/Kentucky Board of Cosmetology

**Summary:** The Kentucky Board of Cosmetology (“the Board”) failed to give a detailed explanation of the cause for delay when it cited KRS 61.872(5) in responding to a request for records. However, the Board did not subvert the intent of the Open Records Act (“the Act”) within the meaning of KRS 61.880(4) when it established on appeal that the additional delay in producing records was warranted.

***Open Records Decision***

On October 10, 2023, attorney Courtney Graham (“Appellant”) requested copies of five categories of records in connection with her representation of a client whose license the Board had revoked. First, the Appellant requested “the meeting video, agenda, all meeting materials provided to Board members, and the Board Meeting minutes” for all Board meetings from January 2021 through October 2023. Second, she requested the “file, including all evidence regardless of form, compiled for purposes of [the] grand jury testimony” of a Board inspector against her client. Third, the Appellant requested the “Chain of Custody” logs or forms for a computer, a cell phone, and records taken from her client’s premises on March 3, 2022. Fourth, she requested all emails, attachments, letters, and text messages (on Board-issued cell phones) sent or received by any of four named individuals between January 1, 2021, and October 10, 2023, containing any of five key words. Finally, the Appellant requested all emails, attachments, letters, and text messages (on Board-issued cell phones) sent or received by any of the same individuals between January 1, 2018, and October 10, 2023, containing the words “Ethics Commission.”

On the fifth business day after receiving the Appellant’s request, the Board stated it was “conducting a thorough search for documents” but had not completed that search. Citing KRS 61.872(5), the Board asserted that, “[d]ue to the volume of

documents requested, current staff workload, and the need to review those documents for possible exempted information,” it needed additional time and “anticipate[d] responding . . . no later than November 30.” The Appellant replied and stated she understood that a search for emails might require additional time, but asked whether the Board could produce the other records “in the short term.” The Board responded that it could not. This appeal followed.

Under KRS 61.880(1), a public agency must decide within five business days whether to grant a request or deny it. This time may be extended under KRS 61.872(5) when records are “in active use, in storage or not otherwise available” if the agency gives “a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record will be available for inspection.” In light of this provision, the Attorney General has recognized that persons requesting large volumes of records should “expect reasonable delays in records production.” 12-ORD-228. However, a vague statement about the “volume” of a request is not a “detailed explanation” under KRS 61.872(5). *See, e.g.*, 22-ORD-164; 17-ORD-194. Furthermore, concerns regarding staff workload are an insufficient justification for delay. *See, e.g.*, 22-ORD-167. A public agency must “make proper provision for the uninterrupted processing of open records requests” by having “an individual available to timely process” those requests. 04-ORD-088. Thus, the cursory statement contained in the Board’s initial response failed to provide the “detailed explanation” required by KRS 61.872(5).<sup>1</sup>

Under KRS 61.880(4), a person who “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), may appeal to the Attorney General as if the record had been denied. Here, the Appellant claims the Board has subverted the intent of the Act by unreasonable delay in producing records.

On appeal, however, the Board provides more detail about the scope of records implicated by the Appellant’s request. In particular, during the time period of the request, the materials reviewed by the Board at its meetings include “1,337 cases involving applications for licensure, disciplinary cases, or requests for reconsideration.” In disciplinary cases, which constitute the majority of the matters before the Board, each record “includes, on average, six documents and 25 photographs/videos,” for a total of approximately “8,022 separate documents and 33,425 photographs/videos.” Documents pertaining to other matters reviewed at Board meetings include “financial statements; regulation drafts; proposed legislation; and documents and material provided by those requesting to address the Board in varied topics.” Furthermore, the Board’s files “frequently include personal

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<sup>1</sup> While the Board claims it could not have estimated the number of responsive records within the five-day response period under KRS 61.880(1), it could have given more substantive explanation of the types of records contributing to the extensive volume and the nature of the information to be redacted.

information, such as contact information for complainants, for licensees, and photographs of drivers' licenses," which might be subject to redaction. Furthermore, the Board explains it has recently made a "transition to a new database/licensing management system," so that responsive records are partially contained in the old database and partially contained in the new one, along with "some in a network drive; some in a cloud-based system; and some are in active use."

Under KRS 61.880(1), the Board's response to the Appellant's request was due on October 17, 2023. The Board's commitment to produce the responsive records on November 30, 2023, results in a delay of only 29 business days. In determining whether a delay is reasonable, the Office considers such factors as "the number of the records, the location of the records, and the content of the records," including whether they contain both exempt and nonexempt information. 21-ORD-045. Here, not only has the Appellant admitted a delay may be necessary to obtain the requested emails, but the Board has now substantiated that other portions of the request are quite voluminous and scattered, the records are likely to require redaction, and it is working in good faith to fulfill the request. In view of the totality of the circumstances, the Board did not subvert the intent of the Act within the meaning of KRS 61.880(4) when it delayed the production of records until November 30, 2023.<sup>2</sup>

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>2</sup> Although the Board points out it is simultaneously attempting to process another voluminous request for records with minimal staff, staffing issues and the "volume of unrelated requests" do not justify a delay in producing records. 22-ORD-134. However, the Board has otherwise substantiated its need for additional delay in this case.

Distributed to:

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