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23-ORD-329

December 13, 2023

In re: Mikayla D. Ford/Board of Cosmetology

Summary: The Board of Cosmetology ("the Board") subverted the Open Records Act ("the Act") within the meaning of KRS 61.880(4) when it failed to adequately explain why a delay of 55 days is necessary to provide responsive records.

Open Records Decision

On October 20, 2023, Mikayla D. Ford ("Appellant") submitted a request to the Board seeking: (1) a copy of her complete licensing file; (2) copies of any complaints against her that were submitted to the Board in 2021; (3) a copy of the Governor's executive order appointing a specific Board member; (4) a copy of the Executive Director's licensing file; (5) copies of any emails sent or received by six individuals between January 1, 2021, and the present that contained the Appellant's name, the names of either of two businesses, or a specific regulation; and (6) any transcripts of meetings "or documents" generated between January 1, 2021, and the present that mention the Appellant or "Eyelash artistry/programs."

On October 31, 2023, the Board responded and invoked KRS 61.872(5) "[d]ue to the current workload of staff, the number of documents implicated in [the] request and the need to review those documents for possible exempted information." The Board stated it needed "additional time to compile a full response" and it "anticipated responding" to the Appellant's request "no later than December 18." The Appellant initiated this appeal on November 9, 2023, claiming the Board subverted the intent of the Act within the meaning of KRS 61.880(4) when it failed to explain why it needed 55 days to provide the records.

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." KRS 61.880(1) (emphasis added). Thus, when an agency receives a request to inspect records, the Act requires it to complete a search for responsive records within five business days so it can "determine" whether to grant or deny the request. After conducting its search, if the agency determines that any responsive records are "in active use, storage, or not otherwise available," it may delay access to them. KRS 61.872(5). However, 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.*

If a requester, like the Appellant here, believes the agency's delay is unreasonable, he or she may seek the Attorney General's review by alleging the agency subverted the intent of the Act "past the five (5) day period described in" KRS 61.880(1). *See* KRS 61.880(4). In determining how much delay is reasonable, the Office has considered the number of records, the location of the records, and the content of the records. *See e.g.,* 22-ORD-176; 01-ORD-140; OAG 92-117. Weighing these factors is a fact-intensive analysis. For example, this 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. However, the Office has found that a six-month delay was reasonable to review 22,000 emails for nonexempt information. *See, e.g.*, 12-ORD-197. Ultimately, the agency carries the burden of proof to sustain its actions. KRS 61.880(2)(c).

Here, the Board received the Appellant's request on October 24, 2023, and issued a timely response on October 31, 2023. However, the Board's response did not notify the Appellant of its determination whether to grant or deny the request. While the Board invoked KRS 61.872(5), it did not state the *records* would be available on December 18, but that it intended to "compile a full response" to the Appellant's request by then because it had not yet completed its search. The Board's response also did not quantify or estimate the number of records involved or state whether they were "in active use, storage, or not otherwise available." Accordingly, the Board's response failed to provide a detailed explanation of the cause of delay because it merely asserted it needed until December 18 to complete its search and prepare "a full response."

Nor has the Board carried its burden on appeal that a delay of 55 days is reasonable. The Board explains the delay is necessary because its five "employees have a great deal of work to do that is not related to open records requests" and it is "transition[ing] to a new database/licensing management system" that has raised various issues while transferring "40,000 licensees" to the new system. However, *every* public agency is tasked with various, often numerous, responsibilities, and yet, they still must comply with the Act. An agency may only invoke KRS 61.872(5) when the *records* are "in active use, storage, or not otherwise available," not merely because its employees are too busy with their other responsibilities to comply with the Act.

Similarly, the fact an agency is too busy fulfilling *other* requests made under the Act also is no basis to invoke KRS 61.872(5). *See, e.g.*, 22-ORD-167; 19-ORD-188 n.1. Here, much of the Board's justification in delaying access to the requested records is the burden *other* requests to inspect records have placed on it. While the Board has quantified the number of records responsive to those other requests and states those other records may need to be redacted, it has not estimated the number of records *this* request implicates or explain why it needs 55 days to respond to *this* request.

The only explanation the Board proffers in support of its 55-day delay in providing the records is that they are "contained in different formats: hardcopy; electronic; some in [its] previous database; some in a network drive; some in a cloud-based system; and some are in active use." Thus, the Board has explained that the records are stored in various places. Even so, it appears the records are all stored electronically, not scattered in multiple physical locations that might necessitate time and travel to retrieve. Having failed to quantify or estimate the number of records implicated by the Appellant's request, or explain what material contained in those records may be exempt and require separation, the Board has failed to carry its burden of establishing that a 55-day delay is reasonable.[1] As a result, the Board subverted the intent of the Act within the meaning of KRS 61.880(4).

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

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[1] Indeed, aside from some personal information that may need to be redacted from the Executive Director's licensing file, emails containing preliminary opinions or discussions with Board counsel regarding legal services that might be subject to the attorney-client privilege, or records involving active complaints that may be subject to KRS 61.878(1)(h), it is not readily apparent how any of the other requested records are exempt. The Board has not explained what exemptions the records may implicate. Thus, it is not clear how much time the Board would actually require to separate nonexempt information from exempt information.

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/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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