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**23-ORD-348**

December 28, 2023

In re: John Cheves/Department of Corrections

**Summary:** The Department of Corrections (“the Department”) subverted the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when it sought extensive extensions of time to produce responsive records.

***Open Records Decision***

On October 19, 2023, John Cheves (“the Appellant”) submitted a request to the Department for copies of all “[r]eports submitted from July 1, 2022, to the present date following the investigations of Department of Corrections employees, by investigators with the [Department’s] institutional Internal Affairs; the Division of Probation and Parole; or the Justice and Public Safety Cabinet’s Division of Employee Management.”

In a timely response, the Department notified the Appellant it was granting his request, but it invoked KRS 61.872(5) to delay production of the requested records because the records were “not otherwise available.” The Department explained that the reports related to internal affairs investigations at each of its 13 correctional facilities were stored at those facilities and at the Division of Probation and Parole and the Justice and Public Safety Cabinet. The Department further explained that, when it obtained responsive records from these locations, it would have to review each of them for personal information exempt under KRS 61.878(1)(a) and information that could pose a security risk if released. *See* KRS 197.025(1). The Department stated it “anticipate[d] being able to send a final response to [the Appellant] on or before November 30, 2023.” However, the Department did not provide responsive records by that date. Rather, it issued a “supplemental response” notifying the Appellant it had located 900 pages of records that would need to be reviewed for personal information and information that could pose a security risk if

released. It therefore sought an additional extension of time to produce the records to and including December 21, 2023. The Appellant then initiated this appeal, claiming the Department's delay is unreasonable and subverts the intent of the Act.

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). 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 person believes an agency is "subverting the intent" of the Act by engaging in unreasonable delay or "excessive extensions of time," he or she may seek the Attorney General's review as if the request had been denied. KRS 61.880(4).

The Office has previously held that the requirement under KRS 61.872(5) for an agency to notify the requester of the "earliest date" records will be available means what it says. *See, e.g.,* 21-ORD-011; 07-ORD-047. Accordingly, when an agency misses its own deadline for providing responsive records, it subverts the intent of the Act. *Id.* Moreover, there were 26 business days between October 20, 2023, when the Department received the request, and the "earliest date" it said the records would be available, November 30, 2023. While it may be true that the records were stored in several locations throughout the Commonwealth, it is not clear why it would take more than 26 business days to gather and review 900 pages of records. Even if it took the Department six business days to ask its correctional facilities to search for and provide responsive records to it, the Department could have achieved its deadline in the next 20 business days by reviewing approximately 45 pages per day, or 6 pages per hour, which is certainly not an insurmountable task. Yet the Department claimed it needed an additional three weeks to comply with the Appellant's request. Thus, even if the Department's original delay of 26 business days was reasonable, its request for an additional three weeks amounted to excessive extensions of time under KRS 61.880(4). Accordingly, it subverted the intent of the Act.

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](mailto:OAGAppeals@ky.gov).

**Daniel Cameron**  
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s/ Marc Manley  
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