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24-ORD-020

January 25, 2024

In re: Laura O'Brien/Boone County School District

Summary: The Boone County School District (“the District”) violated the Open Records Act (“the Act”) when it failed to notify the requester whether it was complying within the five-day period after receiving the request, as required by KRS 61.880(1), and when it did not properly invoke KRS 61.872(5) to delay access to the records.

Open Records Decision

On December 15, 2023, Laura O'Brien (“Appellant”) submitted a request to the District for records related to the Superintendent. The District responded the same day, stating it had received the request and, “[p]ursuant to KRS 61.872(5), if [the District is] unable to respond to [the] request within five (5) days, because the records [the Appellant] request[ed] must be compiled [the District] will advise.” On December 29, 2023, having received no further response from the District, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) days, excepting Saturdays, Sundays, and legal holidays, 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.” Here, the District received the Appellant’s request on December 15, 2023, the same day she submitted it. However, the only response it provided was to inform the Appellant the request had been received and, *if* it was unable to compile records in five days, *then* it would advise the Appellant of that fact. However, the District neither compiled the records within five days nor advised the Appellant that additional delay in processing her request was necessary.

On appeal, the District claims it complied with the Act by responding to the Appellant’s request within five business days of receipt. However, an agency’s

response under KRS 61.880(1) must notify the requester whether it will grant or deny the request, not simply acknowledge receipt of the request. The District further argues it was closed for its winter break from December 20, 2023, to January 2, 2024, and therefore, it was not operating on “regular office hours” during that time.¹ In essence, the District argues its “winter break” tolls the five-day period under KRS 61.880(1) to notify the Appellant whether it will grant or deny the request. However, the District confuses the requirement to notify a requester whether it will comply with a request under KRS 61.880(1), with its option to delay access to records that are “not otherwise available” under KRS 61.872(5). To be sure, a public agency may delay access to responsive records if they are “in active use, storage, or not otherwise available.” KRS 61.872(5). However, a public agency that invokes KRS 61.872(5) to delay access to responsive records must also 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. Further, the agency must properly invoke KRS 61.872(5) within the five-day period under KRS 61.880(1). That five-day period only excludes “Saturdays, Sundays, and *legal holidays*,” and it only excludes those dates from the period “*after the receipt*” of the request. KRS 61.880(1) (emphasis added).

KRS 2.110 establishes the Commonwealth’s “legal holidays.” *See Wilkins v. Ky. Ret. Sys. Bd. of Trustees*, 276 S.W.3d 812, 813–14 (Ky. 2009). Additionally, “[s]tate offices shall be closed and state employees *shall be given a holiday*” on certain dates established under KRS 18A.190 (emphasis added). Further, while KRS 158.070 allows a local board of education to establish the school calendar for its district, and the school district’s calendar applies to public school personnel within the district, KRS 158.070 itself does not specifically enumerate or require any particular holidays, other than the holiday for Martin Luther King Jr.’s birthday. *See* KRS 158.070(5)(c); *see also* KRS 158.070(3)(d). The Office has previously concluded that a school district’s closure for its “spring break” is not a “legal holiday” under KRS 2.110, KRS 18A.190, or KRS 158.070. *See, e.g.*, 01-ORD-94. There is no reason to conclude otherwise with respect to a school district’s “winter break.” *See, e.g.*, 23-ORD-013 (holding a public university’s winter break did not cause the requested records to be “unavailable”). However, in some cases, a closure of the school district’s offices could justify a claim

¹ The District also claims that, under KRS 61.872(3)(a), the Appellant only has the right to inspect the records during “regular office hours” and not during the District’s winter break when its office was closed. However, the Appellant exercised her right to inspect records by mail under KRS 61.872(3)(b), and she never asked to inspect the District’s records in-person at its offices. Thus, the District’s reliance on KRS 61.872(3)(a) is misplaced. It is KRS 61.880(1) that controls the deadline by which the District must notify the Appellant whether it is granting or denying her request, not the Appellant’s chosen method of inspection under KRS 61.872(3).

that the requested records are “not otherwise available,” within the meaning of KRS 61.872(5), if school personnel cannot physically access the records. Indeed, here, the District claims the responsive records were physically stored in the Superintendent’s office, which, like with the rest of the District’s main office, was locked during its winter break. While this fact may have supported the District’s invocation of KRS 61.872(5), the District nevertheless violated the Act by failing to explain to the Appellant that the requested records were not available because they were locked away in the Superintendent’s office during the District’s winter break.²

On appeal, the Appellant admits she would have been satisfied with the delay in access to records if the District had explained prior to its closure that it was about to begin winter break and that the records would not be available during that period.³ But the District’s response gave no explanation at all for the cause of its delay and simply left the Appellant wondering whether she would receive a response to her request. Accordingly, the District’s response violated the Act when it neither granted nor denied the Appellant’s request within the five-day period under KRS 61.880(1), nor otherwise properly invoked KRS 61.872(5) to delay access to the records.

In sum, and to clarify the duties of school districts across the Commonwealth when requests to inspect records are received near or during breaks in the school year, a school district’s winter break does not alleviate it of its duties under the Act. A school district’s winter break also is not a “legal holiday” within the meaning of KRS 61.880(1). But a school district that receives a request shortly before a scheduled break may delay access to the records until after the break has concluded under KRS 61.872(5), *if* the requested records will not be available while its offices are closed.⁴ If a school district chooses to invoke KRS 61.872(5), then it must comply with

² Additionally, if its offices are lawfully and actually closed, then the District cannot “receive” a request submitted *during* the closure. This is true even in the context of requests that have been submitted by email. The Office routinely calculates the date of receipt according to the agency’s ordinary business hours, and a request emailed after ordinary business hours is treated as being received the following business day. *See, e.g.*, 21-ORD-113; 19-ORD-073. But here, the District admits it received the Appellant’s request before it was closed for its winter break.

³ Indeed, the District promptly made the requested records available to the Appellant on January 4, 2024, after the appeal was initiated. However, the Appellant still argues the District’s response failed to comply with the Act and that it improperly delayed access to records beyond the five-day period under KRS 61.880(1). *See* KRS 61.880(4) (“If a person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to . . . the imposition of 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.”).

⁴ In other words, whether classes are in session is not dispositive of a school district’s responsibilities under the Act. Even during a district’s summer break from June to August of each year, the district’s

all of that statute's provisions, including the requirements to provide a detailed explanation for the cause of delay and notice of the earliest date on which the records will be available.

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.

Russell Coleman
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/s/ Matthew Ray
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Distributed to:

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administrative work continues, its public records are available to its records custodian, and it must respond timely to requests made under the Act. But here, the District has represented that its offices were physically locked and its staff were not working during this particular break. Under these particular facts, the records were "not otherwise available" during this break.