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24-ORD-022

January 25, 2024

In re: Kevin Zipperle/University of Louisville Athletics Association

Summary: The University of Louisville Athletics Association (“the Association”) did not violate the Open Records Act (“the Act”) when it could not provide records that do not exist. The Association subverted the intent of the Act, within the meaning of KRS 61.880(4), when it delayed a final response to a request beyond five business days, did not properly invoke KRS 61.872(5), and failed to dispense with the request on the date by which it had committed to respond.

Open Records Decision

On October 11, 2023, Kevin Zipperle (“Appellant”) requested “a copy of the [Association’s] monthly financial analysis for the month ending 9-30-2023.” In response, the Association provided a quarterly budget update, which it indicated was the only responsive record. After further inquiry from the Appellant, the Association explained it had changed its reporting procedures under the tenure of the new Chief Financial Officer. As a result of this change, it no longer records the information with “[t]he level of detail as provided in previously [sic] monthly financial reports.”

On December 13, 2023, the Appellant submitted a new request for “unaudited copies [of] Statements of Revenues, Expenses and Changes in Net Position” as of September 30, 2023, and a “Statement of Net Position” as of September 30, 2023, which he claimed is “commonly referred to as a balance sheet.” On December 15, 2023, the Association acknowledged receipt of the request and stated the University of Louisville was “closed for the holiday break from” December 16, 2023, to January 2, 2024, and it “expect[ed] to have a response to this request by Friday, January 5, 2024.” The Appellant initiated this appeal on January 5, 2024, complaining that he had not yet received a response to his second request.

With regard to the first request, the Appellant claims the Association has not answered his question as to whether it still generates monthly financial analysis reports. On appeal, the Association asserts it has made clear that it no longer does

so, and therefore, no such report for September 2023 exists. Once a public agency states affirmatively that it does not possess any additional records, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant claims the Association ought to be generating records with the same amount of detail that was contained in its former monthly financial analysis reports. However, the mere assertion that a record should exist is not sufficient to establish a *prima facie* case that it does exist. *See, e.g.*, 23-ORD-042. Therefore, the Association did not violate the Act when it could not provide a record that does not exist.

On January 10, 2024, the Association responded to the Appellant’s second request by stating that “[t]hese records do not exist for the time period requested.” On appeal, the Association explains that “[t]he requested spreadsheets were part of the Monthly Financial Analysis report” that it no longer generates. The Appellant states he “believe[s]” the Association still creates these documents, but offers no evidence that it does. Therefore, the Appellant has not presented a *prima facie* case that such records exist.

However, the Appellant is correct that the Association failed to issue a timely response to the request. Under KRS 61.880(1), a public agency has five days, “excepting Saturdays, Sundays, and legal holidays,” to fulfill or deny a request for public records. This period may be extended if the records are “in active use, in storage or not otherwise available,” but the agency must give “a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection.” KRS 61.872(5). Here, the Association received the request on December 13, 2023, and did not claim any records were in active use, in storage, or otherwise unavailable. Instead, it stated it would respond after the University of Louisville’s “holiday break.” But school vacations are not “legal holidays” under KRS 61.880(1), and therefore, do not toll a public agency’s response time under the Act. *See, e.g.*, 24-ORD-020; 23-ORD-013; 01-ORD-94. Thus, the Association was required to respond to the request by December 20, 2023.

Under KRS 61.880(4), a person may petition the Attorney General to review an agency’s action if the “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) or] excessive extensions of time.” Here, the Association did not issue a final response to the request within five business days. Further, although the Association stated it would respond by January 5, 2024, it did not dispense with the Appellant’s request by that date, instead further extending its response time until January 10, 2024. Thus, the Association subverted the intent of the Act by delay and excessive extensions of time, within the meaning of KRS 61.880(4), when it failed to issue a timely response, did not properly invoke

KRS 61.872(5), and repeatedly extended its time to respond to the Appellant's request.

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.

Russell Coleman
Attorney General

/s/ James M. Herrick
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Assistant Attorney General

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Distributed to:

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