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24-ORD-094

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In re: Stephen Sherman/Kentucky Department of Revenue

Summary: The Kentucky Department of Revenue (“Department”) violated the Open Records Act (“the Act”) when it denied a request to inspect records without citing an exception and explaining how it applied to the records withheld. The Department also violated the Act when it failed to properly invoke KRS 61.872(5) to delay access to records. The Department’s belated reliance invoking the “homeland security” exception is improper because it failed to comply with KRS 61.878(1)(m)3.

Open Records Decision

On February 9, 2024, Stephen Sherman (“Appellant”) submitted a request to the Department for “Final and draft versions of the manuals, handouts, presentations or other materials used to train [Department] staff regarding the Kentucky fuels tax from 2020 through 2024.” On February 16, 2024, the Department responded to the Appellant’s request by citing KRS 61.872(5), stating that it “will require additional time to review and redact or withhold any documents that are exempt from disclosure,” and advising the Appellant that a response would be issued on or before March 1, 2024. On February 26, 2024, the Department stated that it had produced all responsive records but was withholding a single document “because it is training on internal processes, which are not released to the public.” This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). Or, if the responsive records are “in active use, storage, or not otherwise available,” a public agency may delay access to them by stating the earliest date on which they will be available and giving a detailed explanation of the cause of the delay. KRS 61.872(5). Here, although the Department responded to the request, it neither granted nor denied the request within five business days. Instead, it stated

that the requested records “are still in the process of being compiled” and the Department needed “additional time to review and redact or withhold any documents that are exempt from disclosure.” The Department did not assert that the records were in “active use, storage, or not otherwise available.” Accordingly, the Department’s initial response did not comply with KRS 61.872(5).

Further, “[a]n agency response denying, in whole or in part, inspection of any records shall include a statement of *the specific exemption* authorizing the withholding of the record and *a brief explanation of how the exception applies to the record withheld.*” KRS 61.880(1) (emphasis added). Here, the Department’s final response, issued on February 26, 2024, did not cite *any* exception to the Act or explain how it applied. Rather, it simply stated, “A single document has been withheld because it is training on internal processes, which are not released to the public.” As such, the Department violated the Act because its final response failed to comply with KRS 61.880(1).

On appeal, for the first time, the Department asserts the record was properly withheld under what has been referred to as the “homeland security exemption,” or KRS 61.878(1)(m)1., which exempts “[p]ublic records the disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act.” The Department asserts that the record details “procedures Department employees use to input confidential tax information in the Department’s data systems.”

However, “the same day that a public agency denies a request to inspect a public record for a reason identified in [KRS 61.878(1)(m)], that public agency *shall* forward a copy of the written denial of the request, referred to in KRS 61.880(1), to the executive director of the Kentucky Office of Homeland Security and the Attorney General.” KRS 61.878(1)(m)3. (emphasis added). As discussed, the Department’s final response under KRS 61.880(1), which was issued on February 26, 2024, did not cite KRS 61.878(1)(m) as an exception. But more importantly, the Department has provided no proof that it sent a copy of its February 26 response to either the Attorney General or the executive director of the Kentucky Office of Homeland Security on the same day it was issued to the Appellant.¹ Rather, the Department’s first attempt to invoke KRS 61.878(1)(m) was made on appeal, after the Appellant challenged the Department’s wholly inadequate response.

¹ The Office notes that, although it has received two such letters this year from two other agencies, it has no record of the Department having sent a copy of a denial based on KRS 61.878(1)(m).

Apart from the Department's failure to comply with KRS 61.878(1)(m)3., its response on appeal also is insufficient to invoke KRS 61.878(1)(m). The Office has found that public agencies carry a heavy burden to explain how the exception applies. *See, e.g.*, 09-ORD-100 (finding that an agency failed to carry its burden that the designs of a 300-foot radio antenna were exempt under KRS 61.878(1)(m)). That is because, by its express terms, KRS 61.878(1)(m) is a narrow exception. It applies only to a potential "terrorist act," defined as "a criminal act intended to" "[i]ntimidate or coerce a public agency or all or part of the civilian population," "[d]isrupt a system identified in [KRS 61.878(1)(m)1.f.]," or "[c]ause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency." KRS 61.878(1)(m)2. The Office has found that records that merely expose a security vulnerability are not exempt under KRS 61.878(1)(m) in the absence of proof that a "reasonable likelihood" exists that the information could be used to carry out a "terrorist act." *See, e.g.*, 15-ORD-041 (rejecting a law enforcement agency's claim that security footage inside the agency's facility was exempt under KRS 61.878(1)(m) despite its potential to show the camera's "blind spots").

The Department does not explain how release of the record would create a "reasonable likelihood" that a terrorist act would occur. There is no basis to conclude there is a "reasonable likelihood" that release of the record would lead to a criminal act intended to "[i]ntimidate or coerce a public agency or all or part of the civilian population" or "[c]ause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency." Accordingly, the only potential "terrorist act" that could arguably occur is a criminal act intended to "disrupt a system identified in" KRS 61.878(1)(m)1.f. But the only "system" under which the Department *might* qualify is "information technology." Still, the only concern the Office can imagine if the record is released, given the Department's lack of explanation, would be to expose vulnerabilities in the Department's software that could lead to the criminal act of *identity theft*. Such a criminal act is, of course, a serious concern, and perhaps some enactment of the General Assembly or federal law would allow the Department to withhold the record on that ground. *See* KRS 61.878(1)(k) and (l); *see also* 22-ORD-025 (law enforcement records describing tactical responses to riots were not exempt under KRS 61.878(1)(m) but were exempt under KRS 17.150(2)(c) as intelligence reports which, if released, could endanger officer safety). But KRS 61.878(1)(m) may only be invoked to prevent certain kinds of crime, not crimes in general.

At bottom, the Department puts forth no proof that release of the record has a reasonable likelihood of leading to a "terrorist act." Further, because the Department

did not comply with KRS 61.878(1)(m)3. in the first instance, the Office cannot find that it properly withheld the records under KRS 61.878(1)(m)1.f.

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/ Zachary M. Zimmerer
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