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25-ORD-151

June 10, 2025

In re: Steven Taylor/City of Ludlow

Summary: The City of Ludlow ("the City") violated the Open Records Act ("the Act") when it did not invoke KRS 61.872(5), give a detailed explanation of the reason for delay in responding to a request, or dispense with the request on the date by which it had said records would be available for inspection.

Open Records Decision

On April 24, 2025, Steven Taylor ("Appellant") submitted a request to the City seeking all text messages between four sets of individuals from September 1, 2024, to the date of his request.[1] In response, on April 30, 2025, the City stated it would withhold all communications exempt under KRS 61.878(1)(a), (i), (j), and (s). It further stated that it had instructed the City council members and the City's mayor to search their personal electronic devices for responsive records, but because the records were not currently available, "a final response to [the Appellant's] Request will be tendered on or about May 7, 2025." On May 7, 2025, the City stated that "some text messages were identified [that] afternoon" but no records had "been approved for production" because they had "not yet been reviewed by the City Attorney." The City further stated it had sent a second request "to the relevant parties for clarification as to whether they have completed their search" and for "[c]larification on the status of the remainder of [the Appellant's] requests will be sent on or about May 14, 2025." On May 15, 2025, having received no further response from the City, the Appellant initiated this appeal.

[1] Specifically, the Appellant sought texts (a) between three current and former members of City council and (b) between one member of the City council and the City's mayor.

Under KRS 61.880(1), a public agency has five business days 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). 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 City's initial response did not grant or deny the Appellant's request, nor did it invoke KRS 61.872(5). Rather, it advised the Appellant that the individuals who may possess responsive records had been instructed to search for them, and that a final response would be issued "on or about May 7, 2025" because "production of those records are not readily available and will require manual review of personal cell phone records." However, records are not "unavailable" merely because a search has yet to be completed. Such an assertion, standing alone, is not a detailed explanation of the cause for further delay.

Further, although the City stated the records would be available for inspection "on or about May 7, 2025," it did not make any records available by that date. Then it missed the second date on which it stated records would be made available. The Office has found that a public agency does not comply with KRS 61.872(5) when it notifies the requester of the earliest date on which requested records would be available but then misses its self-imposed deadline. *See, e.g.*, 25-ORD-086; 23-ORD-079; 21-ORD-011. Therefore, the City 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 timely respond or make a final disposition of the Appellant's request by the date on which it said the records would be made available.[2]

[2] On appeal, the City asserts that it may wholly deny the Appellant's request under 15-ORD-226. The Office, in that decision and others, has found that emails and text messages on privately-owned electronic devices are not public records under KRS 61.870(2) because they are not "prepared, owned, used, in the possession of or retained by a public agency." *See, e.g.*, 24-ORD-118 (addressing text messages on private cell phones belong to agency employees); *see also* 25-ORD-101 (addressing records held on private email accounts belonging to state officers which the agency held out as being used for official business). Here, however, the City states it has taken possession of the responsive text messages, conducted a review for exempted information, and redacted the records. Moreover, it admits that "the redacted documents [are] in its control." Thus, the records identified by the City are public records as defined by KRS 61.870(2).

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
Attorney General

/s/ Zachary M. Zimmerer
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Assistant Attorney General

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