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25-ORD-169

July 7, 2025

In re: Lisa Gannoe/University of Kentucky

Summary: The University of Kentucky ("the University") violated the Open Records Act ("the Act") when it failed to grant or deny a request for records within five business days and did not give a sufficiently detailed explanation of the reason for its delay under KRS 61.872(5). The University subverted the intent of the Act, within the meaning of KRS 61.880(4), when it failed to provide records by the date it represented they would be available. However, the University did not violate the Act when it did not provide a record that does not exist.

Open Records Decision

On May 14, 2025, Lisa Gannoe ("the Appellant") submitted a three-part request to the University for records related to her application for employment. First, she requested "[e]xisting records, notes, and emails related to [her] acceptance of a job offer with the Owen County Extension as a Family and Consumer Sciences Extension Agent." Second, she requested "[e]xisting records, notes, and emails related to [her] rescinded offer as an Owen County Extension Agent on April 7, 2025, including the reasons for the rescinded offer." Finally, she requested "[e]xisting records, notes and emails between [the] Director [of] the Employment HR office and the County Extension Services HR Office regarding [her] rescinded employment offer."

On May 22, 2025, the sixth business day after it received the request, the University issued a response demanding the Appellant give "a timeframe for each" request, "specify who the records were between for each" request, and "provide specific search terms" so it could locate the requested records.[1] Despite its purported

[1] Although the Appellant has not made an issue of the University's demand that she identify the specific employees who communicated with each other regarding her application for employment, it is noteworthy that this information was more readily available to the University than to the Appellant. Therefore, it was not the Appellant's burden to identify all employees who might have been involved in such communications. *See* 24-ORD-089. Similarly, it was not necessary for the Appellant to provide

inability to identify the records, the University further claimed that the records were "in active use, in storage or not otherwise available pursuant to KRS 61.872(5)" and that it would require 30 days "to (1) gather records that are potentially responsive; (2) evaluate those documents to determine if the records are responsive; (3) determine if the responsive documents are exempt; and (4) if the documents are exempt[,] redact the exempt materials." On the same date, the Appellant provided a relevant time period, names of specific employees, and suggested search terms.[2] The Appellant also requested that the University provide a specific date by which the records would be available for inspection.

On May 28, 2025, the University stated it needed additional time to review and redact the records because of "multiple ongoing requests" and gave June 4, 2025, as the date by which records would be made available. On June 5, 2025, having received no further response, the Appellant submitted a follow-up inquiry to the University. That same day, the University provided certain records to the Appellant with a response stating that some records had been withheld or redacted. Specifically, the University stated that "some third-party information has been redacted as it is considered an invasion of personal privacy pursuant to KRS 61.878(1)(a) and therefore, exempt from disclosure. Furthermore, some documents are exempt from disclosure as they are considered preliminary pursuant to KRS 61.878(1)(i) and (j). Finally, some documents have been omitted as they contain attorney-client privileged communication." This appeal followed.

Under KRS 61.880(1), a public agency has five business days to grant or deny a request for public records. Here, the University provided its initial response on the sixth business day after it received the request, and it neither granted nor denied the request at that time. The time period under KRS 61.880(1) 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." However, merely reciting the text of KRS 61.872(5) is not a sufficiently detailed explanation of the cause for delay. *See, e.g.,* 19-ORD-004. Nor is it sufficient merely to claim the records must be gathered, evaluated, reviewed, and redacted, because "the Act contemplates that all those actions should be completed within five business days for every request, unless KRS 61.872(5) applies." 25-ORD-076. Furthermore, the volume of unrelated requests, which the University asserted as a reason for delay on May 28,

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search terms when her request was for records related to a discretely defined subject. *See Univ. of Ky. v. Kernel Press, Inc.,* 620 S.W.3d 43, 48 n.2 (Ky. 2021) (holding a request was proper when it sought "all records detailing [the] resignation" of a specific employee); 22-ORD-213 (finding a request need not be narrowed by search terms when it sufficiently describes the requested records). Once the Appellant specified the temporal scope of her request, the request sufficiently described the records.

[2] The Appellant maintained the records "should not be difficult to find" because they were "recent documents from mainly one unit on campus."

2025, does not justify a delayed response. *See, e.g.,* 25-ORD-128. Therefore, because the University did not respond within five business days and did not properly invoke KRS 61.872(5) to justify its delay, it violated the Act.

Under KRS 61.880(4), a person may complain to the Attorney General that "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 University gave June 4, 2025, as the date by which it would make records available, but did not make any records available or otherwise contact the Appellant by that date. A public agency subverts the intent of the Act by excessive extensions of time when it fails to meet a self-imposed deadline to make records available. *See, e.g.,* 23-ORD-079; 21-ORD-011. Therefore, the University subverted the intent of the Act within the meaning of KRS 61.880(4).

On appeal, in view of the broad right of inspection granted to applicants for employment under KRS 61.878(3) for records that relate to them, the University has withdrawn its reliance on KRS 61.878(1)(i) and (j) and provided the Appellant copies of the records it previously withheld as "preliminary." Therefore, as to the materials thus provided, this appeal is moot. *See* 40 KAR 1:030 § 6. However, the University has redacted portions of the records, relying on KRS 61.878(1)(a) and the attorney-client privilege. Specifically, the University redacted the name of another candidate for employment under KRS 61.878(1)(a),[3] and it redacted certain communications from the Extension Office's Human Resources Office seeking legal advice from the University's Office of Legal Counsel as privileged under KRE 503. In her response to the University's disclosure, the Appellant does not object to those specific redactions.

However, the Appellant alleges that the University failed to disclose "a reason why [her] job offer was rescinded." More specifically, the Appellant claims the University failed to provide a document or documents "showing what was said to the hiring official by" her prior employer. The University, for its part, states no such record exists. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to make a *prima facie* case that the record does exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to support a *prima facie* case that a requested record exists, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support for the existence of the record. *See, e.g.*, 21-ORD-177; 11-ORD-074. Here, regarding what was said to a hiring official by her prior employer, the Appellant merely claims she "know[s] that was documented." But a requester's bare assertion that a record exists is insufficient to

[3] The Attorney General has consistently found that the heightened privacy interest in information about unsuccessful candidates for employment outweighs the public interest in disclosure of that information. *See, e.g.,* 17-ORD-093; 10-ORD-227.

establish a *prima facie* case that it actually exists. *See, e.g.*, 22-ORD-040. When a specific record does not exist, the Act does not require an agency to create one. *See, e.g.,* 16-ORD-052. Because the Appellant has not established a *prima facie* case that such a record exists, the Office cannot find that the University violated the Act by failing to provide it.

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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Distributed to:

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