



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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26-ORD-122

March 25, 2026

In re: Brian Mackey/Kentucky Department of Agriculture

Summary: The Kentucky Department of Agriculture (“the Department”) violated KRS 61.880(1) by failing to respond within five business days of receiving a request. The Department also subverted the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), by not providing records by its self-imposed deadline.

Open Records Decision

On December 2, 2025, Brian Mackey (“the Appellant”) submitted a request for public records to the Department.¹ By letter dated December 11, 2025, the Department advised the Appellant that his request was granted, stating it had “conducted an exhaustive search of its records; the results of the search have just become available for the KDA legal team to review for responsiveness and possible exemptions and redactions.” The Department further explained that more than 350 records “and 150 parent emails containing an unknown number of attachments have been identified” as possibly responsive to his request, all of which “must be reviewed for responsiveness and potential redactions, such as personally identifying information that may be exempt under KRS 61.878(1)(a).” Accordingly, the Department stated it required an extension of time under KRS 61.872(5) in which to comply with the Appellant’s request. The Department “anticipated that the

¹ Specifically, the Appellant sought: (1) “A list of each captive cervid operation in the state with name and location and the number of whitetail deer and/or elk at each captive cervid operation. Individual head counts for each operation currently and when that head count was done”; (2) “The number of CWD samples submitted for testing, from dead animals, for the past 5 years from each individual operation and those test results”; (3) “All information pertaining to movement of animals to and from the captive cervid operation in Breckinridge county that had positive CWD test result October 2024, I believe the name of said operation is Sinking Creek Whitetails. All documents from that investigation”; (4) “All communication between KDA, KDA Commissioner Shell, KDFWR, KDFWR Commissioner Storm and Sinking Creek Whitetails or any of their representatives pertaining to the CWD positive test results from 2024 to current date at the captive facility in Breckinridge county”; and (5) “The total dollar amount of indemnity money paid to the captive operation in Breckinridge county after depopulation occurred July 2025 and where that money came from.”

responsive documents and emails will be prepared for disclosure no later than January 5, 2026.” However, on January 13, 2026, the Appellant initiated this appeal challenging the Department’s failure to send a timely, written response or to provide him with copies of any existing, responsive, and nonexempt records by its extended deadline of January 5.

The Appellant submitted a second request to the Department on December 17, 2025, seeking copies of “[a]ny documents pertaining to regulation violations governing captive cervid operations in KY” from the past five years, which may consist of “warning letters, fines, citations, reprimands or notice of noncompliance of regulations or record keeping pertaining to captive cervids and should include the name and location of operation.” By letter dated December 23, 2025, the Department stated the Appellant’s request was granted but invoked KRS 61.872(5), citing nearly identical reasons to justify its delay in producing records but noting that its diligent search had located “[m]ore than 430 parent emails containing an unknown number of attachments” that were potentially responsive and that it anticipated “the responsive documents and emails will be prepared for disclosure no later than January 13, 2026.” That day, the Appellant initiated this appeal, challenging the timeliness of the Department’s response to his December 17 request and its failure to provide him with copies of any existing, responsive, and nonexempt records by its extended deadline of January 13, 2026.²

On appeal, the Department acknowledges it did not send a written response within five business days of receiving the Appellant’s December 2, 2025, request. Nor did it provide the Appellant with records responsive to either of his requests by January 13, 2026, notwithstanding the factual dispute regarding the date by which the Department verbally agreed to produce the records. The Department states that it received notice of this appeal when it “was conducting its final review of responsive records and preparing to provide them” to the Appellant and “apologize[d] for any misunderstanding it caused when communicating with [the Appellant] about the delivery date of the voluminous records he requested.”

² On appeal, the Department explains that, upon receiving the Appellant’s December 17 request and conducting a search, its Records Custodian called the Appellant to “discuss the potential for an extension of time to respond to his original request and make records responsive to his second request available at the same time. The Department ended that phone conversation understanding that [the Appellant] would agree to receiving the records no later than January 15, 2026.” The Department acknowledges it mistakenly listed January 13 as the agreed upon deadline when it documented that conversation by letter dated December 23, 2025. However, the Appellant initiated this appeal on January 13, arguing the Department had failed to comply with its own deadline of January 13. The Office cannot resolve the conflicting narratives regarding any verbal agreement between the parties regarding the date by which the Department agreed to produce the records. *See, e.g.*, 23-ORD-220 (the Office cannot resolve a factual dispute as to whether a requester actually received a public agency’s response); 22-ORD-010; 19-ORD-083.

Under KRS 61.880(1), a public agency has five business days to fulfill or deny a request for public records. A public agency may extend the deadline for production of the records, but only if the records are “in active use, in storage or not otherwise available” and the agency provides “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.”

The Department does not dispute that it violated KRS 61.880(1) by not responding to the Appellant’s December 2, 2025, request until December 11, 2025, seven business days later. However, the unrefuted evidence of record also confirms the Department did comply with KRS 61.880(1) by sending a written response within five business days of receiving the Appellant’s December 17, 2025, request on December 23, 2025. On both occasions, the Department invoked KRS 61.872(5) to delay production of the records. The Department also specified the volume of records implicated and listed the new deadline by which it would provide any responsive and nonexempt records following the necessary review and redaction process. *See* KRS 61.878(1) and (4). However, the Department failed to provide the Appellant with any records by its own, self-imposed deadlines, January 5 and 13, respectively. 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 records will be available but then misses its self-imposed deadline. *See, e.g.,* 26-ORD-001; 25-ORD-385; 25-ORD-086; 23-ORD-079; 21-ORD-011. For this reason, the Department 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 make a final disposition of Appellant’s requests by the dates on which it said the records would be made available.³

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.

³ On February 2, 2026, the Appellant acknowledged receipt of the responsive records. Those records were mailed “using express delivery” and the Department opted to waive postage and copying costs “as recompense for its delay.”

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/s/ Michelle D. Harrison
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Distributed to:

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