



COMMONWEALTH OF KENTUCKY
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23-ORD-004

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In re: Mark Payne/Northern Kentucky University

Summary: Northern Kentucky University (the “University”) violated the Open Records Act (“the Act”) when its response to a request to inspect records failed to comply with KRS 61.880(1) or properly invoke KRS 61.872(5).

Open Records Decision

On November 17, 2022, Mark Payne (“Appellant”) submitted a request to the University for records related to its outgoing president. Specifically, the Appellant asked to inspect the separation agreement concerning the outgoing president and any emails related to the outgoing president exchanged between October 17 and November 17, 2022. In a timely response, the University provided a copy of the separation agreement. However, the University did not grant or deny inspection of the requested emails because, due to the “scope of the request and the number of records involved,” as well as the “intervening Thanksgiving holiday,” it needed until “the week of November 28” to determine if “it will be necessary [for the Appellant] to refine the scope” of his request. Then, on November 29, 2022, the University stated it needed until the “end of this week” to respond because the “staff who handle open records requests have been out sick.” The University did not notify the Appellant of the earliest date on which he could expect to inspect the records. On December 5, 2022, having received no further response from the University, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of

any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” If an agency denies in whole or in part the inspection of any record its response must include “a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). Alternatively, if requested records are “in active use, in storage or not otherwise available,” a public agency may delay inspection of the requested records if it provides the requester a “detailed explanation of the cause” of delay and the “earliest date on which the public record[s] will be available for inspection.” KRS 61.872(5).

Thus, there are only three types of responses a public agency may issue within the five business-day period—approve the request, deny the request by providing citations to exemptions and explaining how the exemptions apply to records that have been identified as responsive, or properly invoke KRS 61.872(5) to delay inspection of the records. This Office has previously found that a public agency violates the Act when its response is timely but does not comply with KRS 61.880(1). *See, e.g.*, 21-ORD-177.

Here, the University issued a response to the Appellant within five business days, but the response failed to comply with KRS 61.880(1) because it did not approve the request, deny it and explain why, or properly invoke KRS 61.872(5) by notifying the Appellant that requested records were “in active use, in storage or not otherwise available” or providing the earliest date on which such records would be available. Therefore, the University’s deficient response violated the Act.¹

A party aggrieved by this decision may appeal it by initiating 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

¹ After the appeal was initiated, the University provided “629 pages worth of emails and attachments to” the Appellant. It claims the appeal is now moot. However, the University continues to withhold several records under various exemptions. Under KRS 61.880(2)(a), this Office’s mandate is to review the request for records and the agency’s response to determine whether the agency violated the Act. In finding that the University’s response failed to comply with KRS 61.880(1), the Office has carried out its mandate. The Office declines to consider the new issues raised on appeal regarding the University’s denial of some responsive records. *See, e.g.*, 22-ORD-200 n.2; 22-ORD-170 n.2; 22-ORD-142 n.3; 21-ORD-177 (the Office may decline to consider new issues raised by the parties’ subsequent correspondence on appeal because such matters encroach upon the Office’s statutory deadline to issue a decision within 20 business days and suffer from incomplete briefing by the parties). Rather, now that the University has issued its final response and denied inspection under various exemptions, the Appellant may initiate this Office’s review of newly alleged violations by initiating a new appeal, and providing a copy of his original request and the agency’s final response. *See* KRS 61.880(2)(a).

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.

Daniel Cameron
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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