



COMMONWEALTH OF KENTUCKY  
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**20-ORD-041**

March 10, 2020

In re: Charity Bird/Office of the Meade County Judge/Executive

*Summary:* Office of the Meade County Judge/Executive (“OCJE”) violated the Open Records Act (“the Act”) by failing to respond to some portions of a request for records, failing to notify the requester that it was not the custodian of some records, and omitting pages from meeting minutes without explanation.

***Open Records Decision***

The question presented in this appeal is whether OCJE violated the Act in the disposition of a December 17, 2019, request by attorney Charity Bird (“Appellant”) for copies of certain records relating to the Meade County River Port. For the reasons that follow, this Office finds that OCJE violated the Act in certain respects.

In her request, Appellant stated that she was seeking records “whether in possession of the Fiscal Court, the Meade County Riverport Authority, the Meade County-Brandenburg Industrial Development Authority, or otherwise within your possession, custody, or control.” Of those three entities, OCJE was the custodian of records for only the Meade County Fiscal Court. In its response, however, OCJE did not explain that fact, but merely provided Fiscal Court records and stated, “I have included the documentations that are available per your request.”

A public agency is not “statutorily obligated to attempt to honor a request for records of another agency.” 08-ORD-037. *See also Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005) (public agency has no duty to provide a record that does not exist in its possession or control). Nevertheless, it was OCJE’s duty to inform the requester in clear terms that it did not have the records. In failing to advise Appellant that it was not the custodian of records for the Meade County Riverport Authority or the Meade County-Brandenburg Industrial Development Authority, OCJE violated the Act.

Appellant’s request consisted of ten numbered parts, four of which are at issue in this appeal. These four shall be analyzed individually.

**1. “Copies of all minutes and attachments from all meetings at which the use or lease of the Meade County Riverport was discussed from December 17, 2018 forward.”**

With regard to these records, Appellant argues that OCJE did not provide fiscal court meeting minutes “for the time period of March 23, 2019, through September 30, 2019,” or for meetings that occurred on December 10 and 19, 2019. In response, OCJE argues that the December 10 and 19 meeting minutes did not yet exist at the time of the request. A public agency cannot provide a requester access to a record that does not exist. *See Bowling*, 172 S.W.3d at 341. Once an agency affirmatively states that no responsive records exist, the burden then shifts to the requester to present a *prima facie* case that the requested records do exist. *Id.* Appellant has made a *prima facie* showing that meeting minutes should exist because these meetings did occur.

OCJE’s explanation that the meeting minutes were not finalized and approved until the first meeting of January 2020 is a reasonable explanation for their nonexistence. Nevertheless, OCJE violated the Act by failing to inform Appellant in its official response to the request that those minutes did not exist.

As to the minutes from March 23 to September 30, 2019, OCJE explains that they were unresponsive to the request because “the use or lease of the Meade County Riverport” was not discussed at those meetings. Appellant has submitted no proof to the contrary. Accordingly, OCJE did not violate the Act as to those minutes.

Appellant also argued that the fiscal court minutes she received “appear to be missing pages.” From the copies attached to the appeal, it appears that the minutes provided for March 12, October 1, and November 12, 2019, were indeed incomplete. Since Appellant requested copies of “all minutes” from the meetings in question, and OCJE omitted pages with no legal or factual explanation, OCJE failed to meet its burden and violated the Act. KRS 61.880(2)(c) (“The burden of proof in sustaining the action shall rest with the agency”).

**2. “Copies of all agendas and any attachments from all meetings at which the use or lease of the Meade County River Port was discussed from December 17, 2019 forward.”**

With regard to this portion of the request, Appellant argues that “only March 12, October 1, October 15, November 12, December 10, and December 19 agendas were provided for Meade County Fiscal Court.” As in the case of the meeting minutes, OCJE asserts that the remaining agendas did not pertain to meetings where the topic was discussed. Accordingly, those records were unresponsive and OCJE did not violate the Act by not providing them.

**3. “Copies of all correspondence, including but not limited to email correspondence and text messages related to 1-8 above.”**

The phrase “1-8 above” refers to the first eight portions of Appellant’s request, which consisted of the first two portions at issue on appeal as well as the following:

Copies of all minutes from all meetings and any attachments at which the board, including but not limited to individual board members, of the Meade County Riverport Authority were discussed from December 17, 2018 forward;

Copies of all agendas and any attachments at which the board, including but not limited to individual board members, of the Meade County Riverport Authority were discussed from December 17, 2018 forward;

Copies of all minutes from all meetings and any attachments at which the notice and bidding procedures for the use or lease of the

Meade County River Port was discussed from December 17, 2018 forward;

Copies of all agendas and any attachments of all meetings at which the notice and bidding procedures for the use or lease of the Meade County River Port was discussed from December 17, 2018 forward;

Copies of all Options and any documents related thereto (including but not limited to any resolutions or minutes), involving Nucor or any of its subsidiaries or affiliates, including but not limited to Greenland Acquisition Company, Inc., Nucor Steel Brandenburg, or Nucor Steel Gallatin LLC (collectively, "Nucor"); [and]

Copies of all documents reflecting in any way any advertising or bidding processes that have been followed with respect to Nucor[.]

Appellant argues that OCJE provided no e-mails or text messages "despite their existence," and claims to have "seen" one e-mail that is responsive to the request.

The meaning of the phrase "related to 1-8 above" is inherently ambiguous, given the manner in which the first eight portions of the request were expressed. OCJE interpreted the request as seeking correspondence related to the requested documents, and Appellant has not contradicted this interpretation.

In its response to this appeal, OCJE stated that eight pages of responsive records "may have been inadvertently left out of [its] response," and provided those eight pages as an attachment.<sup>1</sup> They consist of e-mails and a fax confirmation sheet reflecting the transmittal of meeting notices and agendas. As to these records, this portion of the appeal is moot. 40 KAR 1:030 §6.

Nevertheless, in terms of the request, the eight pages OCJE belatedly provided relate only to meeting agendas. As stated above, if OCJE possessed no records responsive to the other subparts of this request, it was required to state that fact so Appellant could make a *prima facie* case that responsive records did exist. Because it failed to affirmatively deny the existence of responsive records, OCJE violated the Act by failing to fully respond to the request.

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<sup>1</sup> Because Appellant did not describe the one e-mail she claimed to have seen, it is unknown whether it was included among those provided by OCJE.

**4. "All correspondence, including email correspondence, that relates to (a) any impact upon future use of the river port as a result of the planned location of a steel mill operated by Nucor, and (b) any agreement with, or between, Nucor and CGB."**

With regard to this portion of the request, Appellant contends that "only one piece of correspondence was produced and email correspondence was not produced at all." In response, OCJE asserts that the document produced was the only responsive correspondence of any kind in its possession. In the absence of evidence to the contrary, there is no indication that OCJE violated the Act as to this portion of the request.

### **Conclusion**

Accordingly, this Office finds that OCJE violated the Act by failing to respond to portions of Appellant's request and omitting pages of meeting minutes without explanation. OCJE further violated the Act by failing to advise Appellant that it was not the custodian of some of the records requested.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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.

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/s/ James M. Herrick

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