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20-ORD-044

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In re: WSPD Local 6 News/Marshall County Judge/Executive

Summary: Marshall County Judge/Executive's Office ("MCJE") violated the Open Records Act ("the Act") by failing to notify Appellant within three business days of whether it would comply with a request for records and failing to provide a justifiable reason for delay. MCJE also failed to explain how the attorney-client privilege applied to certain records withheld, and failed to meet its burden of proof regarding purportedly nonexistent records.

Open Records Decision

On December 18, 2019, *WPSD Local 6 News* reporter Shamarria Morrison ("Appellant") requested three groups of records relating to a recently enacted county ordinance. Appellant also requested records relating to the "employment and compensation of Lance Cary, who self-identified…as the Executive Director of [the] Judge Executive in a letter[.]" On December 19, 2019, MCJE issued its first written response, stating, "I am in receipt of your [requests] and will respond in a reasonable timeframe." On December 23, 2019, Appellant followed up on the request, and MCJE replied, "I responded on December 19 which met the 3 days requirement to respond. Again, we intend to complete this request in a reasonable time frame."

Having received no further responses, Appellant initiated her first appeal on January 2, 2020, arguing that MCJE failed to respond timely. On January 3, 2020, fifteen days after her initial request, MCJE issued a supplemental response directly

to Appellant with responsive records attached. On January 8, 2020, MCJE responded to the first notice of appeal, stating that it had responded within three days. MCJE further stated that its original belief that the response was sufficient "to meet the three-day time limitation appears to have been based on a misunderstanding" from a conversation with MCJE's prior legal counsel. MCJE stated that its delay was also due to a misunderstanding about which employee would process the request during the holidays.

MCJE provided Appellant 39 pages of responsive records on January 3, 2020. In a letter dated January 7, 2020, however, MCJE denied access to other responsive records, "due to attorney-client privileges. No public funds were spent in procuring those services therefore there are no documents to produce." MCJE did not identify the records withheld, or identify and explain how a statutory exception authorizing their withholding applied. MCJE also implied the nonexistence of records relating to Lance Cary, stating that he "is not and has never been an employee or compensated by the Marshall County Fiscal Court."

On January 8, 2020, Appellant initiated a second appeal to supplement her original appeal and disputed the partial denial of records. She argued that MCJE violated KRS 61.880(1) when it failed to cite an applicable exemption to insepct responsive records, or explain how the exemption applied. Appellant also argued that MCJE's denial of records regarding Lance Cary was not credible. As support, she provided copies of social media posts in which Mr. Cary referred to himself as the Executive Assistant to the Judge Executive. On January 17, 2020, this Office consolidated the two appeals and sent notice to MCJE, but the agency did not submit a response to the second appeal. On February 17, 2020, this Office requested supplemental information from MCJE regarding the specific records withheld as attorney-client privileged, and requested a clear and direct statement whether records regarding Lance Cary exist. MCJE did not respond to this Office's requests.

MCJE Violated KRS 61.880(1) and KRS 61.872(5).

MCJE's initial response was insufficient because it failed to comply with KRS 61.880(1). Upon receiving any request for records the statute declares that a "public agency . . . shall determine within three (3) [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 three (3) day period, of its decision." The initial written response merely stated that MCJE received the request and intended to comply. However, KRS 61.880(1) requires the public agency to inform the requester within three business days whether it will comply with the request. A response that merely acknowledges receipt of a request, without providing written notice that the agency will or will not comply, violates KRS 61.880(1).

Insofar as MCJE intended its initial response to delay the time requirements of KRS 61.880(1), MCJE failed to comply with KRS 61.872(5). That provision provides:

> If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.

MCJE's initial response failed to notify Appellant whether the records were "in active use, in storage or not otherwise available." MCJE also failed to notify Appellant of "the earliest date on which the public record will be available for inspection." KRS 61.872(5); *see, e.g.*, 19-ORD-044 (finding that City of Martin's statement, "I will get copies out as soon as I can," did not comply with KRS 61.872(5)). Accordingly, MCJE failed to meet the requirements of KRS 61.872(5).

MCJE Failed to Justify Withholding Records as Attorney-Client Privileged.

"An agency response denying, in whole or in part, inspection of any record shall 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) (emphasis added). MCJE's supplemental response to Appellant on January 7, 2020, did not identify KRS 61.878(1)(l) as the "specific exception" for withholding records based on the attorney-client privilege.

MCJE also failed to explain how the attorney-client privilege applied to responsive records it withheld. To satisfy the burden of proof imposed by KRS 61.880(2)(c), the public agency is required to provide a written response that identifies any responsive records that are being withheld, and then briefly explain how the asserted exceptions apply to each record or category of records. KRS 61.880(1); *see also City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 852 (Ky. 2013). MCJE did not identify the records withheld or explain how the attorney-client privilege applied in any of its responses. MCJE also declined to respond to this Office's request for MCJE to explain how the exception applied. Accordingly, MCJE failed to meet its burden of proof that the attorney-client privilege authorized withholding documents and violated the Act.

MCJE Failed to Explain the Nonexistence of Responsive Records.

MCJE failed to explain sufficiently the nonexistence of records relating to Lance Cary. Of course, a public agency cannot provide a requester with access to nonexistent records. *See Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). Once an agency affirmatively states that no responsive record exists, the burden then shifts to the requester to present a *prima facie* case that the requested record does exist. *Id.* However, a public agency's response that merely implies the nonexistence of a responsive record fails to provide the requester the reason their request is denied pursuant to KRS 61.880(1). *See e.g.*, 19-ORD-097 (Finding a violation of the Act when an agency referred to its retention policy and claimed the retention period had expired, but the agency did not affirmatively state a record did not exist).

In its initial response, MCJE claimed that Mr. Carey "is not and has never been an employee or compensated by the Marshall County Fiscal Court." This assertion implied that no responsive records existed, but it did not clearly and directly state that MCJE did not possess responsive records. MCJE chose not to respond to this Office's request for clarification whether responsive records existed.

When a requester presents a *prima facie* case that responsive records should exist, the burden is on the agency to explain the adequacy of its search to maintain its position that no records exist. *See City of Ft. Thomas*, 406 S.W.3d at 848 n.3. Here, a responsive email in the record indicates that Mr. Carey communicated with

interest groups on behalf of the Judge/Executive. As such, Appellant has made a *prima facie* case that records may exist. Thus, the burden shifted to MCJE to explain the adequacy of its search. *Id*. However, MCJE did not describe its search for records at all. Accordingly, MCJE failed to meet its burden of proof regarding the nonexistence of records. For this reason, MCJE violated the Act.

A party aggrieved by this decision shall 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 proceeding.

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