



COMMONWEALTH OF KENTUCKY
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20-ORD-059

April 20, 2020

In re: Glenn S. Hayden/City of Mayfield

Summary: The City of Mayfield (“City”) violated the Open Records Act (“Act”) by failing to conduct a reasonable search for responsive records and by failing to confirm or deny whether additional responsive records existed.

Open Records Decision

On January 28, 2020, Glenn S. Hayden (“Appellant”) requested a copy of “records verifying the payment of Occupational taxes to the [City] due to Annexation from Graves County Board of Education [“Board”] for the period beginning January 1, 2016 through December 31, 2017.”¹ Appellant specified that “records of verification” should include “amounts paid, date each payment was made . . . invoices/billing statements, copy of [Board] payment instrument(s), etc.” The City Clerk/Treasurer responded, stating that the City received from the Board the “3rd and 4th quarter 2017, occupational taxes on May 18, 2018. The amount paid at the time was \$30,028.03.” She further stated that she was not “aware” if invoices were sent “as this was being handled by our attorney.” The City agreed to provide Appellant with a copy of the check that it received from the Board upon receiving his payment of the copying fee.

¹ Appellant initiated two appeals in response to the City’s disposition of his request. In the first appeal, Appellant objected to the City denying his request because he sent it via e-mail. This Office resolved that appeal in 20-ORD-052.

On February 9, 2020, Appellant initiated this appeal, emphasizing that he asked for “specific records” and “further clarified” the information those records would contain. He also complained the City only provided information that was readily available via local media outlets and failed to provide any indication that it attempted to identify, locate, or provide access to any responsive documents except for the aforementioned check. In response, the City maintained that it had fully complied with Appellant’s request. The City asserted that a public agency is not required to “gather and supply information independent of that which is set forth in public records.” The City further stated it “has either disclosed or made available to [Appellant] all records in the possession of the [City responsive to] the request.” For the following reasons, the City violated the Act.

The City improperly characterized Appellant’s request as one seeking information rather than records. Under KRS 61.872(1), “all public records shall be open for inspection by any person[.]” KRS 61.870(2) broadly defines “public records,” but the definition does not include “information.” See *Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013). Here, Appellant requested invoices and billing documentation that would encompass a specific transaction, namely, the payment of occupational taxes. Appellant sufficiently described “books, papers . . . or other documentation regardless of physical form” that may be in the City’s possession. KRS 61.870(2).

Because Appellant sufficiently described “public records” he sought to inspect, the City was required to “determine within three (3) [business] days . . . after the receipt of [the] 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.” KRS 61.880(1). Of course, Kentucky courts recognize that a public agency cannot produce that which it does not have nor is a public agency required to “prove a negative” to refute a claim that certain records exist in the agency’s possession unless the requester first makes a *prima facie* showing. See *Bowling v. Lexington Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 340-341 (Ky. 2005). Here, the City admitted that occupational taxes were paid. The City acknowledged that a check existed, but simply stated it was not “aware” of any other responsive records because its attorney “handled” the matter. Once Appellant made a *prima facie* showing that the City paid occupational taxes, the City was required to explain the adequacy of its search to carry its burden of establishing that no additional records existed. See KRS 61.880(2)(c); *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013).

Here, the City failed to state explicitly that no additional records existed or explain that it conducted any search, despite there being *prima facie* evidence that additional responsive records could exist. The City's "limited and perfunctory response [does not] even remotely comply with the requirements of the Act[.]" *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). There is no suggestion that the City attempted to contact the City Attorney to determine if responsive records did, in fact, exist.² Had it done so, it may have discovered additional responsive records. At the very least, this would have demonstrated the City had attempted to conduct a reasonable search. Because the City failed to carry its burden of proving that it conducted an adequate search for responsive records after Appellant made a *prima facie* case that additional responsive records should exist, the City violated the Act.

Either party may appeal this decision may appeal it by initiating action in the appropriate circuit court per 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.

Daniel Cameron
Attorney General

/s/ Michelle D. Harrison

Michelle D. Harrison
Assistant Attorney General

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Distributed to:

Glenn S. Hayden

² Records "which are prepared, owned, used, in the possession of or retained by a public agency" are "public records" and thus are subject to the Act, unless they are exempt. KRS 61.870(2). The City Attorney is an agent for the City. *See Edmondson*, 926 S.W.2d at 859 (finding a county attorney "acts as an agent of [CHFS] with respect to administering [the IV-D] program."). The City's non-exempt records relating to the City's finances are "prepared, owned, [and] used" by the City, and they are in the City's "possession" even when its agent, the City Attorney, may actually hold them. Under the express terms of the Act, such records are subject to inspection.

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