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20-ORD-070

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In re: Ann Marie Pavlik Rosen/Kentucky Municipal Energy Agency

Summary: The Kentucky Municipal Energy Agency ("KYMEA") failed to meet its burden under the Open Records Act of establishing that complying with a request for public records was unreasonably burdensome. However, KYMEA met its burden of establishing that certain records did not exist.

Open Records Decision

On January 6, 2020, Ann Maria Pavlik Rosen ("Appellant") requested from KYMEA the following records for the period of January 1, 2018, through December 31, 2019:[1]

1. Invitations or emails, coordinating conference calls or in person meetings with committee or board members[;]
2. Public notices, agendas, minutes and notes from conference calls and meetings noted in #1[;]
3. Invitations or emails coordinating committee meetings whether conference calls or in person meetings[; and]
4. Public notices, agendas, minutes and notes from any committee meetings noted in #3.

[1] Appellant also filed an Open Meetings Complaint alleging other violations. This Office resolved that appeal in 20-OMD-040. Although this appeal implicates provisions of the Open Meetings Act, this Office's discussion of the Open Meetings Act is to provide context for its finding that KYMEA did not violate the Open Records Act by denying the request for nonexistent records.

More specifically, Appellant stated that she was requesting a "notice, agenda, notes, and minutes from the Executive Committee Meeting that took place on [January 8, 2018] at the Louisville office of Rubin and Hayes."

First, in its response to the open records request, KYMEA relied on KRS 61.872(6) to partially deny Appellant's request and claimed that complying with her request would be unreasonably burdensome. However, to support its assertion, KYMEA was required to produce clear and convincing evidence that Appellant's request was unreasonably burdensome. KRS 61.872(6). The Kentucky Supreme Court has recognized that a public agency "faces a high proof threshold" when attempting to invoke this exception successfully, and that it cannot rely on "inefficiency in its own internal recordkeeping system to thwart an otherwise proper open records request." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664-665 (Ky. 2008). Further, the "obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Id.* Here, KYMEA simply asserted that Appellant's requests were too broad, but did not explain how the requests were too broad or what burdensome measures would be required to produce the requested records. Because KYMEA concluded its response without demonstrating that responding to Items 1 and 2 would be "burdensome," it failed to meet its burden under KRS 61.872(6).

Second, Appellant alleges that KYMEA failed to produce some records that should exist because of statutory obligations under the Open Meetings Act. On the other hand, a public agency cannot provide a requester access to a record that does not exist. *See Bowling v. Lexington-Fayette Urban County Government,* 172 S.W.3d 333, 341 (Ky. 2005). Here, Appellant has made a *prima facie* showing that some of the requested records should exist because the Open Meetings Act required KYMEA to create them. However, that is not the end of the analysis. Because the agency misunderstood its obligations under the Open Meetings Act, it does not have records responsive to Appellant's related requests.

With regard to Appellant's request for notices and agendas, whether these records should have been created depends on whether the specified committee

meetings[2] were regular meetings or special meetings. For regular meetings, "[a]ll public agencies shall provide for a schedule of regular meetings by ordinance, order, resolution, bylaws, or by whatever other means may be required for the conduct of business of that public agency." KRS 61.820. No provision of the Open Meetings Act requires a public agency to publish an agenda for its regular meetings. However, any meeting that is not on the "schedule of regular meetings" is a special meeting and subject to the notice and agenda requirements of KRS 61.823. That provision requires the public agency to deliver, at least twenty-four (24) hours in advance, written notice that consists of the date, time, and place of the meeting, and the agenda, to members of the public agency and media organizations that have requested notification. The notice and agenda may be "delivered personally, transmitted by facsimile machine, or mailed," or sent via electronic mail under KRS 61.823(4)(b). KRS 61.823(4)(c) requires a public agency to post the written notice and agenda in a conspicuous place in the building where the meeting will take place, and in the building which houses the headquarters of the agency, at least 24 hours before the meeting.

Regarding the January 8, 2018, Executive Committee meeting in particular, the record on appeal establishes that counsel for KYMEA notified members of the committee meeting via e-mail, but does not indicate that *public* notice was provided. It is also unclear from the record whether any of the committees had a "schedule of regular meetings." KYMEA argued on appeal that it would announce the time and location of the next committee meeting during its regular meeting. This indicates there was no actual schedule provided, but each committee meeting was scheduled individually at each regular KYMEA meeting. Although it is required to provide an agenda for special meetings under the Open Meetings Act, the agency has demonstrated that it did not meet its statutory obligation. Thus, no responsive records are available.

Regarding Appellant's request for committee meeting minutes, KRS 61.835 requires the public agency to record "[t]he minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings[.]" KRS 61.835 applies to every meeting, including both regular and special meetings. KYMEA provided Appellant some "committee reports" for committee meetings when action was taken. Because KRS 61.835 does not require any certain format in which a public agency must record its actions

[2] KYMEA's committees are subject to all provisions of the Act to the same extent as KYMEA. KRS 61.805(1)(g) (defining "public agency" to include any "committee, subcommittee, ad hoc committee, advisory committee . . . established, created, and controlled by a 'public agency'").

and votes, the "committee reports" qualify as "minutes" under KRS 61.835. For those minutes KYMEA did not provide, KYMEA argued that many of its committee meetings were "informational" and no action was taken. However, it is official action to call a meeting to order and adjourn the meeting. If nothing else, a public agency must record those minimal actions in minutes. *See*, *e.g.*, 95-OMD-64. KYMEA did not meet its statutory obligation to record these minimal actions in meeting minutes. Nevertheless, it has explained why not all the requested minutes exist.

On appeal, Appellant established a *prima facie* showing that KYMEA should have possessed additional responsive records, but KYMEA argued on appeal that provisions of the Open Meeting Act did not apply to its committee meetings. Although KYMEA's assertion is not correct, its error explains why KYMEA did not create the records and therefore had limited records responsive to Appellant's request under the Open Records Act. For this reason, KYMEA complied because it provided a written explanation that it did not create the records Appellant sought. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (finding that when it is clear records do not exist the requester is entitled to a written explanation for their nonexistence.). Thus, KYMEA did not violate the Open Records Act in failing to produce nonexistent records.

Either party may appeal this decision 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
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/s/ Michelle D. Harrison

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