



COMMONWEALTH OF KENTUCKY
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20-ORD-096

July 8, 2020

In re: Andrew Mize/Carter County School District; and
Andrew Mize/Grayson Police Department

Summary: Carter County School District (“District”) violated the Open Records Act (“the Act”) by failing to state affirmatively that the requested records did not exist in its possession. The Grayson Police Department (“Department”) violated the Act by failing to respond to a request for records.

Open Records Decision

On April 4, 2020, Andrew Mize (“Appellant”) submitted a request to the District seeking a copy of the District’s investigative file relating to alleged bullying of a student.¹ The District timely responded and denied the request, stating it did not “have access to” the investigative file because “the Grayson Police Department helped with that investigation.” The District further asserted that the middle school assistant principal assisted with the investigation, “but ultimately [the] Grayson Police Department were the ones that collected any information” for the investigation. Shortly thereafter, Appellant submitted a similar request to the Department, but the Department never responded. Appellant appealed both dispositions and this Office has consolidated them on appeal.

The District violated the Act by failing to state affirmatively that it did not possess responsive records. KRS 61.880(1) requires an agency to determine within

¹ Appellant also requested other records that the District provided, subject to redaction. Appellant has not appealed the District’s redactions to these records.

three business days whether it will comply with a request to inspect records. If an agency declines a request, it must state the exception authorizing denial and provide a brief explanation as to how the exception applies. KRS 61.880(1). Alternatively, the agency may respond within three business days that the responsive records are “in active use, in storage, or not otherwise available.” KRS 61.872(5). If these conditions are met, the agency may extend the time for producing the records by providing the “earliest date on which the public record will be available for inspection” and providing a brief explanation for the cause of delay. *Id.*

Here, it was unclear from the District’s initial response whether it possessed the requested records. By stating it “did not have access” to the requested investigative file, the District failed to explain whether the investigative file was merely in active use, and therefore potentially available at a later date under KRS 61.872(5), or whether it did not exist at all. A public agency is not required to produce records that do not exist. *See Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). But if that is indeed the reason for denial, the public agency must affirmatively state the request has been denied because responsive records do not exist. KRS 61.880(1); *see also* 19-ORD-009.

On appeal, the District supplemented its original response by claiming that it provided Appellant with copies of all responsive records in its possession and that no other responsive records exist. The District further claimed that if any additional records exist, then those records would be in the possession of the Grayson Police Department. Because the District has now clarified that no additional responsive records exist in its possession, the burden shifts to the Appellant to present *prima facie* evidence that the requested records do exist in the District’s possession. *Bowling*, 172 S.W.3d at 341. Appellant has put forth *prima facie* evidence that the requested investigative file may exist somewhere, but that evidence does not support a finding that the records were prepared, owned, possessed, used, or retained by the District. *See* KRS 61.870(2) (defining “public record”).

Instead, Appellant has presented *prima facie* evidence that the investigative file is a public record prepared, owned, possessed, used, or retained by the

Grayson Police Department.² Accordingly, although the District ultimately corrected this error on appeal, the District violated the Act in its initial response by failing to state affirmatively that the requested records did not exist in its possession.

Turning to the Grayson Police Department, Appellant claims that the Department failed to respond to his request at all. KRS 61.880(1) requires every public agency to respond to an open records request within three business days. This Office sent notice of Appellant's appeal to the Department and invited the Department to submit a response. However, the Department failed to do so. Thus, there is no evidence in this record that the Department responded to Appellant's request or relied upon any exemption to deny the request. Therefore, the Department violated the Act.

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.

Daniel Cameron
Attorney General

/s/ Marc Manley
Marc Manley
Assistant Attorney General

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² Appellant asserts that during an administrative hearing, conducted after his request, a Grayson Police Department officer testified that the requested investigative file did exist, but the officer did not bring it with him to the hearing.

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