



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-159

October 8, 2020

In re: James Lang/Oldham County Health Department

Summary: Oldham County Health Department (“Department”) failed to make a disposition of an open records request within the statutory time period. The Department did not violate the Open Records Act (“the Act”) by failing to provide records that did not exist or by denying a request as one for information.

Open Records Decision

On August 26, 2020, James Lang (“Appellant”) mailed a request to the Department for copies of the policy or procedure used by the Department to determine the square footage of three state correctional facilities. Appellant also requested “the name of the person who has conducted the inspections” of the three facilities. On September 4, 2020, Appellant received an undated response that merely acknowledged receipt of his request, but made no disposition of the request. Instead, the Department attached a blank copy of its Open Records Request Form and requested that Appellant complete it. Appellant did not complete the form, but instead initiated this appeal.

On September 14, 2020, the Department issued a supplemental response to the request. In its supplemental response, the Department advised Appellant that there were no documents responsive to his request for a policy or procedure. The Department also denied Appellant’s request for the name of a person on the grounds that it was a request for information, not for records.

The record before this Office does not indicate when the Department received Appellant's request. However, Appellant received the Department's initial response on September 4, 2020. Because Appellant provided only his postal address with his request, not an e-mail address or fax number, it is clear that Appellant received the response by mail. Therefore, the Department must have received Appellant's request and mailed its initial response prior to September 4, 2020, but did not make a final disposition of the request until September 14, 2020.

Normally, a public agency must dispose of an open records request within three business days. KRS 61.880(1). To address the novel coronavirus public health emergency, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). The Department violated the Act by failing to make a final disposition of Appellant's request within 10 days.

In its supplemental response, the Department stated that no records exist that are responsive to Appellant's request. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). In this case, Appellant has not established a *prima facie* case that a Department policy or procedure for determining the square footage of correctional facilities exists or should exist. Therefore, this Office is unable to find that the Department violated the Act as to that portion of the request.

As to the second portion of Appellant's request, the Act does not require public agencies to fulfill requests for information, but only requests for records. KRS 61.872; *Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records."). Here, the request was clearly one for information: the name of an individual. Thus, the Department did not violate 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 proceeding.

Daniel Cameron
Attorney General

/s/ James M. Herrick

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Assistant Attorney General

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Distributed to:

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