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21-ORD-056

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In re: Rick Adams/Governor's Office of Agricultural Policy

Summary: The Governor's Office of Agricultural Policy ("Office") violated the Open Records Act ("the Act") when it denied a request to inspect annual reports submitted to it by a private entity in connection with the administration of a loan.

Open Records Decision

Rick Adams ("Appellant") asked the Office to produce copies of certain records pertaining to the Consolidated Grain & Barge Company ("Company"). The Company is a private entity that has contracted to perform work for the Meade County River Authority and the Meade County Fiscal Court (jointly referred to as "the County") under a loan agreement executed by the County and the Office. In a timely response, the Office produced 98 pages of records, but it redacted portions of those records that it claims contain confidential and proprietary information. Among the records produced by the Office is a copy of the loan agreement, which requires the County, in part, to provide the Office annual reports containing certain information. The Appellant believes these annual reports contain all the information that he seeks, but that the Office has declined to provide the Appellant with copies of the annual reports. This appeal followed.¹

¹ The Appellant's request sought records relating to different categories of information. The Office partially denied the request because it claimed that it had no records responsive to certain portions of the request. The Appellant claims this is not true, and believes that the annual reports are responsive to his request. It therefore appears that the only real dispute between the parties is whether the annual reports should be released, and whether it was proper to make certain redactions made to those records that have been produced. This Office declines to consider whether there may be other responsive records in the Office's possession. *See, e.g.*, 17-ORD-276; 14-ORD-204; 12-ORD-087.

The Office claims that the annual reports, and the information that it has redacted from the records it has produced, are exempt from inspection under KRS 61.878(1)(c)2.a. That provision exempts from inspection “records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained [in] conjunction with an application for or the administration of a loan or grant.” Under KRS 61.880(2)(c), the Office carries the burden of justifying its denial. To carry that burden, the Office must prove that the records were disclosed to it confidentially and that the records are generally recognized as confidential and proprietary.² Records that are “generally recognized as confidential and proprietary” include “information concerning the inner workings of a corporation” such as the “financial history of the corporation, projected cost of the project, the specific amount and timing of capital investment, copies of financial statements and a detailed description of the company’s productivity, efficiency and financial stability.” *Hoy v. Kentucky Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995).

The contract specifies which records were confidentially disclosed to the Office and which were not. It provides:

Records and other prequalification information confidentially disclosed as part of the bid (application) process shall not be deemed directly pertinent to the contract and shall be exempt from disclosure as provided in KRS 61.878(1)(c). The [Company] also recognizes that any books, documents, papers, records, or other evidence, received during a financial audit *or program review* shall be subject to the Kentucky Open Records Act[.]

(emphasis added). The contract, therefore, recognizes that documents submitted in connection with *the application* for the loan remain confidential. The Office has produced records related to the application, but it has redacted the Company’s estimated number of bushels of grain that it would deliver under the contract. Because the Company’s estimate was made part of the application, then under the contract, that information was confidentially disclosed to the Office and is not subject to inspection to the extent that KRS 61.878(1)(c)2 applies.

² The parties do not dispute that the records were submitted and compiled in connection with the administration of a loan.

But the Office has not carried its burden in proving that the estimated number of deliverable bushels of grain is “generally recognized” as confidential and proprietary. The Office provides only a letter from the Company asserting that the information is confidential and proprietary. While the methods and practices a company uses to *reach* an estimate may be confidential and proprietary, the estimated number itself says nothing about the inner workings of the company. It also provides no insight into the financial status of the company or the company’s anticipated cost to deliver the estimated number of bushels. A single number estimating the Company’s ability to deliver a certain amount of grain is not a “detailed description of the company’s productivity, efficiency, and financial stability. *Hoy*, 907 S.W.2d at 768. Without more than the Office’s bare assertion, this Office cannot conclude that the estimated number of bushels is “generally recognized” as confidential and proprietary. Accordingly, the Office violated the Act when it redacted the estimated number of deliverable bushels of grain from the loan application records.

The annual reports, on the other hand, could not possibly have been submitted at the time of the application. The annual reports are a component of the “program review,” which under the terms of the contract makes them subject to public inspection. The Office clearly has an interest in ensuring that its loans are being put to good use. It secures that interest by requiring the submission of annual reports that provide “the number of producers affected, the counties that have participated in the project, the commodities handled, the amount of bushels obtained, list of cost savings to producers, and the amount of specialty grains brought to the terminal.” The public also has a significant interest in monitoring the use of public funds. *See Lexington-Fayette Urban Cty. Gov’t v. Lexington Herald-Leader Co.*, 941 S.W.2d 469, 471 (Ky. 1997). Because the contract permits public inspection of records submitted as part of a “program review,” the annual reports were not “confidentially disclosed” to the Office. Therefore, the Office violated the Act when it withheld the annual reports.³

³ Even if the annual reports were submitted confidentially to the Office, the agency has failed to explain how the information contained in the annual reports is “generally considered to be confidential or proprietary.” “[T]he number of producers affected, the counties that have participated in the project, the commodities handled, the amount of bushels obtained, list of cost savings to producers, and the amount of specialty grains brought to the terminal” is information concerning the success of the loan program. Such information says nothing about the inner workings of the Company or its financial condition.

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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Distributed to:

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