



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

21-ORD-059

March 29, 2021

In re: Noel Mark Botts/Transportation Cabinet

Summary: Because the Transportation Cabinet (“Cabinet”) failed to respond to an open records request within ten days, it violated the Open Records Act (“the Act”). However, the Cabinet did not violate the Act when it provided all responsive records in its possession.

Open Records Decision

On January 24, 2021, attorney Noel Mark Botts (“Appellant”) asked the Cabinet to provide copies of certain records relating to a turn lane on U.S. 25 South, for which his client had obtained an encroachment permit in 1995. Specifically, the Appellant requested a copy of the permit; any notices that the permit had been revoked; “plats, maps, photos, surveys, and diagrams” showing the turn lane; records relating to compensation offered or paid to the Appellant’s client for the turn lane; any survey of the location; and all correspondence or communication with his client regarding the turn lane. After receiving no response to his request within ten days, the Appellant initiated this appeal.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). In response to the public health emergency caused by the novel coronavirus, however, the General Assembly modified that requirement when it enacted Senate Bill 150 (“SB 150”), which became law on March 30, 2020. SB 150 provides, notwithstanding the provisions of the Act, that “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 Cabinet violated the Act by failing to respond to the Appellant’s request within ten days.

After the appeal was initiated, the Cabinet provided the Appellant the responsive records in its possession, including the encroachment permit; survey plat sheets; and records related to the Cabinet's 2008 acquisition of a portion of the client's property for a road widening project, including the initial offer, settlement documents, and project plans. The Cabinet claims that no other records responsive to the request exist, and that it has produced all of the responsive records it possesses.

Once a public agency states affirmatively that it has provided all responsive records, the burden shifts to the requester to present a *prima facie* case that additional records exist in the agency's possession. *See Bowling v. Lexington-Fayette Urb. Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not made a *prima facie* showing that the Cabinet possesses additional records responsive to his request. From this record, there appears to be a dispute regarding the amount the Cabinet paid for the taking of land. The Appellant claims that his client was not compensated for the Cabinet's taking of a turn lane, despite his client's understanding that the turn lane would be purchased. The Cabinet indicated its "understanding that the acquisition included the area where the turn lane was located and no turn lane was built as part of the project." Therefore, both parties have recognized that the Cabinet acquired the subject turn lane, but it appears that they dispute whether the Cabinet provided compensation for the turn lane. The parties have also mentioned the fact that the Cabinet's acquisition of this land has been the subject of previous litigation. But this not a dispute that may be resolved under the Act. And the existence of this dispute alone is not *prima facie* evidence that the Cabinet should possess more records than those it has provided to the Appellant. Therefore, other than its late response, the Cabinet 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

James M. Herrick
Assistant Attorney General

#69

Distributed to:

Noel Mark Botts, Esq.
Todd Shipp, Esq.
Chea Coleman Kelley, Esq.