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21-ORD-066

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In re: Jonathan Raikes/Nelson County Judge/Executive

Summary: The Nelson County Judge Executive (the "Judge/Executive") violated the Open Records Act ("the Act") when it did not issue a timely response to a request to inspect records.

Open Records Decision

On February 8, 2021, Jonathan Raikes ("Appellant") sent an email to the Judge/Executive in which he expressed some concerns regarding the wages of various county employees. He then asked the Judge/Executive for a "copy of the section of the employee policy which allows Nelson Fiscal Court to withhold one dollar on [*sic*] the hour from jail employees who receive promotions." On February 23, 2021, after receiving no response to his request, the Appellant emailed the Judge/Executive again to check the status of the request. The Judge/Executive responded to that email and told the Appellant to cease sending checks to the Office of the Judge/Executive for open records requests.[1] However, the Judge/Executive did not provide a response to the Appellant's request or produce any records. This appeal followed.

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

[1] The Judge/Executive has a policy under which he does not charge copying costs for requests that result in ten or fewer pages.

inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). The Judge/Executive admits that he failed to issue a timely response, and attributes the error to a miscommunication. Therefore, the Judge/Executive violated the Act when he failed to issue a timely written response to a request to inspect records.

After the appeal was initiated, the Judge/Executive provided the Appellant with one page of an employment policy in which the appointment and promotion of employees is discussed. The Judge/Executive further states that no policy exists that discusses withholding pay from employees. Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to make a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urb. 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).

Here, the Appellant has not made a *prima facie* showing that a policy that discusses withholding pay from employees exists within the Judge/Executive's possession. Therefore, the Judge/Executive's disposition of the request 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 proceedings.

Daniel Cameron
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/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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