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21-ORD-103

June 3, 2021

In re: Richard Ciresi/City of West Point

Summary: The City of West Point ("City") violated the Open Records Act ("the Act") when it failed to explain how an exception to the Act authorized it to deny inspection of a record. The City also violated the Act, as modified by SB 150, when it failed to fulfill an open records request within ten days.

Open Records Decision

On April 27, 2021, City Council member Richard Ciresi ("Appellant") requested certain records and information relating to alleged misconduct by the city clerk. The City denied the Appellant's request for a "complete list of everything that has been reported to the authorities as theft, fraud, or misappropriation as related to the City Clerk." Although the City cited KRS 61.878(1)(h) in its denial, it did not explain how the statute applied to the requested record. This appeal followed.

When a public agency denies a request under the Act, it must give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). Here, the City merely quoted the language of KRS 61.878(1)(h) without further explanation.[1] Thus, the City violated the Act.

[1] Moreover, KRS 61.878(1)(h) exempts "records of law enforcement agencies or agencies involved in administrative adjudication" of statutory or regulatory violations, but only if the premature release of such records would harm the prospective law enforcement action. The City is not a law enforcement agency, and there is no evidence that it is engaging in

On appeal, the City explains that it did not provide a list because the City has "made several submissions" to the Kentucky State Police ("KSP"), but the City has "no record as to what the state will charge [the] former clerk with." Additionally, the City states that producing a list before charges are brought could "expose [the City] to a slander suit" if the list does "not match up with the items" that become the subject of criminal charges. In other words, the City has submitted records to KSP as part of the investigation, but it has not created a "complete list" of all such records it has submitted. The Act does not require a public agency to compile information or to create a record that does not already exist. *See, e.g.,* 21-ORD-046. Therefore, the City did not violate the Act by denying the Appellant's request for a list that the City had not created.

On appeal, the Appellant complained that the City had not responded to several additional portions of his request.[2] Each portion will be addressed below.

In response to the Appellant's request for an "[a]udit checklist from the auditor," the City responded, that the list would be provided "when the auditor supplies [it] to us." While the City's response could have been clearer, it appears that the audit checklist requested by the Appellant did not exist in the City's possession at the time of the Appellant's request. Once a public agency states affirmatively that it does not possess a record, the burden shifts to the requester to present a *prima facie* case that the requested record does exist in the agency's possession. *See Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not made a *prima facie* case that the auditor had provided the City with the checklist at the time the request was made, or that the City currently possesses an audit checklist.

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administrative adjudication of potential statutory or regulatory violations. KSP may be engaging in such a prospective law enforcement action, but there is no evidence that the City is doing so.

[2] The Appellant submitted his request on April 27, 2021, and the City responded on April 29, 2021. The City stated that many of the requested records would be provided on May 7, 2021, or within ten days of the date of the request. Due to temporary changes to the Act following the 2020 General Assembly's enactment of SB 150, public agencies are permitted ten calendar days to respond to requests to inspect records. Thus, if the City had produced responsive records on May 7, 2021, such production would have been timely under SB 150. However, the Appellant initiated this appeal on May 4, prior to the date on which the City claimed additional records would be available. After initiating this appeal, the Appellant claims that the City has not produced certain records by May 7, as it claimed it would do.

Thus, the City did not violate the Act when it did not provide the requested record.

In response to the Appellant's requests for the current balance on a "$75,000 note taken to purchase Gene Smith property" and a "[s]chedule of principal and interest payments due on bonds," the City responded that it would provide responsive records by May 7, 2021. However, the Appellant states that the City still has not provided the requested information or record.

The Act does not require public agencies to fulfill requests for information. KRS 61.872; *Dept. of Revenue v. Eifler,* 436 S.W.3d 530, 534 (Ky. App. 2013); *see also* 21-ORD-014 (finding that an agency had no duty to honor a request for "numbers" rather than public records). When the Appellant asked for the balance on a note, he was not asking to inspect a specific record. Rather, he sought the answer to a question. But the Appellant's request for the schedule of principal and interest is a request for record because it is a request for a specific document "owned, used, in the possession of or retained by" the City. KRS 61.870(2). When a public agency receives a request to inspect a public record, such as a schedule of principal and interest, ordinarily it must respond to such a 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). Accordingly, the City violated the Act by failing to either produce the requested schedule within ten days, or explain why an exception applied to deny inspection of the requested record. KRS 61.880(1).

In response to the Appellant's requests for "[d]etails of [the] Tourism Grant" and "[d]etails of [the] KIA Grant," the City responded to ask that the Appellant provide the dates of the grants. A request to inspect records under the Act must describe the records in a manner "adequate for a reasonable person to ascertain the nature and scope of [the] request." *Commonwealth v. Chestnut,* 250 S.W.3d 655, 661 (Ky. 2008). However, in the Appellant's initial request for "[d]etails of Tourism Grant" and "[d]etails of KIA grant," he did not identify any particular grant, the identifying details about the grant that he sought, or the dates he believed such grants had been issued. Without such information, a reasonable person could not ascertain what records that the Appellant sought to inspect. Therefore, the City did not violate the Act by

inviting the Appellant to provide a more complete description of the records he sought to inspect.[3]

In sum, the City violated the Act by failing to explain how KRS 61.878(1)(h) applied to the requested list of "everything reported to the authorities." The City further violated the Act when it did not provide the records reflecting a schedule of principal and interest payments within ten days. However, the City did not violate the Act when it denied a request for a list it had not created and an audit checklist it did not possess, or when it could not produce records related to grants that the Appellant had not sufficiently described.

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
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/s/ James M. Herrick

James M. Herrick
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Distributed to:

Mr. Richard Ciresi
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[3] After the City responded to the appeal, the Appellant explained that he wished to inspect records showing "when received, the amount of the grant[s] and the purpose." The Appellant has not provided the requested dates to identify the grants he wishes to inspect. However, he has clarified that the "Tourism Grant" is an item to which the city clerk charged expenses in entries appearing in records the Appellant has already received. Because the Appellant only raised this issue after the appeal had been initiated and after the City had responded to his initial claims on appeal, the City has not responded to the Appellant's new claims. Therefore, the record before this Office is inadequate to determine whether these clarifications from the Appellant are sufficient for the City to identify the records the Appellant seeks.