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21-ORD-113

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In re: Rona Dawson/Lexington-Fayette Urban County Government

Summary: The Lexington-Fayette Urban County Government (the "City") violated the Open Records Act ("the Act") when it failed to affirmatively state in its response to a request that the requested records did not exist in its possession. However, the City did not violate the Act, as modified by Senate Bill 150, when it issued a response to an open records request within ten days.

Open Records Decision

On April 22, 2021, after the close of business, Rona Dawson ("Appellant") submitted a request electronically to the City for copies of the Lexington Fire Department's records pertaining to the construction of a new medical center in eastern Fayette County. Specifically, the Appellant asked for "all site, blasting, terms and conditions documents and all project records of any type" relating to the construction site. On April 29, 2021, the City emailed a letter to the Appellant stating that the medical center under construction is "not in [the City's] jurisdiction." The City then directed the Appellant to the Kentucky Energy and Environment Cabinet, which the City claimed may have responsive records for "the State project."

On April 30, 2021, the Appellant again emailed the City and claimed that a local ordinance requires the Lexington Fire Chief to sign a permit authorizing the use of dynamite or other explosives as part of a construction project. The City responded, informing the Appellant that the City had forwarded the Appellant's email to its legal department and it would "get back with [the Appellant]" regarding this issue. Having received no response, on May 12, 2021, the Appellant again emailed the City, seeking a response to her April 30 email. The Appellant then initiated this appeal on May 13, 2021, after

she received no response to her claim that the City should possess a signed permit for blasting according to the City's ordinance.

First, the Appellant claims that the City's response to her request was untimely. It was not. In response to the public health emergency caused by the novel coronavirus, the General Assembly 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). Under KRS 446.030, when the period of time prescribed by statute is seven days or less, weekends and legal holidays are excluded from the computation of time. Therefore, because SB 150 provides ten days to respond, weekends or holidays are not excluded from the computation of time and a response is due within ten calendar days of receipt.

The Appellant emailed her request after business hours on April 22, 2021, and the City received it the following business day, April 23, 2021. As such, the City's response was due on May 3, 2021 under the Act as modified by SB 150. The City responded to the Appellant's request on April 29, 2021. Therefore, the City's response was timely under the Act as modified by SB 150.[1]

Second, the Appellant argues that the City failed to affirmatively state whether records responsive to her request existed in the City's possession. The Act regulates access to public records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot grant a requester access to a record that does not exist. *Bowling v. Lexington Urban County Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). However, if a public agency denies a request because no responsive records exist in its possession, the public agency must affirmatively state as much in its response to the requester. *See id.*; *see also* 21-ORD-004. Here, the City did not affirmatively state that it was denying the Appellant's request because no responsive records existed in its possession. Instead, the City stated only that

[1] To the extent that the Appellant claims that the City failed to timely respond to her subsequent email, in which she responded to the City's response to her request, the Act did not require further response from the City. KRS 61.880(1) requires a public agency to decide whether to comply with a request to inspect records and to notify the requestor of its decision within the prescribed period. The City timely decided not to comply with the request, and it timely communicated that decision to the Appellant. Thereafter, the Act provides a mechanism for a person to dispute a public agency's denial – by appealing the decision to this Office. KRS 61.880(2)(a).

the medical center was "not in [the City's] jurisdiction."[2] Because the City did not affirmatively state that it was denying the request because no responsive records existed in its possession, it violated the Act.

On appeal, the City now states affirmatively that no responsive records exist in its possession. Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist in the agency's possession. *Bowling*, 172 S.W.3d at 341. This Office has found that a requester can make a *prima facie* case that records should exist by citing a statute, regulation, or other legal authority that requires the creation of the requested record. *See, e.g.*, 20-ORD-038; 11-ORD-074. If the requester can make 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 Fort 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 claims that a local ordinance required the fire chief to sign a permit authorizing the use of explosives as part of the construction project. Under Lexington-Fayette County Code of Ordinances § 9(10), "[a]ny person intending to do business in the urban county, which business will require the storage, use, manufacture, sale, handling, transportation or other disposition of highly flammable materials, crude petroleum or any of its products, gun or blasting powder, dynamite or explosives, shall first give notice, in writing, to the fire chief of the intention of such person to conduct such business at a given location in the urban county and to apply for a license to do business in the urban county."[3] The ordinance further requires the fire chief to "make an inspection of such premises" within ten days, and provide his written approval that the business and premises are in compliance with applicable safety standards. *Id*. In response, the City claims that it searched its records, but it does not possess any permit signed by the fire chief for the construction project.

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[2] The City's initial response to the Appellant did not explain what it meant by this statement. After all, the medical center is located within the City. In subsequent correspondence, however, the City explained that state officials, not local officials, inspect medical centers for compliance with applicable building codes. That is why it directed the Appellant to the Kentucky Energy and Environment Cabinet, which is the agency that inspects building projects such as these.

[3] Lexington-Fayette Code of Ordinance § 9(10) available at https://library.municode.com/ky/lexington-fayette_county/codes/code_of_ordinances?nodeId=COOR_CH9FIPR_S9-10SAAZBUREPE (last accessed June 8, 2021)

While the ordinance helps the Appellant establish a *prima facie* case that the requested record may exist, the City has adequately explained that it searched its records and no executed permit exists. Whether the local ordinance required the fire chief to execute the requested permit under these facts is outside the scope of this Office's review under KRS 61.880(2). The City did not violate the Act when it did not provide access to records that it claims do not exist in its possession.

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/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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