



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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21-ORD-214

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In re: Vickie Stephens/Metcalf County Fiscal Court

Summary: The Metcalf County Fiscal Court (the “Fiscal Court”) violated the Open Records Act (“the Act”) when it did not properly invoke KRS 61.872(5) to delay inspection of certain records, and when it failed to explain the adequacy of its search for records.

Open Records Decision

In April of 2021, Vickie Stephens (“Appellant”) submitted a request for records to the Fiscal Court. After reviewing the records provided by the Fiscal Court, on August 14, 2021, the Appellant submitted a new request for records she believed were missing from the records the Fiscal Court had provided previously. Specifically, she sought a copy of a letter sent by the Judge/Executive on his letterhead that had been referenced in previous documents, a specific email that had been referenced in the Fiscal Court’s meeting minutes, more general requests for all correspondence issued between the Fiscal Court and state and local emergency management agencies in connection with an audit, and the Fiscal Court’s fourth quarter financial report for 2020. In a timely response, the Fiscal Court provided a copy of the financial report. The Fiscal Court also stated that it had previously provided the Appellant all responsive correspondence in response to the Appellant’s earlier request. The Fiscal Court committed to searching its records once more, but did not state when its search would be concluded because its “Emergency Management Director is out on medical leave and will be for the foreseeable future.” Having received no further response from the Fiscal Court, this appeal followed.

Although an agency is ordinarily required to respond to a request, and produce responsive records that are not exempt, within five business days,

KRS 61.880(1), a public agency may extend that time when certain conditions are met. Specifically, “[i]f the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed five (5) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.” KRS 61.872(5).

Here, the Fiscal Court timely provided the Appellant with a financial report, but it failed to produce any of the requested correspondence or affirmatively state that no such correspondence existed within its possession. Instead, the Fiscal Court committed to conducting a more thorough search for records. Although the Fiscal Court recognized that more time would be required to conduct such a search, it failed to notify the Appellant of the earliest date upon which it would make responsive records available. Therefore, the Fiscal Court violated the Act.

After the appeal was initiated, the Fiscal Court claims to have “searched [its] records,” but it could only locate ten additional pages of responsive records. 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 requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public 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).

Among the additional records the Fiscal Court located is an email from an employee of Kentucky Emergency Management discussing the Judge/Executive’s request to change his account credentials to access a federal grant portal. The employee stated that, to complete the request, the Judge/Executive would be required to submit the request via a signed letter on his letterhead. In a later email, a Fiscal Court employee indicated that the letter had been drafted and was ready for the Judge/Executive’s signature. The Appellant claims that this is the specific letter she seeks, and the emails the

Fiscal Court provides on appeal constitute a *prima facie* case that a draft of the requested letter was created.¹

Moreover, the Appellant also sought a specific email that a Fiscal Court employee received from the Federal Emergency Management Agency (“FEMA”) regarding “double dipping” of grant awards. To make her *prima facie* case that this email exists, the Appellant provides a copy of the Fiscal Court’s meeting minutes from November 10, 2020, which documents the employee’s claim that he received such an email. This, too, is sufficient to establish a *prima facie* case that the employee received the requested email.

Because the Appellant has made a *prima facie* case that a draft of the requested letter, and email from FEMA, should exist, the burden shifts to the Fiscal Court to explain the adequacy of its search. *City of Fort Thomas*, 406 S.W.3d at 848 n.3. However, the Fiscal Court states only that it “searched [its] records” and could not locate the requested records. This Office finds that the Fiscal Court has failed to adequately explain how it searched for these records, in violation of the Act.²

The Appellant also sought all correspondence between the Fiscal Court and state and federal emergency management agencies related to an audit on April 11, 2019. To make her *prima facie* case that such records should exist, the Appellant provides an email she received on April 12, 2019, notifying her that such an audit had been initiated the previous day. After conducting a more thorough search on appeal, the Fiscal Court provided correspondence related to the audit and the Fiscal Court’s proposed solutions to the auditor’s findings. The Fiscal Court claims that it searched its records, and also requested employees of Kentucky Emergency Management to search their records, for additional correspondence, but neither the Fiscal Court nor Kentucky

¹ The evidence in the record indicates that employees of the Fiscal Court created a draft letter that was ready for the Judge/Executive’s signature. However, there is no evidence in this record that the letter was in fact signed and delivered. The Appellant requested the letter that was sent, not a draft. Regardless, the evidence suggests that the letter was ready to be sent and the Fiscal Court provides no explanation for why the letter was not sent. Moreover, the Fiscal Court never claimed to have located the draft or claim such a draft was exempt under KRS 61.878(1)(i) or (j).

² Although this Office finds that the Fiscal Court failed to adequately explain its search, this Office is unable to conclusively state that the requested records do exist. That is because this Office is ill-equipped to make factual findings that records actually exist. *See, e.g.*, 19-ORD-083; 03-ORD-061; OAG 89-91.

Emergency Management could locate additional correspondence. Although the Fiscal Court was ultimately able to find additional correspondence, it only did so after three searches. It did not produce the correspondence in response to the Appellant's first request in April; it did not produce the correspondence in response to the Appellant's subsequent request in August; and only after it searched a third time on appeal did it locate such correspondence. Under these facts, coupled with the nominal details the Fiscal Court provides about the parameters of its search, this Office cannot find that the Fiscal Court adequately explained its search for records in the first instance. But it has adequately searched as of the third time, and this Office cannot find that additional responsive records should exist.

In sum, the Fiscal Court violated the Act when it failed to properly invoke KRS 61.872(5) and notify the Appellant of the earliest date on which records would be available. It also violated the Act when it failed to adequately explain its search for records once the Appellant established a *prima facie* case that such records should exist. However, this Office is unable to conclusively state that additional records do exist and were not provided.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
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/s/Matthew Ray
Matthew Ray
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Distributed to:

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