



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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21-ORD-250

December 13, 2021

In re: Kelly Copas/Monroe County Judge Executive's Office

Summary: The Monroe County Fiscal Court (the "Judge Executive's Office") violated the Open Records Act ("Act") when it did not issue a timely response to a request under the Act and when it did not comply with KRS 61.880. However, it did not violate the Act when it provided copies of all the records it claims exists in its possession.

Open Records Decision

On October 11, 2021, Kelly Copas ("Appellant") submitted a request to the Judge Executive's Office for "copies of any correspondence (letters or digital "email") [the Judge Executive's Office] has sent or received regarding the construction of the SPLASH PARK [sic] on the property the fiscal court purchased on Columbia Avenue, Tompkinsville, Kentucky." The Appellant specified the temporal scope of his request was for records generated between January 1, 2020 and October 8, 2021. On October 12, 2021, the Judge Executive's Office confirmed receipt of the Appellant's request but did not specifically deny the request or indicate any intention to comply with the request. This appeal followed.

Under KRS 61.880(1), upon receiving a request for records under the Act, the agency "shall determine within five [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision." Here, the Judge Executive's Office stated that the project at issue "is in front of the National Park Service for review and BRADD is in charge of this

project.”¹ The Judge Executive’s Office advised the Appellant to contact the BRADD office at a specific phone number for any further assistance about this project. Although, the Judge Executive’s Office response was issued within five business days, the response was deficient because the response did not notify the Appellant whether or not the Judge Executive’s Office intended to comply with the request. And the Judge Executive’s Office did not claim that it was the incorrect agency to receive the request. *See* KRS 61.872(4) (requiring a public agency to “notify the applicant” if the agency “does not have custody or control of the public record requested”). Thus, the Judge Executive’s Office violated the Act.

On appeal, the Judge Executive’s Office provides the Appellant with nine pages of responsive records. The Appellant contends that the Judge Executive’s Office should possess additional 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). Here, the Judge Executive’s Office did not include the requisite affirmative statement that it does not possess additional responsive records. Thus, it is not clear from this record whether all responsive records have been provided to the Appellant.

If the Judge Executive’s Office had affirmatively stated that all responsive records had been provided, then the burden of proof would shift to the Appellant to present a *prima facie* case that additional records exist. Here, however, the Appellant only states his disbelief that the Judge Executive’s Office possesses only nine pages of responsive records for a “\$1.3 million project.” This Office has previously held that a requester’s mere assertion that an agency should possess responsive records is not enough to establish a *prima facie* case. *See, e.g.*, 21-ORD-174. And this Office has historically found that it

¹ It would appear as though “BRADD” is an acronym that refers to the Barren River Area Development District, an area development district created under KRS 147A.05. *See generally*, <https://www.bradd.org/index.php/about-us/faq> (last accessed Dec. 3, 2021).

is unable to resolve competing factual claims about the existence of additional records. *See, e.g.*, 19-ORD-083; 03-ORD-061; OAG 89-81. Accordingly, this Office cannot find that the Judge Executive's Office violated the Act in failing to produce additional records.

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
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Kelly Copas
Renea Crowe