



COMMONWEALTH OF KENTUCKY
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21-ORD-253

December 16, 2021

In re: Michael Murphy/Gallatin County Floodplain Coordinator's Office

Summary: Because appeals brought before the statutory deadline for a public agency to respond are not ripe for review, this Office is unable to determine if the Gallatin County Floodplain Coordinator's Office (the "Coordinator's Office") violated the Open Records Act ("the Act") based on a factual dispute between the parties as to whether the records provided are different from records that were sought.

Open Records Decision

On November 16, 2021, Michael Murphy ("Appellant") emailed a request containing two subparts to the Coordinator's Office to inspect records related to a construction project at a specific property. First, he asked to inspect the application for the "Residential Zoning/ Construction Permit" for the project. Second, he asked to inspect "[d]ocuments granting approval for the City of Glencoe, Carrollton utilities and USDA Rural development," and all communications between the applicant, project participants, and "any government agency pertaining to" the application. On November 16, 2021, within a few hours of receiving the request, the Coordinator's Office responded and provided fifteen pages of responsive documents consisting of the requested application. The Coordinator's Office did not, however, immediately provide the requested communications or indicate whether such communications were being withheld under an exemption to the Act. The Appellant then immediately filed this appeal, the same day he submitted his request and the Coordinator's Office responded.

When a public agency receives a request under the Act, it must “determine within five (5) [business] days, . . . whether to comply with the request and shall notify in writing the person making the request, within the five (5) [business] day period, of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1).

Here, the Coordinator’s Office issued a response within a few hours of receiving the request and stated “[a]ttached please find the information requested in your Open Records Request Dated 11/16/2021.” The Coordinator’s Office did not provide any of the requested communications, state that no such communications existed, or claim an exemption under the Act permitted it to deny inspection of the communications. However, on November 19, 2021, after the appeal was initiated but within three business days of receiving the Appellant’s request, the Coordinator’s Office emailed the Appellant and stated that the “papers” the Appellant sought to inspect “will be available for inspection during regular business hours.” The Coordinator’s Office therefore claims on appeal that it has provided, or made available for inspection, all responsive records. The Coordinator’s Office claims that the appeal was not ripe at the time it was submitted and that the appeal is now moot.

In 20-ORD-175, this Office explained that an appeal brought solely on “preliminary correspondence meant to facilitate a request” issued by a public agency prior to the expiration of time for the agency to respond is not a “denial” capable of this Office’s review. KRS 61.880(1) permits a public agency up to five business days to “determine” whether to comply with a request, and to notify the requester of its decision. Simply put, a public agency’s correspondence issued prior to the expiration of time to respond will not become ripe for this Office’s review until after the statutory deadline for the agency to respond has expired, unless such correspondence affirmatively denies the request. To hold otherwise would lead to premature appeals, such as these, or incentivize public agencies to refrain from communicating with a requester prior to the expiration of time to respond, which would have a broader negative impact on the efficiency of processing requests.

Here, the Coordinator's Office determined on November 19, three business days after receiving the request, to provide additional records for inspection. There is no evidence in the record that the Appellant has inspected the records the Coordinator's Office has made available at its facilities. Therefore, this Office is unable to determine whether the Coordinator's Office has now provided all responsive records. *See, e.g.*, 19-ORD-083; 03-ORD-061; OAG 89-81 (finding that the Office is incapable of resolving factual disputes about whether all responsive records have been 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
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Michael Murphy
John G. Wright