



COMMONWEALTH OF KENTUCKY
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22-ORD-083

April 28, 2022

In re: Candy Messer/Greenup County Road Department

Summary: The Greenup County Road Department (“the Department”) violated the Open Records Act (“the Act”) when it failed to respond in writing to a request for records. However, the Department did not violate the Act when it could not provide records that do not exist.

Open Records Decision

On March 15, 2022, Candy Messer (“Appellant”) submitted a request to the Department for “the names of the 223 cemetery roads on the county road inventory list as well as the dates they were accepted by Greenup County Fiscal Court to be included,” and for “the 39 cemetery names and property owners requesting maintenance of these 39 cemetery roads.” After receiving no written response from the Department, the Appellant initiated this appeal.

When a public agency receives a request to inspect records, that agency must decide within five business days “whether to comply with the request” and notify the requester in writing “of its decision.” KRS 61.880(1). Here, the Department does not dispute that it received the Appellant’s request on March 15, 2022, and failed to issue a timely written response. Thus, the Department violated the Act.

On appeal, the Department states that records pertaining to the names and acceptance dates of cemetery roads on the county road inventory list are available for the Appellant’s inspection. Accordingly, that portion of this appeal relating to those records is moot. 40 KAR 1:030 §6.

The Department further states that it has created no records to document maintenance requests or work performed on cemetery roads, and that therefore no such records exist. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist. See *Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant alleges that the Superintendent of the Department stated at a fiscal court meeting that his office had received 39 telephone calls requesting maintenance on cemetery roads. The Appellant argues that the Superintendent could not have given such a “precise number” without having written documentation of those maintenance requests. The Department, however, states that 39 was not intended as a “precise number,” but was merely “a good-faith estimate” from memory “suggesting that many cemetery roads had been repaired and maintained at the request of citizens and funeral directors.” Thus, to the extent that the Appellant may have presented a *prima facie* case that the requested records exist, it has been rebutted. Accordingly, the Department did not violate the Act when it could not provide records that do not exist.

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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
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/s/ James M. Herrick

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Assistant Attorney General

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Distributed to:

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