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24-ORD-134

June 12, 2024

In re: Kenneth Tracy/City of Frankfort

**Summary:** The Office cannot find that the City of Frankfort (the “City”) violated the Open Records Act (“the Act”) when it partially denied a request for records that it claims do not exist within its possession.

***Open Records Decision***

On April 26, 2024, Kenneth Tracy (“Appellant”) submitted a request for records to the City for a “copy of all text messages, phone call lists showing duration of calls, and emails with respect to 850 Hickman Hill Lane (PVA Map #104-00-00-005.00), by and between” the Frankfort–Franklin County Planning Commission (“Commission”) Chairperson “and all planning commissioner members.” The Appellant’s April 26 request also requested similar records for other named commissioners. On May 3, 2024, the City responded, partially granting the request as to the records related to the Commission Chairperson and providing responsive records. The City also partially denied the request as to the other named commissioners because the Commission Chairperson “is the only board member that had any related records.” This appeal followed.

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 the records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to support a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested records, or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. 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 City initially and on appeal stated affirmatively that it does not possess any additional responsive records.<sup>1</sup> To make a *prima facie* case that the City should possess additional responsive records, the Appellant asserts that, because the records the City provided “mention” phone calls between parties, there should be “documentation” of “how the conversation took place.” As proof, the Appellant provides an email dated May 1, in which a phone “call” is referenced. Here, although the Appellant has provided some evidence to factually support his claim that a phone call occurred, he has not presented any statute or regulation requiring the City to create the requested records, or some evidence to factually support the existence of any responsive records related to the phone call within the City’s possession.<sup>2</sup> As a result, the Office cannot find that the City possessed the requested record at the time of the Appellant’s request or that it violated the Act.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

**Russell Coleman**  
**Attorney General**

/s/ Matthew Ray  
Matthew Ray  
Assistant Attorney General

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<sup>1</sup> The City, on appeal, also states that, on May 3, 2024, it received a similar but different request from the Appellant and provided records responsive to that request. However, because the Appellant did not provide the Office with copy of that request or the City’s response, any issues regarding that request are not before the Office. *See* KRS 61.880(2)(a).

<sup>2</sup> The Appellant responded to the City’s response on appeal, in which he asserts the City “does not provide cell phones” but, “if a private cell phone is used to conduct public business on behalf of [the City], those records become public record.” However, the Appellant has not provided proof that any related records were generated. In contrast, the City asserts that records responsive to the part of the Appellant’s request it partially denied never existed.

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Distributed to:

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