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24-ORD-143

June 18, 2024

In re: John Barrow/City of Strathmoor Village

Summary: The City of Strathmoor Village (“the City”) violated the Open Records Act (“the Act”) when it failed to respond to a request for public records within five business days. The City also violated the Act when it denied a request for public records without citing a statutory exemption and explaining how it applied to the records withheld. The City did not violate the Act when it could not provide records that are not within its possession, custody, or control, but violated the Act when it withheld records in their entirety instead of redacting the exempted material and providing the nonexempt portions.

Open Records Decision

On April 1, 2024, John Barrow (“Appellant”) submitted a request to the City for a “[c]opy of all payroll payments made to all employees of [the City] including elected officials” in 2023, including “the identification of all person [sic] relating (directly or indirectly) to any elected official” and “any individual paid via a contractor or any business.” Having received no response to his request by May 13, 2024, the Appellant attended a City meeting and made an inquiry to the city attorney, who orally informed him his request would be denied. Having received no written denial by May 16, 2024, the Appellant initiated this appeal.

When a public agency receives a request for public records, it must determine within five business days “whether to comply with the request [and] notify in writing the person making the request, within the five (5) day period, of its decision.” KRS 61.880(1). On appeal, the City states it “has no record of when it actually received the request” but “admits that its written response . . . may have been untimely.” Because the Appellant claims he submitted his request on April 1, 2024, and the City does not dispute that it failed to respond in writing prior to his initiating this appeal on May 16, 2024, the City violated the Act.

The day after the Appellant initiated this appeal, the City denied the Appellant's request in writing. With regard to payroll for vendors and contractors, the City stated it did not have any such records because it "does not provide any payroll services to" those entities. The City further stated that "[t]he only persons for whom the City does any 'payroll' are [its] police officers and elected officials," but it was withholding those records because they include "information regarding deductions from and taxation of, the income of those employees, which is information which is not open to the public." The City's response cited no provision of the Act.

Under KRS 61.880(1), a public agency denying inspection of public records must "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." Here, the City's response cited no exception, but merely stated certain information was "not open to the public." Therefore, the City violated the Act.

On appeal, the City reiterates that it does not provide payroll services for vendors or contractors, and therefore, it has no payroll records for employees of those entities. A public agency "is responsible only for those records within its own custody or control." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)). Once a public agency states affirmatively that it does not have the requested records within its possession, custody, or control, the burden shifts to the requester to present a *prima facie* case that it does possess such records. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not attempted to make such a showing. Accordingly, the City did not violate the Act when it could not provide payroll records for vendors or contractors.

With regard to its own employees, the City claims its payroll records are exempt from disclosure under KRS 61.878(1)(a) because they contain "information personal to [its] employees such as tax deductions and child support payments." KRS 61.878(1)(a) exempts from public disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." In OAG 82-233, the Attorney General recognized that payroll records contain "a mixture of exempted and non-exempted information," such that the "name of the person being paid and the gross pay to that person is not exempt from public disclosure," but information relating to payroll deductions, "such as withholding for taxes, insurance, retirement, credit union, bonds, charitable contributions, and annuities are items which come under the exemptions provided by KRS 61.878(1)(a)." The Office has consistently held that information regarding such deductions is exempt. *See, e.g.*, 22-ORD-240; 16-ORD-234; 07-ORD-056. Therefore, the City is correct that information regarding payroll deductions is exempt under KRS 61.878(1)(a).

However, when records contain a mixture of exempt and nonexempt information, a public agency may not withhold the records in their entirety; rather, the agency must redact the exempt portions and provide the remainder. *See* KRS 61.878(4) (“If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.”). Therefore, the City violated the Act when it denied the Appellant’s request for its payroll records altogether, rather than providing him a redacted copy of those records.

A party aggrieved by this decision may appeal it by initiating an 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.

Russell Coleman
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/s/ James M. Herrick
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Distributed to:

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