COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-161

July 9, 2024

In re: Nathan McCamish/Lexington–Fayette Urban County Government

Summary: Because the requester has made a *prima facie* case that a public record should exist, the Lexington–Fayette Urban County Government ("the City") violated the Open Records Act ("the Act") when it failed to explain the adequacy of its search for the record.

Open Records Decision

Nathan McCamish ("Appellant") submitted a request to the City to inspect "the most up-to-date documentation regarding the percentage of funding provided by [the City] to" the seven nominating organization listed in Ord. No.[1] 25-20(2). The Appellant further specified that "most up-to-date" refers to the "documentation 'updated on a rotating basis to coincide with the end of the term of each commission member,' per [Ord. No.] 25-20(9)." In response, the City produced a single document. The Appellant then explained that, per Ord. No. 25-20(9), more than one document should exist. The City responded that "no additional records exists in our custody that are responsive to your request." This appeal followed.

After the appeal was initiated, the City provided an email with attachments and documents that were "filed away in boxes from 2002 and 2009" it believed "may pertain to [the] Appellant's original request." However, the City maintains that the additional funding documents identified by the Appellant do not exist. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 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

[1] Code of Ordinances, Lexington–Fayette Urban County Government.

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, to make a *prima facie* case the funding records exist, the Appellant cites Ord. No. 25-20(9)(g), which requires "all groups named as nominating organizations" to "submit to the mayor . . . in writing" the "[p]ercent[age] of the organization's funding provided by the [City]." In response, the City suggests that "the nominating organizations listed in the Code of Ordinances" did not "provide [the City] with that information." Whether the nominating organizations provided the information to the City is a question of fact this Office is unable to adjudicate. *See, e.g.*, 22-ORD-159 n.2. But by pointing to the City's ordinance requiring the production of the funding records, the Appellant has presented sufficient information to suggest the records should exist.[2] As such, the burden shifts to the City to explain the adequacy of its search, which it has failed to do.

An adequate search for records is one using methods reasonably designed to find responsive records. *See, e.g.*, 95-ORD-096. Reasonable search methods include reviewing the files pertaining to the general subject matter of the request, and the files of employees either specifically mentioned in the request or whose job duties are related to the subject matter of the request. *See, e.g.*, 19-ORD-198. To carry its burden of explaining how its search was adequate, an agency must, at a minimum, specifically describe the types of files or identify the employees whose files were searched. *See id*. But here, the City only states that it "conducted an additional search to do [its] due diligence and ensure no additional records exist." The City did not describe the files it searched or identify which employees' files were searched. Just as a requester cannot make a *prima facie* case that records do or should exist merely by asserting that they do, an agency cannot meet its burden merely by asserting that it searched for records.

---

[2] The City cites 24-ORD-101 for the proposition that it may rebut the Appellant's *prima facie* case by stating that the requested records do not exist. In 24-ORD-101, the Office stated that although "the Appellant ha[d] perhaps presented a case that [records] *should* exist," the agency "ha[d] rebutted the presumption that [records] *do* exist by asserting that none were created" (emphasis in original). Importantly, in 24-ORD-101, the agency rebutted the case that records should exist by affirmatively stating it did not create the requested records. Moreover, the Office explained that "the [agency] ha[d] discharged its duty under the Act by explaining *why* no responsive records exist." *Id.* (citing *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011)) (emphasis added). Here, the City states only that "the failure of the nominating organizations listed in the Code of Ordinances to provide [the City] with that information is not a violation of the [Act]." "[W]hen it is determined that an agency's records do not exist, the person requesting those records is entitled to a written explanation for their nonexistence." *Eplion*, 354 S.W.3d at 603. The City has not affirmatively explained *why* no responsive records exist and, therefore, has not rebutted the Appellant's *prima facie* case.

At bottom, the Office cannot find that the funding records, in fact, exist. Adjudicating such factual questions is beyond the Office's purview under KRS 61.880(2). The Office can, however, determine whether a requester has made a *prima facie* case that a record should exist. And once such a showing is made, the agency is called upon to explain the adequacy of its search. *City of Fort Thomas*, 406 S.W.3d at 848 n.3. Because the Appellant presented evidence the funding records should exist, the City was required to describe the methods it used to search for them. By merely asserting it conducted "an additional search to do [its] due diligence," the City has not adequately explained the adequacy of its search. For that reason, 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/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

#272

Distributed to:

Nathan McCamish
Jason Hernandez
Evan P. Thompson