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24-ORD-205

September 24, 2024

In re: Marcus Laytham/City of Mount Washington

Summary: The City of Mount Washington (the "City") violated the Open Records Act ("the Act") when it failed to perform an adequate search and timely fulfill a request for records. However, the Office cannot find that the City possesses additional responsive records that it has not provided.

Open Records Decision

Marcus Laytham ("Appellant") submitted a request to the City for "[a]ny and all documents relating to the administrative investigation(s) into" a named Sergeant that allegedly occurred at Mount Washington Elementary school on or about August 9, 2024.[1] The City granted the request and provided an audio file and eight pages of responsive records, asserting these were "all the records" it had related to the investigation specified in the Appellants request.[2] The Appellant initiated this appeal claiming that his "request has not been fulfilled in its entirety."

The Appellant asserts he had not received the audio file, interview reports created by the investigator, resume of a particular individual, or the investigator's

[1] The Appellant specified that the scope of his request included the "outside investigation conducted by [an outside investigator] and the internal investigation conducted by [a Lieutenant Colonel]." The Appellant further specified that the scope of his request included "all interviews . . . findings and conclusions, emails [in] which the investigation was discussed, all initiation letters . . . [and] the itemized bill, contract, or memorandum of understanding associated to the outside investigation conducted."

[2] The initial batch of responsive records the City provided to the Appellant consisted of an itemized invoice for an independent investigation and the "investigators findings" from the "internal affairs" investigation of the named individual.

findings. For its part, the City stated that it considered the request to be "completed." However, on appeal, the City located additional responsive records and provided them to him.[3] The City explains that the failure to locate these additional records was due to "a miscommunication between the city clerk['s] office and police department." The City again states that it has provided all responsive records that it possesses. The Office has previously found that an initial search is inadequate where the public agency locates additional responsive records in subsequent searches. *See, e.g.,* 22-ORD-003. Thus, the City violated the Act when it failed to perform an adequate search for records to timely fulfill the Appellant's request.[4]

The City maintains that it does not possess the outside investigator's "findings of the investigation," the report of the interview with a specific individual, and the employment contract for the outside investigator. 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 makes 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).

To make a *prima facie* case that the City possesses additional records, the Appellant provides the itemized invoice for the outside investigation. The invoice lists numerous activities performed by the independent investigator, such as "communications" with various individuals, interviewing certain individuals and drafting reports of the interviews, and "reviewing documents" such as the specified individual's resume. With the invoice, the Appellant may have made a *prima facie* case that the outside investigator created certain records, such as interview reports. However, the Appellant has not made a *prima facie* case that the City now possesses the records created by the outside investigator during his investigation.

For its part, the City has informed the Appellant that any additional records that might exist are in the possession of the outside investigator. In response, the Appellant states the City "knowingly and willfully withheld documents known to

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[3] Specifically, the City provided the Appellant with documents related to the Lieutenant Colonel's investigation; "all interviews including audio and written"; investigation "findings and conclusions"; "emails discussing the investigation"; "initiation letters"; "itemized bill [*sic*] associated with the outside investigation"; and "the audio interview."

[4] The City later provided records consisting of an audio recording and four additional pages of records. The City again states these are all the responsive records it possesses.

exist" because it found additional documents after the first search was performed. Yet, the Appellant does not provide any evidence to bolster his bare assertion that the City possesses additional records it has not provided.

The Office has previously found that a requester's bare assertion that additional records exist in the possession of the public agency is not enough to establish a *prima facie* case that additional records actually do exist in the possession of a public agency that have not been provided. *See, e.g.,* 24-ORD-154; 23-ORD-335; 22-ORD-040. Likewise, here, the Appellant has not presented a *prima facie* case that, following the City's subsequent search, additional records exist. Furthermore, the Office has historically declined to adjudicate factual disputes between the parties about whether additional records exist and were not provided. *See, e.g.,* 19-ORD-083. As a result, the Office cannot find that the City has failed to provide all responsive records in its possession.

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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Distributed to:

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