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24-ORD-248

November 25, 2024

In re: Doug Price/Kentucky State Treasurer

Summary: The Kentucky State Treasurer (“the Agency”) did not subvert the Open Records Act (“the Act”) when it did not provide records that did not exist at the time of the request.

Open Records Decision

On August 26, 2024,¹ Doug Price (“the Appellant”) submitted a request for “copies of records or database exports that detail amounts paid out and collected” in fiscal years 2023 and 2024. Further, he sought “to obtain the current balance of the UP fund.” The Appellant also sought “a list from the Treasurer’s office of escheated items valued at over \$500” for six specified years. Last, the Appellant sought “records of or a database export indicating a search on” two specified Kentucky addresses. In response, on August 27, 2024, the Agency provided all available public records to the Appellant. The Appellant then informed the Agency that he had not received all records he had sought. In response, the Agency stated that portions of his request sought information or records that did not exist. This appeal followed.

After this appeal was initiated, the Appellant stated that his request was “fully answered” by the Agency on November 14, 2024, but maintains that the Agency subverted the Act, within the meaning of KRS 61.880(4), due to its delay in providing all responsive records. Thus, any claims regarding the Agency’s original non-production of records are moot, *see* 40 KAR 1:030 § 6, and the only issue before the Office is the Appellant’s assertion that the Agency subverted the Act.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). A public agency may also delay access to responsive records if such records are “in active use, storage, or not otherwise available.” KRS 61.872(5).

¹ The Appellant had previously submitted a similar request to the Agency prior to August 26, 2024, but withdrew that request and submitted the August 26 request in its place.

A public agency invoking KRS 61.872(5) to delay access to responsive records must notify the requester of the earliest date on which the records will be available and provide a detailed explanation for the cause of the delay. *Id.*

Here, the Agency explains that the Plaintiff submitted requests for information or sought records that did not exist at the time of his request. But rather than deny the request, it informed the Appellant that it would create records containing the requested information and later inform him of the cost of doing so.² On appeal, the Agency maintains that, at the time of the request, it did not possess additional responsive records beyond those provided to the Appellant. 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 such records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, “then the 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 support a claim that the agency possesses responsive records that it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency’s search. *See, e.g.*, 95-ORD-96.

Here, the Appellant has not made a *prima facie* case that the Agency possessed additional responsive records at the time of the request. Rather, he asserts that previous representatives of the Agency had provided him with the same information he sought here. However, even accepting as true the Appellant’s claim that he had been given this information before, that claim is not *prima facie* evidence that the Agency possessed a record containing that information at the time of his August 26 request.³ Moreover, merely asserting that certain records should exist does not establish a *prima facie* case that they do.⁴ *See, e.g.*, 24-ORD-017; 23-ORD-294; 23-ORD-042.

² Under KRS 61.874(3), if “a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.” However, because the Agency has provided the Appellant with responsive records and “fully answered” his request, the issue of whether the Agency could have charged the Appellant for creation of those records is moot. *See* 40 KAR 1:030 § 6.

³ The Agency’s subsequent production of records it claims it created in response to the Appellant’s request is evidence only that it possessed the *information* the Appellant sought. That subsequent production is not *prima facie* evidence that responsive records existed at the time of the request.

⁴ Further, even if a requester makes a *prima facie* case that additional records may or should exist, the Office cannot conclude that the records do, in fact, exist. Rather, the Office has long held it cannot resolve factual disputes about whether all records responsive to a request have been provided, or whether requested records should include additional content. *See, e.g.*, 23-ORD-027; 22-ORD-010; 19-ORD-083; 03-ORD-061; OAG 89-81.

At bottom, the Appellant has not presented a *prima facie* case that the Agency possessed responsive records when he submitted his August 26 request.⁵ Accordingly, the Office cannot find that the Agency violated the Act, when it did not provide records it does did possess within five business days of the request.

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
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Assistant Attorney General

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Distributed to:

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⁵ Last, the Office notes that KRS 61.872(5) is not implicated here because the Agency claims additional responsive records did not exist at the time of the request. An agency must invoke KRS 61.872(5) and state the earliest date that records will be made available when records are “in active use, storage, or not otherwise available.” Here, because the records did not exist at the time of the request, KRS 61.872(5) did not apply to them. *See, e.g.*, 23-ORD-178.