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25-ORD-073

March 24, 2025

In re: Darcie Davis/Morgan County Fiscal Court

Summary: The Morgan County Fiscal Court (“the Fiscal Court”) violated the Open Records Act (“the Act”) when it failed to properly invoke KRS 61.872(5) to delay its production of public records. The Fiscal Court did not violate the Act when it did not provide records it does not possess.

Open Records Decision

On September 20, 2024, Darcie Davis (“Appellant”) submitted a request to the Fiscal Court seeking “maintenance and deed records related to” three specified roads. That same day, the Fiscal Court acknowledge receipt of the request and stated that its “normal response time is 30 days from receipt.” On October 24, 2024, the Appellant submitted a follow-up email asking when she could expect to receive responsive records. On October 28, 2024, the Fiscal Court stated that it could not locate maintenance records for the identified roads. This appeal followed.

A public agency has five business days from the receipt of a request for public records made under the Act to fulfill the request or deny it and explain why. KRS 61.880(1). A public agency can delay its production of responsive records beyond five business days if the records are “in active use, in storage or not otherwise available,” but it must “immediately notify the applicant” and give “a detailed explanation of the cause . . . for further delay . . . and earliest date on which the public record[s] will be available for inspection.” KRS 61.872(5).

Here, the Fiscal Court notified the Appellant on September 20, 2024, that it would take 30 days to issue a response. However, the Fiscal Court did not specifically invoke KRS 61.872(5) or notify the Appellant of the earliest date on which the public records would be available. Although the Fiscal Court stated its “normal response

time is 30 days from receipt,” it failed to meet even that self-imposed deadline to provide the records. As a result, the Fiscal Court violated the Act when it failed to properly invoke KRS 61.872(5) to delay its production of public records.

Regarding the Appellant’s request for maintenance records, neither party specifically addresses the substance of the Fiscal Court’s October 28 response, in which it stated it could not locate any responsive records. 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). Here, the Appellant has not established a *prima facie* case that the maintenance records exist. Therefore, the Fiscal Court did not violate the Act when it did not provide records it does not possess.¹

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

¹ Under KRS 61.880(2)(a), a party wishing to appeal a denial of a request for public records must “forward to the Attorney General a copy of the written request and a copy of the written response denying inspection.” In her appeal, the Appellant asserts various violations by the Fiscal Court related to requests she submitted for copies of ordinances, meeting notes, and security footage from a fiscal court meeting. Although the Appellant submitted a copy of her request for the ordinances and meetings notes, she did not provide a copy of the Fiscal Court’s response regarding those records. With respect to her request for security footage, the Appellant did not provide a copy of either her original request or the Fiscal Court’s response. Because the Appellant did not submit copies of both her original requests and the Fiscal Court’s responses, those requests for records are not properly before the Office in this appeal.

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Distributed to:

Darcie Davis

Jim Gazay, Morgan County Judge Executive

Myles Holbrook, Morgan County Attorney