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20-ORD-038

March 9, 2020

In re: William Bell/Graves County School Board

Summary: Graves County School Board ("Board") violated the Open Records Act ("Act") by failing to provide an existing appraisal responsive to a request and by failing to explain why additional records do not exist notwithstanding Appellant's *prima facie* showing that such records may exist.

Open Records Decision

The question presented in this appeal is whether the Board violated the Act in the disposition of William Bell's ("Appellant") January 30, 2020, request for a copy of the following records "pertaining to the 12 x 30 dwelling that was purchased by the [Board] on September 18, 2015":

- a. [T]he most current [or latest] Effective Facility Plan or amendment that lists this property [dwelling] as surplus to educational need [on or about July 26, 2017];
- b. [T]he request, required to be made in writing to the Chief State School officer to dispose of this property [dwelling];
- c. [T]he Official approval that was granted;

- d. [T]he appraisal of this property [dwelling] by a qualified appraiser;
- e. [T]he document indicating the [Board's] acceptance or rejection of any or all bids;
- f. [A]ll bids that were received and considered[;]
- g. [The Board's] "advertisement," advertising this property [dwelling] for sale and disposal as directed by Policy 04.08:
 - 1. [T]he record from the Superintendent to the [Board], advising this property [dwelling] was no longer needed for public school purposes;
 - 2. [T]he record by the [Board] authorizing the disposal of this school property [dwelling] through closed sealed bids, public auction, or sale for at least the fair market value established by certified appraisal, as mention[ed] in d. above; and
 - 3. [A]ll sealed bids, public auction, or sale for at least the fair market value established by certified appraisal.

In a timely response, Board attorney Jesse E. Wright notified Appellant that he could inspect a document responsive to request "a," at the Office of the Board of Education during regular business hours. The Board further advised Appellant that minutes of Board meetings containing information responsive to items "1" and "2" of the request were available for inspection during regular business hours. However, with regard to items "b" through "g" and item "3" of the request, the Board simply stated, "there are no documents responsive to your request." Lastly, the Board noted that "interrogatories" contained in the request, which did not ask for public records, were not properly framed requests and, therefore, it was not providing any response.¹ Based upon the following, this Office finds that the Board's disposition of Appellant's January 30, 2020, request violated the Act.

The Act only regulates access to records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot provide a requester access to a nonexistent record. See *Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005) ("The unfettered possibility of fishing

¹ "The purpose of the Open Records Law is not to provide information, but to provide access to public records which are not exempt by law." OAG 79-547, p. 2; 04-ORD-144. Accordingly, requests for information as opposed to requests for public records, "need not be honored." 00-ORD-76, p. 3 (citing OAG 76-375); 04-ORD-080.

expeditions for hoped-for but nonexistent records would place an undue burden on public agencies.”). Once a public agency states affirmatively that no responsive records exist, the burden then shifts to the requester to present a *prima facie* case that the requested records do exist. *Id.* If the requester establishes a *prima facie* case that records 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). Of course, “the existence of a statute, regulation, or case law directing the creation of the requested record” creates a rebuttable presumption of the record’s existence, which a public agency can overcome “by explaining why the ‘hoped-for record’ does not exist.” 11-ORD-074, p. 4.

Here, Appellant made a *prima facie* showing that records should exist by submitting a copy of the Board’s policies regarding the sale of school property and further stating that the Board had sold the subject property to a named person. According to a cited policy, a copy of which Appellant provided, the Board may sell property “no longer needed for public school purposes” through “closed sealed bids, public auction, or sale for at least the fair market value established by a certified appraisal.” Disposal of School Property, Board Policy 04.8. In this appeal, the Board acknowledged the “12 x 30 wooden shed was, in fact, sold ... for fair market value established *by appraisal*,” but claimed that because “[t]he 12 x 30 wooden shed is not real property; the referenced policy sections are inapplicable to the sale.” Appellant disputes that assertion, arguing that Board Policy 04.08 AP.1 applies, which provides additional procedures for the sale of real property.

Regardless of whether the building is “real property” and Board Policy 04.08 AP. 1 should apply, the Board has now affirmatively stated the building “was sold for fair market value established by appraisal.” At a minimum, the Board must possess a document responsive to item “d” of Appellant’s request (“the appraisal of this property [dwelling] by a qualified appraiser”). The Board violated the Act in failing to either provide Appellant with a copy as requested or provide a statutory basis for denial in writing. KRS 61.880(1).

With regard to Appellant’s remaining requests for documents, the Board’s admission that it sold the building and the Board’s policies for selling property constitute a *prima facie* showing that additional responsive records could exist. In *Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011), the Kentucky Court of Appeals declared that “when it is determined that an agency’s records do not exist, the person requesting the records is entitled to a written explanation for their nonexistence.” If the Board chose to sell the property based solely on the appraisal then additional responsive documents may not exist. This Office plays no role in determining whether such a decision complied with the applicable Board policies. *See generally* KRS 61.880. If, however, that is the reason for the nonexistence of additional documents responsive to Appellant’s other requests, the Board must still explain the adequacy of its search and the reason why no additional

documents exist. *See* KRS 61.880(1); KRS 61.880(2)(c); *Eplion*, 354 S.W.3d at 604; *City of Fort Thomas*, 406 S.W.3d at 848 n.3.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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.

Daniel Cameron
Attorney General

/s/ Michelle D. Harrison

Michelle D. Harrison
Assistant Attorney General

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Distributed to:

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