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20-ORD-056

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In re: Jason Eye/Louisville Metro Government

Summary: Louisville Metro Government's ("Metro") did not violate the Open Records Act ("the Act") in denying a request based on the nonexistence of responsive records. Metro discharged its duty under the Act by conducting a good faith search for responsive records.

Open Records Decision

On February 18, 2019, Jason Eye ("Appellant") emailed a request for records to Metro seeking records from the Department of Codes and Regulations ("Codes and Regulations"). Appellant requested a copy of "original code enforcement violation(s)" allegedly committed by a specific person on October 20, 2004, and requested the specific address of where the code enforcement violations occurred. Appellant also provided a possible address for the violations to assist in the search for records. Metro responded, "[t]here are no responsive records for this request."

On March 18, 2020, Appellant appealed, stating he is personally aware of multiple violations filed against the property and individual named in his request.[1] On appeal, Metro argues that Codes and Regulations complied with the requirements of the Act and described the search for responsive records by stating, "the staff at Codes and Regulations searched in their electronic database for the

[1] On appeal, Appellant claimed that he first requested records in person at the Codes and Regulations office, but that he was questioned regarding the purpose of his request. There is no evidence in the record that this inquiry affected Metro's disposition of the request.

name on the ORR . . . as well as the address given on the ORR by [Appellant]. No information turned up for either." Metro stated that Codes and Regulations is prepared to conduct additional searches if Appellant can provide information in addition to the name and address initially provided, but that they were unable to identify responsive records exist based upon the limited information in his request. Metro also identified the Codes and Regulations website where Appellant could personally search the office's electronic records.

The right to inspect and receive copies of public records only attaches if the records sought are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot produce that which it does not have nor is a public agency required to "prove a negative" to refute an unsubstantiated claim that certain records exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). To prove this negative, an agency must "present[] evidence of its standards and practices regarding document production and retention, as well as its methods of searching its archives." *Id*. But the *Bowling* court held that this process is unduly burdensome to public agencies unless the requester first establishes a *prima facie* case that the requested records do exist. *Id.* "*If* the requester makes a *prima facie* showing that responsive records have not been accounted for, *then* the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (emphasis added).

Here, Appellant has produced no affirmative evidence that responsive records exist beyond his mere belief that Metro possesses records relating to the property at issue that were allegedly created sixteen years ago. Although Appellant stated that he is personally aware of the existence of responsive records, no evidence supporting that belief exists in the record. Having failed to make a *prima facie* case, Metro was not required to explain the adequacy of its search. *Id. See e.g,* 12-ORD-030 (affirming denial of request for nonexistent records where appellant did not offer any "irrefutable proof that such [records] were created or still exist"). However, despite not being required to explain its search in the absence of a *prima facie* showing that records exist, Metro wisely explained its search methods on appeal. Metro explained that it searched its electronic archive using the information provided by Appellant and the electronic archives were empty. Based on the foregoing, Metro did not violate the Act.

A party aggrieved by this decision shall 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 proceeding.

Daniel Cameron
Attorney General

/s/ John Marcus Jones

J. Marcus Jones
Assistant Attorney General

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Distributed to:

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