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**22-ORD-097**

May 16, 2022

In re: Michael Murphy/Department for Local Government

**Summary:** The Department for Local Government (the “Department”) violated the Open Records Act (“the Act”) when it failed to respond to a request under the Act within five business days. This Office cannot find that the Department violated the Act when it denied a request for records that it claims do not exist within its possession.

***Open Records Decision***

On March 31, 2022, Michael Murphy (“Appellant”) submitted a request to the Department for a copy of an interlocal agreement between the City of Glencoe and Gallatin County regarding the Joint Code Enforcement Board, and a copy of the approval letter from the Commissioner’s Office. The Appellant noted that the records he requested “should have been filed with [the Department] after May of 2021.” On April 18, 2022, having received no written response from the Department, the Appellant initiated this appeal.<sup>1</sup>

On April 19, 2022, after the appeal was initiated, the Department issued its written response to the request and claimed that it “is unable to locate any responsive records.” The Department admits that it received the Appellant’s

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<sup>1</sup> Between April 5 and April 14, the Appellant attempted to check the status of his request, and the Department unsuccessfully attempted to call the Appellant. Although the Department attempted to contact the Appellant by phone, the Department did not issue a written response that notified the Appellant whether the Department would comply with the request. See KRS 61.880(1).

request on March 31, 2022, but that the custodian of records was on leave at the time. The Department further explains that although a different employee drafted a formal response, the Department did not send the response to the Appellant due to a “miscommunication.”

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” Here, the Department admits it did not issue a written response within five business days of receipt of the request. Thus, the Department violated the Act.

In its untimely response, the Department stated affirmatively that it does not possess any responsive records. Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make 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, since the Department did not respond to the Appellant’s request until after he initiated this appeal, the Appellant was unable to make a *prima facie* case that these records exist within the Department’s possession.<sup>2</sup> Thus, this Office cannot find that the Department violated the Act when it denied a request for records that it claims do not exist within its possession.

A party aggrieved by this decision may appeal it by initiating 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

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<sup>2</sup> Under KRS 65.260, some types of interlocal agreements must be submitted to either the Department or the Attorney General for approval prior to the agreements taking effect. It is not clear from the evidence presented whether this particular interlocal agreement was required to be submitted to the Department for approval.

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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.

**Daniel Cameron**  
**Attorney General**

s/Matthew Ray  
Matthew Ray  
Assistant Attorney General

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Distributed to:

Michael Murphy  
Matt Stephens