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22-ORD-114

May 23, 2022

In re: WDRB News/Jeffersontown Fire Protection District

Summary: The Jeffersontown Fire Protection District (“the District”) did not violate the Open Records Act (“the Act”) when it denied a request for records that do not exist. However, the District violated the Act when it failed to inform the requester that the records did not exist.

Open Records Decision

On April 1, 2022, WDRB News (“Appellant”) requested access to and copies of “[a]ny initiating letters of investigation by the [District] since March 1, 2022,” “[a]ny submitted letters of resignations or firing for Jeffersontown Fire Dept/EMS since March 1, 2022,” and a “[c]omplete contract” between the District and a specific investigations company, as well as a separate contract between the District and an attorney. The District denied the request under KRS 61.878(1)(h) on the grounds that the District was “currently investigating an issue involving administrative and statutory regulations and release of records with information at this time might harm the agency by revealing the identity of the complainant, who has requested anonymity.” This appeal followed.

On appeal, the District argues that this appeal is unperfected because the Appellant did not provide the Attorney General with copies of subsequent correspondence from the District dated March 25 and March 29, 2022. However, KRS 61.880(2)(a) requires only that “[i]f a complaining party wishes the Attorney General to review a public agency’s denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying

inspection.” The Appellant complied with this requirement by providing copies of its written request and the District’s denial. Accordingly, this appeal is perfected.

On May 10, 2022, the District provided the Appellant with a copy of its engagement agreement with the attorney. Therefore, the portion of this appeal that pertains to that document is moot. 40 KAR 1:030 § 6.

With regard to its denial of the Appellant’s request, the District acknowledges that its citation of KRS 61.878(1)(h) “was improvidentially [*sic*] used alone without additional details.” Specifically, the District states that none of the requested records existed as of the time of the request and the District’s initial response, although the engagement agreement with the attorney was created later. Furthermore, on March 25 and March 29, 2022, in response to the Appellant’s request for “letters of resignations or firings,” the District provided the Appellant with copies of a letter of retirement from a member of the Jeffersontown Fire Department. The District still maintains that no “letters of resignation or firings” exist.

Once a public agency states affirmatively that no responsive records exist, the burden shifts to the requester to present a *prima facie* case that responsive records do exist. See *Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not attempted to present a *prima facie* case that “initiating letters of investigation,”¹ letters of resignation or firing, or contracts with the investigative company exist. Therefore, the District is not obligated to provide the Appellant with records that the District claims do not exist.²

However, if the District did not possess responsive records, it should have affirmatively stated in its initial response that no records responsive to the request exist. See *Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 867 (Ky. App. 2021); see also 20-ORD-041 (finding that a public agency has a “duty to inform the requester in clear terms that it [does] not have the records”). Instead, the District denied the request on the basis of KRS 61.878(1)(h). By failing to

¹ The District’s assertion that is “currently investigating an issue” raised by an anonymous “complainant” constitutes a *prima facie* case that an investigation is being conducted. However, it is not *prima facie* evidence that an “initiating letter” exists.

² Because the nonexistence of the requested records is dispositive of the issues relating to the denial of the request, it is not necessary to determine whether KRS 61.878(1)(h) applies to any records.

inform the Appellant of the nonexistence of the records, the District violated the Act.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/James M. Herrick
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Assistant Attorney General

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