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22-ORD-274

December 20, 2022

In re: Gypsy Cantrell-Ratliff/Elkhorn City Clerk's Office

Summary: The Elkhorn City Clerk's Office (the "Clerk's Office") did not violate the Open Records Act ("the Act") when it did not create a record to fulfill a request for a record that does not exist. The redaction of personal information by the Clerk's Office is permitted under KRS 61.878(1)(a).

Open Records Decision

Gypsy Cantrell-Ratliff ("Appellant") submitted a request to the Clerk's Office containing ten subparts. In a timely response, the Clerk's Office made available for inspection records responsive to all but three of the subparts. The Clerk's Office also asked the Appellant to describe with more specificity the records she sought with respect to subparts 3, 5, and 7 of the request. In subsequent correspondence, the Appellant described more fully the records she sought. The Clerk's Office then provided records responsive to subpart 7, but denied subparts 3 and 5 of the request because the records do not exist.¹ The Appellant then initiated this appeal, seeking this Office's review of the Clerk's Office's denial of subparts 3 and 5 and the redaction of personal information.²

¹ Since this Office finds the Clerk's Office properly denied subpart 3 because the records do not exist within its possession, it is unnecessary to consider its alternative argument that it was a request for information.

² Under 40 KAR 1:030 § 6, "[i]f the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter." Since the records requested in subparts 1, 2, 4, 6, 7, 8, 9, 10 have now been made available to the Appellant, issues related to these subparts are now moot. *Id.* Although the Appellant disputes the

In subpart 3 of the request, the Appellant sought “lists” containing information related to payments to vendors and employee wages and benefits.³ On appeal, the Clerk’s Office explains it denied this subpart of the request because it does not create or maintain “lists” containing the types of information the Appellant sought.

In subpart 5 of the request, the Appellant initially sought “[a] list of all projects completed or under construction showing source of funding, date of bid, bidding contractors and successful bidder, and cost of project from January 1, 2018 to present.” She later clarified that she was seeking “[a] copy of the advertisement for the blacktop that was recently laid, copy of the bidders showing successful bidder with bid amounts and source of funding.” The Clerk’s Office denied this subpart of the request because no responsive records exist. The Clerk’s Office explains on appeal that the cost of the project was within the discretionary “spending limits of the Mayor’s Office under the Kentucky Model Procurement Act,” and thus, no advertisement of bids was issued.

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 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). To establish a *prima facie* case, a requester must provide some evidence to support his claim that the requested record exists, such as a statute or regulation requiring the creation of the requested record, or other factual support for the existence of a record. *See, e.g.*, 22-ORD-141; 21-ORD-177; 11-ORD-074.

Here, the Appellant has not attempted to make a *prima facie* that the Clerk’s Office should possess an itemized list containing the information she sought in

Clerk’s Office’s claim that all the records have been made available to her, this Office is unable to resolve factual disputes between parties. *See, e.g.*, 22-ORD-010 (declining to resolve a factual dispute that the records received were different from the records requested); OAG 89-81 (same).

³ Initially, subpart 3 sought “[a] list of all vendors including but not limited to private contractors, engineering firms, accounting firms, legal firms, and material suppliers showing monetary payments per month per year for each vendor from January 1, 2018 to present.” The Appellant later clarified subpart 3 sought a “[c]omplete employee list showing wages and benefits paid for each department of city government including but not limited to water department, maintenance, office staff, police department and elected officials with copies of W-2’s for each for the recent two years.”

subpart 3 of her request. However, to make a *prima facie* case that the Clerk's Office should possess an advertisement and bids for the asphalt project, *i.e.*, subpart 5 of the request, the Appellant claims she "contacted the asphalt company and . . . [a]ccording to the asphalt company there was 350 tons of asphalt purchased at a cost of \$103.00 per ton and [it] was delivered to Elkhorn City." In other words, the Appellant disputes the Clerk's Office's claim that the amount of the project was within the Mayor's discretionary spending limit such that the Model Procurement Code would have required the solicitation of bids. However, the Office cannot resolve a factual dispute concerning whether the asphalt project fell within the Mayor's discretionary spending limit of \$30,000 under KRS 45A.385 such that copies of a solicitation advertisement and bids should exist.⁴

Nothing in the administrative record indicates the Clerk's Office possesses the requested itemized lists, or a solicitation and bids related to the asphalt project the Appellant described. Kentucky Courts and the Office have previously found that an agency is not required to create a record to satisfy a request under the Act. *See Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records."); *see also* 22-ORD-242; 18-ORD-184; 18-ORD-021; 17-ORD-089; 12-ORD-026; 11-ORD-091; 10-ORD-187. Here, the Clerk's Office has stated the requested records are not the type regularly kept as part of its records. The Act does not require an agency to create a record to fulfill a request. Thus, the Clerk's Office did not violate the Act when it did not create a record to fulfill the Appellant's request.

Finally, the Appellant also objects to the Clerk's Office's redaction of personal information from the records it did provide. The Clerk's Office states it redacted "personal information" such as "social security number[s], tax withholdings, garnishments or other information beyond the name, employee number and the gross wages paid" from the W-2 tax forms it provided.

Public records that contain "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" are exempt from disclosure under KRS 61.878(1)(a). To determine whether

⁴ If the Appellant is accurate about the number of tons and price for the asphalt, then the total purchase price would be \$31,415.00, slightly above the small purchasing limit of \$30,000. *See* KRS 45A.385. This Office cannot decide ancillary questions of law, such as whether an agency has complied with the Model Procurement Code. But given the Appellant's estimate of the price of the contract is close to the maximum amount of the Mayor's small purchasing authority, and the Clerk's Office claims the project was treated as one under KRS 45A.385, the Clerk's Office has explained why no advertisement or bids for the project exist.

a record may be properly redacted or withheld under KRS 61.878(1)(a), this Office measures the public's right to know that public agencies are properly executing their functions against the "countervailing public interest in personal privacy" when the records in dispute contain information that touches upon the "most intimate and personal features of private lives." *Ky. Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992). This balancing test requires a "comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance . . . [T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.* at 327–28.

There are certain categories of personal information that public agencies may categorically redact. In *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013), the Kentucky Supreme Court recognized that private citizens' addresses, telephone numbers, social security numbers, and driver's license numbers will hardly ever provide insight into whether a public agency is properly executing its function. The Court also recognized that law enforcement agencies could redact from public records information related to witnesses, uncharged suspects, and juveniles. *Id.* at 86. The Office has previously found that information concerning payroll deductions may be withheld under KRS 61.878(1)(a). *See. e.g.*, 07-ORD-056.

Here, the Clerk's Office has redacted the types of personal information that Kentucky courts and this Office have found are categorically exempt from inspection under KRS 61.878(1)(a). Furthermore, the Appellant has not presented any compelling countervailing public interest in favor of permitting public inspection of the redacted personal information. Thus, the Clerk's Office did not violate the Act when it redacted personal information from the records it provided under KRS 61.878(1)(a).

In sum, the Clerk's Office did not violate the Act when it did not create a record to fulfill a request for a record that does not exist within its possession. The redaction of personal information by the Clerk's Office is permitted under KRS 61.878(1)(a).

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 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.

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#438

Distributed to:

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