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**23-ORD-023**

January 31, 2023

In re: Bethany Baxter/City of Irvine

**Summary:** The City of Irvine (“the City”) violated the Open Records Act (“the Act”) when it partially denied the Appellant’s first request for records without citing the specific exemption on which it relied to deny the request, when it did not respond to the Appellant’s second request for records within five business days of receiving it, and when it failed to respond at all to portions of the Appellant’s second and third requests for records. The City did not violate the Act when it did not provide records that do not exist within its possession.

***Open Records Decision***

On June 8, 2022, Bethany Baxter (“Appellant”) submitted a request to the City to inspect the following records: (1) the original version of the “City of Irvine’s Zoning Ordinance” and all subsequent amendments to the Ordinance; (2) the “Irvine City Council meeting minutes for both May, 2022 meetings”; (3) the “City of Irvine’s proposed agenda for upcoming meetings”; (4) “the City of Irvine’s Comprehensive Plan”; and (5) “the City of Irvine’s Planning Commission meeting minutes from January 2021 to present.”<sup>1</sup> In a timely response, the City stated it “does not have a Comprehensive Plan. But the Mayor or City Attorney can verify that.” The City did not elaborate, or provide any further response to this request. On September 7, 2022, the Appellant submitted another request to the City to inspect additional records.<sup>2</sup>

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<sup>1</sup> On June 10, 2022, the Appellant narrowed her request for the “City of Irvine’s Zoning Ordinance” to only the original and present versions of the Ordinance.

<sup>2</sup> These records included “the City of Irvine’s comprehensive plan,” “a list of all members of the City of Irvine’s Planning Commission” along with their appointment date and term expiration date, “a list of all members of the City of Irvine’s Board of Adjustments” along with their appointment date and term expiration date, and “all meeting minutes for the City of Irvine Board of Adjustments from January 1, 2021 to the present.”

On October 17, 2022, the Appellant emailed the City and stated she had not received any response to her September 7 request, but the City did not respond to her email. On December 16, 2022, the Appellant submitted a third request to the City to inspect additional records not included in her previous requests.<sup>3</sup> The Appellant again informed the City she never received a response to her September 7 request. Then, on December 19, 2022, the City responded and provided records responsive to one part of the Appellant's September 7 request. The City did not otherwise respond to the December 19 request. This appeal followed.

On appeal, the City has explained its responses to parts of the Appellant's three requests. Regarding the first request for the comprehensive plan, the City states it "was mistakenly under the impression that it was provided at the same time as the zoning ordinance." Regarding the second request, the City does not explain why it failed to respond, but now claims on appeal that some of the requested records do not exist. The City also states no records responsive to the Appellant's third request exist.

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." KRS 61.880(1). If an agency denies in whole or in part the inspection of any record, its response must include "a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." *Id.* A public agency cannot simply ignore portions of a request. *See, e.g.*, 21-ORD-090.

In her first request, the Appellant sought five categories of records. The City provided all records responsive to four of those categories, but the City stated it "does not have a Comprehensive Plan." However, the City has since admitted that it does indeed have a comprehensive plan that it should have produced. Therefore, the City violated the Act when it failed to produce a record it possessed without citing any applicable exemption or otherwise accurately explaining its initial denial of that portion of the first request.

The City did not respond to the Appellant's second request, submitted on September 7, 2022, until December 19, 2022. The City does not dispute that it received the request, or explain why it failed to timely respond to it. Thus, the City

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<sup>3</sup> These records included "Business license(s) issued to" individuals who owned mobile home parks in the City in the last five years and "all licenses, certifications, correspondence, records or other documentation" between the city and a specified individual that related to that individual's ownership of a mobile home park in the last five years.

violated the Act when it failed to respond to the Appellant's second request within five business days. KRS 61.880(1).

Finally, in her third request, submitted on December 16, 2022, the Appellant requested two new categories of records and reminded the City of her second request. In response, the City provided records responsive to one part of the September 7 request, but did not otherwise respond to the remainder of the September 7 request or any of the December 16 request. Therefore, the City violated the Act when it failed to state whether it would comply with or deny the September 7 and December 16 requests.

On appeal, the City states it does not possess records responsive to the September 7 request for "a list of all members of the City of Irvine's Planning Commission" or any portion of the December 16 request for business licenses issued to individuals who owned "mobile home parks" or for certain business records of specified individuals. 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).

Here the Appellant has not established a *prima facie* case that responsive records exist for any of her requests. Even if she had established a *prima facie* case that the requested records should exist, the City has explained why they do not. First, the City states that "new members of the planning commission have not yet been selected." Second, the City explains it issued a business license to a trailer park but "did not keep a copy of the license" it issued. Whether the City was required to create a record documenting the business license is separate from whether the record was in fact created and the City failed to permit its inspection. If a record should exist but does not, an agency may be required to explain why the record does not exist. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011). The City explained on appeal that the requested record does not exist because it was never created. Therefore, the Office cannot find that the City violated the Act when it did not provide records that do not exist.

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/ Zachary M. Zimmerer  
Zachary M. Zimmerer  
Assistant Attorney General

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Distributed to:

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