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23-ORD-038

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In re: Alan Rubin / Louisville Metro Government

Summary: Because the requester has made a *prima facie* case that a public record should exist, Louisville Metro Government ("Metro") violated the Open Records Act ("the Act") when it failed to explain the adequacy of its search for the record.

Open Records Decision

Alan Rubin ("the Appellant") submitted a request to Louisville Metro Government to inspect various records, including a letter written in 2008 by a specific Metro employee in relation to a zoning case. Metro provided records responsive to portions of his request, but it did not provide the 2008 letter. The Appellant then initiated this appeal, claiming Metro did not provide all responsive records.

After the appeal was initiated, Metro provided additional responsive records. However, Metro again stated the 2008 letter does not exist. 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, to make a *prima facie* case the requested record exists, the Appellant provided a comment log from a 2008 zoning violation investigation in which an employee of Metro stated she was in the process of writing a letter that matches the Appellant's description. The comment log does not, however, note whether such a letter was ever finalized or sent. According to the same log, the investigation ended

approximately six months later. Whether the letter was actually finalized or sent is a question of fact this Office is unable to adjudicate. *See, e.g.*, 22-ORD-159 n.2. But the Appellant has presented sufficient evidence to suggest the 2008 letter should exist, given the employee memorialized her intent to create such a record. *Cf*. KRE 803(3) (excluding from the rule against hearsay a statement of the declarant's mental state, including intent to take action). As such, the burden shifts to Metro to explain the adequacy of its search, which it has failed to do.

An adequate search for records is one using methods reasonably designed to find responsive records. *See, e.g.*, 95-ORD-096. Reasonable search methods include reviewing the files pertaining to the general subject matter of the request, and the files of employees either specifically mentioned in the request or whose job duties are related to the subject matter of the request. *See, e.g.*, 19-ORD-198. To carry its burden that its search was adequate, an agency must, at a minimum, specifically describe the types of files or identify the employees' whose files were searched. *See id*. But here, Metro states only that "several searches were conducted to locate the record [the Appellant] describes and no responsive record was found." Metro did not describe the files it searched or identify which employees' files were searched. Just as a requester cannot make a *prima facie* case that records do or should exist merely by asserting they do, an agency cannot meet its burden that its search was adequate merely by asserting it searched for records.

At bottom, this Office cannot find that the requested 2008 letter does, in fact, exist. Adjudicating such factual questions is beyond this Office's purview under KRS 61.880(2). The Office can, however, determine whether a requester has made a *prima facie* case that a record should exist. And once such a showing is made, the agency is called upon to explain the adequacy of its search. *City of Fort Thomas*, 406 S.W.3d at 848 n.3. Because the Appellant presented evidence the requested letter should exist, Metro was required to describe the methods it used to search for it. By merely asserting it searched several times, Metro has not carried its burden that its search was adequate. For that reason, it 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/Zachary M. Zimmerer
Zachary M. Zimmerer
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Distributed to:

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