



COMMONWEALTH OF KENTUCKY
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23-ORD-082

April 5, 2023

In re: Darrin Hardy/City of Ludlow

Summary: The City of Ludlow (“the City”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

On March 2, 2023, Darrin Hardy (“Appellant”) submitted a request to the City to inspect the “first and last name, title, salary, and complaints on all” public officials, police officers, city employees, the mayor, the fire department, and the public works department. On March 10, 2023, having received no response from the City, the Appellant initiated this appeal.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). However, this Office has consistently found that it is unable to resolve factual disputes between a requester and a public agency, such as whether a requester received an agency’s response to a request. *See* 21-ORD-233 (agency claimed it issued a response but the requester claimed he did not receive it); *see also* 22-ORD-125 (agency claimed it did not receive the request); 22-ORD-100 (same); 22-ORD-051 (same); 21-ORD-163(same).

Here, the City claims it emailed its response to the Appellant on March 3, 2023. As proof, the City provides a copy of its response and the email transmitting it, both of which are dated March 3, 2023. The City’s response included “a document containing the name, title, and salary for each employee” and provided that information for the mayor and city council in the body of the response. The City’s response further stated that no “complaints” exist. Accordingly, this Office cannot resolve the factual dispute between the parties about whether the City issued the

response or whether the Appellant received it, and therefore, cannot find that the City's response was untimely.

On appeal, the City reaffirms that it does not possess any "complaints." 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 any "complaints" exist. Therefore, the City did not violate the Act when it did not provide records it does not possess.

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

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Distributed to:

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