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23-ORD-174

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In re: Mary Wilson/Gateway Regional Arts Center

Summary: This Office cannot find that the Gateway Regional Arts Center (the “Center”) violated the Open Records Act (“the Act”) because this Office cannot find that it is a public agency subject to the Act.

Open Records Decision

On May 1, 2023, Mary Wilson (“Appellant”) submitted a request to the Center for various financial records from the 2022 and 2023. On May 26, 2023, the Center responded and stated it had “the records [it] is legally required to provide to [the Appellant] available at [her] convenience.” The Appellant retrieved the records from the Center, which consisted of tax records from 2019 and 1998. This appeal followed.

On appeal, the Center claims it is not a public agency as defined in KRS 61.870(1). Under KRS 61.870(1)(h), a private entity, such as the Center, is not a “public agency” unless it is a “body which, within any fiscal year, derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds.” KRS 61.870(1)(h). Here, the Center claims it does not meet the definition of a public agency under KRS 61.870(1)(h) because in fiscal year 2023 it only derived 9.4% of the funds it expended from state or local authority funding.¹

Although a “public agency” carries the burden of proof under KRS 61.880(2)(c), that is only so if the entity is a “public agency” in the first place. In situations where

¹ The Center states that in fiscal year 2023 it expended \$244,504.52, and of that amount, \$23,008.69, or 9.4%, was derived from state or local authority funds.

a requester is claiming that a private entity is a public agency subject to the Act, the burden is on the requester to make a *prima facie* case that, in the fiscal year covering the scope of her request, at least 25% of the funds the entity expended were from state or local funds. *See, e.g.*, 23-ORD-070 (finding the requester made a *prima facie* case the entity was subject to the Act in the fiscal year encompassing the scope of his request). Here, the Appellant has not made a *prima facie* case that 25% of the funds the Center expended in fiscal year 2022 or 2023 were derived from state or local authority funds. Rather, she merely asserts the Center received \$100,000 from the Governor, but she does not provide any proof, such as news reports or other documentation, demonstrating such a grant was made or when. Even if the Appellant's mere assertion that the Center received \$100,000 in state funds were sufficient to make a *prima facie* case, the Center claims only 9.4% of the funds it expended in 2023 were derived from state and local authority funds.² As a result, this Office cannot find that the Center is a "public agency" under KRS 61.870(1)(h) or that it violated the Act.

A party aggrieved by this decision may appeal it by initiating an 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.

Daniel Cameron
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

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² However, the Office notes that in previous fiscal years the Center may have met the 25% threshold, based on tax records from previous years indicating it received larger amounts of state or local funds. Although the Appellant provides tax records from 2019 and before, there is no evidence in the record demonstrating that 25% of the funds the Center expended in fiscal years 2022 or 2023 were derived from state or local authority funds.

Distributed to:

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