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23-ORD-202

August 7, 2023

In re: Saeid Shafizadeh/Spencer County Attorney's Office

Summary: The Spencer County Attorney's Office ("the agency") did not violate the Open Records Act ("the Act") when it could not provide records that are not within its custody or control. The agency subverted the intent of the Act within the meaning of KRS 61.880(4) when it demanded that a requester provide a date range for his request when he had already done so.

Open Records Decision

On June 26, 2023, Saeid Shafizadeh ("Appellant") submitted a request to the agency for in-person "inspection and thereafter, photocopies of" seven categories of records. Immediately following the enumerated list of records, the Appellant stated, "The scope of this request includes all indexes and files of the Spencer County [sic] for the years 2019 through 2023." At issue in this appeal are the agency's responses to the first three parts of the Appellant's request.

First, the Appellant requested "[m]anuals used in Child Support Enforcement and Collection." In its response, the agency stated "[t]he manuals are not in [its] possession" and provided the email address of the records custodian for the Cabinet for Health and Family Services, from whom "[t]he manuals can be requested."¹ On appeal, the Appellant claims the agency "has a section with separate staff dedicated to Child Support Enforcement [and] as such, it is in possession of the Child Support Enforcement and Collection Manuals for Spencer County." The agency, however, insists "there are no responsive documents in [its] possession, custody, or control."

¹ See KRS 61.872(4) ("If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.").

A public agency “is responsible only for those records within its own custody or control.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)). Once a public agency states affirmatively that a record is not within its custody or control, the burden shifts to the requester to present a *prima facie* case that the requested record exists. See *Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester’s bare assertion that an agency must possess requested records is insufficient to establish a *prima facie* case that the agency actually possesses such records. See, e.g., 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for his contention. See, e.g., 21-ORD-177; 11-ORD-074. Here, the fact that the agency has a section dedicated to child support does not establish a *prima facie* case that it possesses “manuals” on the subject. Thus, the agency did not violate the Act when it did not provide records that are not within its custody or control, or when it provided contact information for the records custodian of an agency that may possess the requested records. See, e.g., 23-ORD-142.

The Appellant also requested the “Program Administration Contract under 921 KAR 1:020 for Spencer County.” Finally, he sought “[a]udits, investigations, warning, citation and/or fines by the Cabinet or federal agency of Spencer County Attorney Office’s duties under Kentucky Child Support Enforcement Programs, Title 42 United States Code §§ 601-651 *et seq.*, Subchapter IV, Part D of Social Security Act.” In response, the agency claimed both requests were not “temporal specific” and “additional information [was] required.” It then asked the Appellant to specify the fiscal years encompassing the requests. On appeal, the agency notes that other parts of the Appellant’s request contained limiting language “for fiscal years 2019 through 2023,” but these two requests did not. The agency claims “it is unreasonably burdensome” to produce these records “with[out] placing a reasonably limited date range.” But, as the Appellant correctly points out, his request contained a general clause after the list of requested records that clearly limited the scope of the entire request to “the years 2019 through 2023.”²

Under KRS 61.880(4), a person may invoke the Office’s review to allege “the intent of [the Act] is being subverted by an agency short of denial of inspection.” Here, the agency demands that the Appellant “identify a date range” for the second and third parts of his request before it will provide responsive records. But the Appellant has already done so. A public agency must grant in-person inspection of nonexempt public records under KRS 61.872(1) after the agency receives “a written

² In a supplemental response to this appeal, the agency claims the Appellant’s language is ambiguous as to whether it means “fiscal years” or “calendar years.” This minor ambiguity, however, is not equivalent to the alleged lack of a “reasonably limited date range” on which the agency relied to delay fulfillment of the request.

application . . . describing the records to be inspected.” KRS 61.872(2)(a). This description need only be “adequate for a reasonable person to ascertain the nature and scope of [the] request.” *Com. v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008).³ In this case, the Appellant’s description was adequate for this purpose. An agency subverts the intent of the Act when it delays access to records by demanding a requester describe the records sought with greater specificity than the Act requires. *See* 22-ORD-213. Because the agency delayed the Appellant’s access to records after he already provided the information the agency claimed it required, it subverted the intent of the Act within the meaning of KRS 61.880(4).⁴

A party aggrieved by this decision may appeal it by initiating an 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/ James M. Herrick
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Assistant Attorney General

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Distributed to:

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³ In contrast to in-person inspection, a person seeking copies of public records delivered by mail must “precisely describe[]” records to be inspected. KRS 61.872(3)(b).

⁴ On July 17, 2023, after the Appellant had initiated this appeal and called attention to the date range specified in his original request, the agency provided the Appellant with copies of audits for fiscal years 2020, 2022, and 2023, as well as a child support enforcement contract for fiscal year 2023.