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23-ORD-203

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In re: Whitney Marion/Oldham County Schools

Summary: The Oldham County Schools (“the agency”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist

Open Records Decision

On June 30, 2023, Whitney Marion (“Appellant”) submitted a request to the agency to inspect the transcript from its June 26, 2023, meeting, and a list detailing which policies were approved, not approved, or “held over to another meeting.” In response, on July 1, 2023, the agency stated it would provide responsive records on July 21 due to the “primary leadership team . . . [being] away for vacation.” The Appellant then initiated this appeal on July 11, 2023, claiming to have not received any further response from the agency.

Under KRS 61.880(1), 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.” Or, if responsive records are “in active use, in storage or not otherwise available,” a public agency may delay access to them by stating the earliest date on which they will be available and a detailed explanation of the cause of the delay. KRS 61.872(5).

Here, the agency provides a copy of the response it claims to have mailed to the Appellant on July 7, 2023, which was the fourth business day after the Appellant submitted her request. The Appellant claims she did not receive the response. The Office has consistently found 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). Accordingly, the Office cannot resolve the factual dispute between the parties about whether the agency issued the response or whether the Appellant received it, and therefore, cannot find that the agency's response was untimely in violation of the Act.

Now having received the agency's response to her request, the Appellant claims it only provided her with a list of the policies discussed at the June 26, 2023, meeting, and copies of those policies, rather than a list detailing which policies were approved, not approved, or held to another meeting. The agency claims no such list exists. 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 the agency possesses a list detailing which policies were approved, not approved, or held to another meeting. Moreover, the Act does not require an agency to create records in response to a request made under the Act. *See Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.") Therefore, the agency did not violate the Act when it did not provide records that do not exist.¹

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

¹ The agency also asks the Office to find that repeated requests to inspect records and appeals to the Office submitted by the Appellant and others constitute a violation of KRS 61.872(6). That statute allows an official custodian to refuse to permit inspection of public records in certain circumstances. Here, the agency did not deny the Appellant's request under KRS 61.872(6), but rather, it granted the request and provided responsive records. Therefore, it is not necessary for the Office to address the agency's alternative argument.

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
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Distributed to:

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