



COMMONWEALTH OF KENTUCKY
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23-ORD-237

September 11, 2023

In re: J. Brooken Smith/Louisville/Jefferson County Metro Government &
Louisville/Jefferson County Metro Government
Ethics Commission

Summary: Louisville/Jefferson County Metro Government (“Metro”) and the Louisville/Jefferson County Metro Ethics Commission (“the Commission”) violated the Open Records Act (“the Act”) when they failed to respond to a request to inspect records within five business days. Neither Metro nor the Commission violated the Act when they did not provide records they do not possess.

Open Records Decision

On July 25, 2023, J. Brooken Smith (“Appellant”) used Metro’s “NextRequest” system to request copies of the Commission’s records.¹ Having received no response by August 10, 2023, the Appellant initiated this appeal.

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.” There is no dispute here that the Appellant did not receive a response to his request within five business days. The question, similarly raised in 23-ORD-134 and 22-ORD-167, is which public agency is responsible for the violation. For the same reasons held in 23-

¹ Specifically, the Appellant sought “all transcripts of the hearing” regarding two specific ethics complaints and “all pleadings, motions, and orders filed and/or entered concerning” those same ethics proceedings.

ORD-134, the Office finds that both agencies violated KRS 61.880(1) for failing to respond within five business days, but for slightly different reasons.

The Commission asks the Office to reconsider its prior decision because it is “factually incorrect” that “Metro is apparently at the Commission’s mercy with respect to producing the Commission’s records.” 23-ORD-134 p.3. The Commission explains on appeal that it does not, in fact, have access to its own records, and heavily relies on Metro staff to facilitate obtaining its records. But as noted previously, Metro has by law established that “[a]ll files, records, and documents maintained by, or in the possession of any ethics board, agency, or office under the jurisdiction of Jefferson County or the former City of Louisville *shall be delivered to the Ethics Commission and thereafter maintained by the Ethics Commission.*” LMCO² § 21.10 (emphasis added). Therefore, the Commission is the official custodian of its own records. 23-ORD-134. The response that must be issued within five business days of receiving a request to inspect records “shall be issued *by the official custodian or under his or her authority*, and it shall constitute final agency action.” KRS 61.880(1) (emphasis added). Because the Commission is the official custodian of its own records under LMCO § 21.10, it has the legal duty to issue a response itself or demand the agent acting under its authority do so. *Cf. Southern Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 928–29 (Ky. 2013) (discussing the agency-principal relationship regarding the duty to produce records in response to discovery requests under CR 34.01 that were served on the principal). If the agent fails to perform on behalf of the principal, then the principal must take the matter up with its agent, but it does not excuse the principal of its duty to a third party. Because a request for the Commission’s records that was received by someone “under [its] authority” (*i.e.*, Metro, where the Commission directs the public to submit its requests) went unanswered for more than five business days after it was received, the Commission violated the Act.

Metro’s violation of the Act, however, is somewhat different than the Commission’s. That is because Metro received the request through the NextRequest system it operates. Being a public agency, and having received a request to inspect records, Metro also had an independent duty to decide within five business days whether to grant or deny the request and notify the requester of its decision. KRS 61.880(1); *see also* 22-ORD-167. If it has a contractual or other legal duty to the Commission to perform these services on its behalf, then it was required under *that* legal authority to search for and produce the Commission’s records subject to any applicable exemption. However, if no such contractual or other legal authority compels Metro to provide these services, then the Act requires it to “notify” the

² Louisville Metro Code of Ordinances.

requester that it “does not have custody or control of the public record requested” and “furnish the name and location of the official custodian of the agency’s public records.” KRS 61.872(4). Metro did not determine within five business days whether to grant or deny the request and notify the requester, KRS 61.880(1), or direct the requester to the proper agency under a claim that it was not the official custodian, KRS 61.872(4). Therefore, it violated the Act.

On appeal, both agencies claim they do not possess the specific transcripts and pleadings the Appellant requested.³ 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 either Metro or the Commission possess transcripts or pleadings related to the specified ethics complaints. Accordingly, the Commission and Metro did not violate the Act when they did not provide records they do not possess.

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

³ Metro did locate and provide meeting agendas and minutes related to the specified complaints.

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Distributed to:

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