



COMMONWEALTH OF KENTUCKY
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23-ORD-246

September 15, 2023

In re: Janet Farrow/City of Vanceburg

Summary: The City of Vanceburg (“the City”) violated the Open Records Act (“the Act”) when it failed to respond to a request to inspect public records within five business days. However, the City did not violate the Act when it denied a request for records it did not possess at the time the request was made.

Open Records Decision

On June 23, 2023, Janet Farrow (the “Appellant”) submitted a request to the City for “the names and contact information” of the members of the City’s Board of Ethics and “documentation showing when they were appointed and their designated term limits.” On July 5, 2023, the City responded and stated it did not possess any responsive records. Then, on July 11, 2023, the Appellant submitted a second request to the City for a copy the Mayor’s “Statement of Financial Interest” that was required to be filed pursuant to local ordinance. Having received no response to her second request by August 13, 2023, the Appellant initiated this appeal.

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.” KRS 61.880(1). Here, the Appellant provides proof the City received her first request on June 27, 2023. As such, the City’s response was timely issued five business days later, on July 5, 2023. However, the City admits it failed to respond timely to the Appellant’s second request. Accordingly, it violated the Act.

In its responses to both requests, the City claimed not to possess any responsive records. 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). A requester can make a *prima facie* case that responsive records should exist by citing to legal authority requiring an agency to create the requested document. See, e.g., 21-ORD-177; 11-ORD-074.

Here, the Appellant has made a *prima facie* case that responsive records should exist by citing City of Vanceburg Ordinance No. 230.01,¹ which establishes the City’s ethics code and requires the appointment of members to a Board of Ethics. Section 13 of that ordinance also requires all elected officials, including the Mayor, to file a financial disclosure form “with the Board of Ethics.” Section 14 further requires each elected official to file their annual financial disclosure each year before the first Monday in February.

In response, the City claims no Board of Ethics existed at the time of the Appellant’s request, which is a fact the Appellant does not dispute. As such, the City did not possess records related to the appointment of members at the time the Appellant made her first request. The City states it now has a Board of Ethics because members were appointed at its meeting on July 5, 2023, after the City responded to the request. Moreover, the only records reflecting the appointment of those members were the minutes of its July 5 meeting, which were not approved until its next meeting on August 7, 2023. Finally, because the Board of Ethics was not established until shortly before the Appellant’s second request on July 11, no such Board existed on the first Monday in February when the Mayor’s financial statement was due to be submitted. As such, the City has adequately explained why records responsive to the request do not exist, notwithstanding the ordinance that requires such records to be created. See *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (when it is determined an agency should have responsive records but does not, the requester is entitled to a written explanation for their nonexistence). As such, the Office cannot find the City violated the Act when it denied a request for records that do not exist.

¹ Available at <https://kydlgweb.ky.gov/Documents/Legal/Ethics/489.pdf> (last accessed Sept. 15, 2023).

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/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Janet Farrow
R. Stephen McGinnis