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23-ORD-298

November 6, 2023

In re: Genevia Risner/City of Maysville

Summary: The City of Maysville ("the City") violated the Open Records Act ("the Act") when it conducted an inadequate search for records. However, the Office cannot find that the City violated the Act when it denied a request for a record it claims not to possess.

Open Records Decision

On September 27, 2023, Genevia Risner ("Appellant") submitted a request to the City for records related to the condemnation of a barn on her property.[1] The City notified the Appellant that the "documents, photos, and audio filed for [her] request" could be picked up upon payment of a proscribed copying fee. The Appellant then initiated this appeal, claiming the City failed to include six records she believes should exist and are responsive to her request.

As an initial matter, the Office notes that it is ordinarily incapable of adjudicating claims by requesters that agencies possess additional records that have not been provided. *See, e.g.*, OAG 89-81. The Attorney General is not the custodian of every public record in the possession of every public agency, and therefore, cannot make findings of fact that any particular record that has been requested actually exists. Rather, the Act requires public agencies to conduct adequate searches for responsive records in good faith. In the absence of evidence that a search was

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[1] Specifically, the Appellant sought "[d]ocumentation on barn/blacksmith shop at 2027 Old Main St. Please include documentation specifying the barn as a contributing resource to the Washington Historic District. Any permit communication and updates to records associated with the structure. Any recorded meetings that include the structure as a topic on agenda item, specifically dating in February, March, and September 2023. Please include as well any information discovered in the records collection process relating to the property/structure."

inadequate, the Attorney General cannot find a violation simply because the requester did not receive every document she expected she would receive from a public agency.

This concept, repeated for decades, that the Attorney General cannot "adjudicate a dispute regarding a disparity, if any, between records for which inspection has already been permitted, and those sought but not provided," OAG 89-81, is similar in nature to disputes arising out of an agency's claim that no responsive records exist at all. In those cases, the agency is required to "affirmatively state" no responsive records exist. *See, e.g.*, 23-ORD-241. Here, however, responsive records did exist, so the City could not have been expected to "affirmatively state" no responsive records exist. Instead, the City effectively stated it had provided all responsive records.

In cases where an agency claims no responsive records exist, the burden shifts to the requester to present a *prima facie* case that the requested records do or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Only if the requester makes such a *prima facie* case will the adequacy of the agency's search be called into question. *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). It therefore stands to reason that when a requester claims *additional* records should exist, she carries the burden to present a *prima facie* case that *additional* records do or should exist. *See, e.g.*, 23-ORD-259 (requester presented a *prima facie* case additional records should exist).

Here, the City essentially admits its initial search was inadequate because, after it received notice of this appeal, it "found additional documents" and provided them to the Appellant. The additional records are responsive to five of the six types of records the Appellant claimed were not included in the City's first response. Ordinarily, the Office would consider an appeal moot after the City's acknowledgment of its failure to conduct an adequate search for these five records because, under 40 KAR 1:030 § 6, "[i]f the requested documents are made available to the complaining party after the complaint is made, the Attorney General shall decline to issue a decision in the matter." However, with respect to one of those five records, a specific email, the City admits it "overlooked" the email but nevertheless *did not* provide an additional copy to the Appellant because she already possessed it and attached it to her appeal. And because the City did not make that requested record available to the Appellant after the appeal was initiated, the Office cannot consider that portion of the appeal to be moot. As such, the Appellant has made a *prima facie* case that the

City's initial search was inadequate, the City has not rebutted that *prima facie* case or mooted the claim, and therefore, the Office finds the City violated the Act.

The Appellant describes the sixth additional record she believes exists, but which the City has not located after the appeal was initiated, as follows: "In the 2011 condemnation order, live and dead loads are listed as criterion under specific violation. In records received no calculations, during any point are included. This information was not presented as part of the most recent motion to demolish either, though indicated as pertinent violations." Attached to the Appellant's appeal is a copy of the 2011 condemnation order, which states in relevant part that the barn was allegedly in violation of Section 304.4 of the relevant building code, which allegedly states, "All structural members shall be maintained free from deterioration, and shall be capable of supporting the imposed dead and live load." In response, the City states that "no document was found for" the address of the barn "explaining live and dead loads."

The Appellant has presented a *prima facie* case that documentation supporting a finding that her barn could not support the "imposed dead and live load" should exist because she was cited for the alleged inability of her barn to meet that requirement. If, as the City claims, no responsive records exist, then it would call into question the basis for that particular finding in the condemnation order. As stated previously, the Attorney General is incapable of finding that a particular public record does, in fact, exist. Rather, the Office can only require the City to explain the adequacy of its search, and here the City claims to have searched all records related to the condemnation of the barn but cannot locate evidence to support this finding in its condemnation order. As such, the Office cannot find that the City failed to conduct an adequate search for records supporting the City's allegation that the Appellant's barn cannot support the "imposed dead and live loads."

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.

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s/ Matthew Ray
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Distributed to:

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