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23-ORD-325

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In re: Martha Coburn/Covington Police Department

Summary: The Office cannot find that the Covington Police Department (“the Department”) violated the Open Records Act (“the Act”) when it attempted to advise requesters seeking public records to submit requests to another employee during the official records custodian’s absence.

Open Records Decision

On October 30, 2023, Martha Coburn (“Appellant”) emailed a request to the Department for records related to a domestic violence incident. On November 8, 2023, having received no response from the Department, 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.” On appeal, the Department admits it received the Appellant’s request on October 30, 2023, the same day it was emailed to the Department’s official records custodian, but the official records custodian was absent at the time of the request. However, anticipating she might receive requests to inspect records during her absence, the Department’s official records custodian implemented an automatic reply system to inform anyone submitting requests for records by email to direct such requests to the Department’s temporary designee. According to the Department, the Appellant did not resubmit her request to the temporary designee identified in official records custodian’s automatic reply email.

The Office has historically and consistently found that an employee's absence does not excuse the timely processing of requests under the Act. *See, e.g.*, 22-ORD-169 n.3. 15-ORD-174; 10-ORD-151 n.2; 00-ORD-166, p.4. But that does not mean an agency's official records custodian is never permitted to take a leave of absence. Rather, the agency must establish a process to facilitate fulfillment of requests to inspect records while the official records custodian is absent. Here, it appears the Department took steps to ensure the timely processing of requests while the official records custodian was absent. In other words, the official records custodian's automatic reply email was a proper execution of KRS 61.872(4), which states, "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."

The Department's official records custodian did not have custody and control of the requested records at the time of the request because she was away from the office, but she attempted to notify the Appellant (and any other requester) of the Department employee who did have custody and control of the Department's records during her absence. Although the Appellant claims not to have received the official records custodian's automatic reply email, the Office cannot resolve factual disputes between the parties to an appeal, such as whether a requester received an agency's response. *See, e.g.*, 23-ORD-220; 21-ORD-233. Accordingly, the Office cannot find that the Department violated the Act when it attempted to notify the Appellant to direct her request to another Department employee.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 any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

¹ In the Department's response issued after the appeal was initiated, it denied the Appellant's request because the requested records do not exist. The Department advised the Appellant to resubmit her request to the Kenton County Emergency Communications Center, which it believed may possess responsive records, and provided the contact information for that agency's official records custodian. 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). The Appellant has not attempted to make a *prima facie* case that the Department should possess responsive records.

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s/ Matthew Ray
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Distributed to:

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