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23-ORD-335

December 18, 2023

In re: James Harrison/Lee County Sheriff's Office

Summary: The Lee County Sheriff's Office ("the agency") did not violate the Open Records Act ("the Act") when it could not provide records that it does not possess. However, the agency subverted the intent of the Act, within the meaning of KRS 61.880(4), when it delayed access to records by demanding the requester describe a record he sought with more specificity than the Act requires.

Open Records Decision

On October 30, 2023, James Harrison ("Appellant") submitted a six-part request to the agency for copies of records. First, he requested documentation of an agreement between the agency and a towing company that he alleged existed in August 2017. Second, he requested "documentation this agency has relating to towing of vehicles and other entities when agent(s) of this agency made decisions to seize a vehicle." Third, he requested "documentation relating to the inventory of the contents of" a specific vehicle. Fourth, he requested "the glossary and/or index of this agency's regulations and internal policies that are a matter of public records [*sic*]." Fifth, he requested documentation relating to the towing company's "duty and/or responsibility after towing a vehicle" at the agency's request "as it existed in August 2017." Finally, he requested "documentation relating to the chain of custoday [*sic*] and/or demand of" a specific vehicle.

In a timely response, the agency stated it had searched "the records turned over" to the current sheriff by his predecessor, who left office in January 2023, and those records did not contain any documentation of an agreement with the towing company or any terms thereof. The agency also did not locate any documentation of the vehicle in question. The agency further asserted it had "no documentation . . . relating to towing of vehicles and other entities when an agent(s) of this office makes

decisions to seize a vehicle." Finally, in response to the request for a glossary or index of its regulations and internal policies, the agency stated it needed "clarification of what this request is inquiring about." This appeal followed.

A public agency "is responsible only for those records within its own custody or control." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136 (1980)). Once a public agency states affirmatively that a record is not within its custody or control, the burden shifts to the requester to present a *prima facie* case that the requested record exists. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester's bare assertion that an agency must possess requested records is insufficient to establish a *prima facie* case that the agency actually possesses such records. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for his contention. *See, e.g.,* 21-ORD-177; 11-ORD-074.

Here, the Appellant asserts the current sheriff cannot "blame" his predecessor for failing to keep proper records. Nevertheless, even if the previous sheriff's record-keeping was inadequate, the fact remains that the requested records from 2017 are not within the agency's custody or control. Similarly, although the Appellant might wish that the agency possesses certain documentation "relating to towing of vehicles and other entities," his bare assertion that it should possess such documentation does not establish a *prima facie* case that the records exist.

In a further effort to prove the agency possesses records from the towing company, the Appellant attaches a September 2023 response to one of his previous open records requests, in which the agency stated the towing company had located some of its own records and provided them to the sheriff, who then forwarded them to the Appellant. The Appellant then claims the agency "had a duty to keep those documents on file" after providing them to him. However, he cites no authority for the agency's alleged duty to keep a copy of a private entity's records. Thus, the Appellant has not presented a *prima facie* case that the agency currently possesses any of the records it claims not to possess. Accordingly, the agency did not violate the Act when it could not provide such records.

The Appellant further claims the agency subverted the intent of the Act by delaying access to records when it asked him to clarify his request for "a glossary" or "index" of the agency's regulations and policies. If a requester asks to receive copies of records by mail, he must "precisely describe[ ] the public records which are readily available within the public agency." KRS 61.872(3)(b). When an agency receives such a request, the agency must decide within five business days whether to grant or deny it. *See* KRS 61.880(1). Under KRS 61.880(4), a person may invoke the Office's review

to allege "the intent of [the Act] is being subverted by an agency short of denial of inspection," including "delay past the five (5) day period described in" KRS 61.880(1).

Here, the Appellant precisely described records he sought to inspect: a "glossary" or "index" of the agency's "regulations and internal policies." An agency subverts the intent of the Act when it delays access to records by demanding a requester describe the records sought with greater specificity than the Act requires. *See* 23-ORD-202; 22-ORD-213. Either the agency has a glossary or index to its regulations and internal policies, or it does not. If no such document exists, the agency must affirmatively state no such record exists in its response to the request. *See Univ. of Ky. v. Hatemi,* 636 S.W.3d 857, 867 (Ky. App. 2021); *see also* 20-ORD-041 (finding a public agency has a "duty to inform the requester in clear terms that it [does] not have the records"). Otherwise, the agency has five business days to provide the record or to deny the request and say why. KRS 61.880(1). Because the agency delayed a final response to the Appellant's request after he had already precisely described the requested record, it subverted the intent of the Act within the meaning of KRS 61.880(4).

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to 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/ James M. Herrick
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Distributed to:

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