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OFFICE OF THE ATTORNEY GENERAL

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24-ORD-101

April 17, 2024

In re: Jill Charles/Boone County Planning Commission

Summary: The Boone County Planning Commission (“the Commission”) did not violate the Open Records Act (“the Act”) when it could not provide records that do not exist.

Open Records Decision

On March 24, 2024, Jill Charles (“Appellant”) requested copies of the “minutes” of meetings held by the Zone Change Committee¹ (“the Committee”) on February 15 and September 20, 2023. In a timely response, the Commission advised that “minutes are not taken at the Zone Change Committee meeting.” However, the Commission provided the Appellant with notes that were prepared for the Committee in advance of the two meetings. This appeal followed.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to support a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested records, or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. 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 cites KRS 61.835, a provision of the Open Meetings Act, which requires every public agency subject to that law to record “minutes of action taken at every meeting[,] setting forth an accurate record of votes and actions at such

¹ Although the Appellant’s request referred to the “Public Zone Committee,” it appears this was merely a misnomer.

meetings.” Under this provision, the Appellant has perhaps presented a *prima facie* case that minutes of the Committee meetings *should* exist. The Commission, however, has rebutted the presumption that minutes *do* exist by asserting none were created. As such, the Commission has discharged its duty under the Act by explaining why no responsive records exist. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011).² Therefore, the Commission did not violate the Act.

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.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

Ms. Jill Charles
Dale T. Wilson, Esq.
Mr. Kevin Costello
Ms. Sara Smith

² To the extent the Appellant argues that minutes *should* have been created, she is alleging a violation of the Open Meetings Act. However, the Appellant has not begun enforcement of the Open Meetings Act by submitting a written complaint to the presiding officer of the agency describing the alleged violations and proposing a remedy. *See* KRS 61.846(1). As such, she has not provided the Office a copy of her written complaint or the agency’s response to it, as required to invoke the Office’s jurisdiction to determine whether a public agency has complied with the Open Meetings Act. *See* KRS 61.846(2); *see also Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 871 (Ky. App. 2021). Thus, the Office expresses no opinion as to whether the Committee’s process of drafting “Committee Reports” and presenting them to the Commission at its meeting complies with KRS 61.835.