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24-ORD-245

November 22, 2024

In re: Eric Bunzow/City of Elsmere

Summary: The City of Elsmere (“the City”) did not violate the Open Records Act (“the Act”) when it could not provide records not within its possession, custody, or control.

Open Records Decision

On or about August 31, 2024, Eric Bunzow (“the Appellant”) submitted two requests to the City pertaining to a social media account on Facebook identified as “Councilwoman Serena Owen.” First, he requested “a copy of any and all Facebook messages between” that account and nine named individuals. Second, he requested “a copy of any and all Facebook people that are blocked on” that account. Upon receipt of the requests, the City forwarded them to the Councilwoman¹ and asked her to provide the requested records to the city clerk because “the City is not in possession or control of the account.” The Councilwoman responded that there were no records responsive to the Appellant’s requests.²

On or about October 11, 2024, the Appellant made a third request to the City for “a copy of the activity log or a public inspection of the activity log” for the Facebook account “Councilwoman Serena Owen.” The City forwarded the request to the Councilwoman, who replied that that she would not comply because the Facebook page was “a personal political candidate page” and, therefore, “is not subject to” the Act. This appeal followed.

In response to this appeal, the City asserts it “has taken every action to attempt to assist” the Appellant, but it “does not possess or maintain” any of the

¹ Serena Owen is a member of the Elsmere City Council.

² The City’s original response indicates that the Appellant also sought copies of the Councilwoman’s paychecks. However, the Appellant did not submit a copy of his request for paychecks to the Office. Rather, he submitted the agency’s response, which quotes that request. Because the Appellant did not submit a copy of his original request for the paychecks, the response to that request is not before the Office on appeal. *See* KRS 61.880(2)(a).

records at issue. A public agency “is responsible only for those records within its own custody or control.” *City of Fort 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 it does not have the requested records within its possession, custody, or control, the burden shifts to the requester to present a *prima facie* case that it does possess such records. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not attempted to make such a showing. Accordingly, the City did not violate the Act when it could not provide the requested records.

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:

Mr. Eric Bunzow
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