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25-ORD-182

July 18, 2025

In re: David Selby/City of Fox Chase

Summary: The City of Fox Chase ("the City") violated the Open Records Act ("the Act") when it failed to issue a timely response, failed to respond to portions of a request, failed to determine whether a document exists, and failed to grant timely inspection of public records without explanation. However, the City did not violate the Act when it could not provide a record that does not exist. Under the circumstances, the city attorney's office was a suitable facility for inspection of records under KRS 61.872(1).

Open Records Decision

On February 14, 2025, City Councilman David Selby ("the Appellant") submitted a request to the City for copies of an "index and/or listing of all City ordinances," a "revisions listing of all City ordinances," and "all City ordinances with signature approval." In a response by the city attorney on March 11, 2025, the City referred to a previous request the Appellant had made in 2023, at which time he had been "provided with the Ordinance Index maintained by the City as well as copies of the [City] Ordinances from 2011–2023." The City further stated that "Ordinance[s] between 1993 and 2011 are not maintained in any electronic or available method for duplication" and "[o]nly one signed copy exist[s] which is maintained by the part-time City Clerk." The City asserted it "would create too much of a disruption" to interrupt the City Clerk's other duties, but the Appellant could "schedule a date and time to review these old Ordinances." Lastly, the city attorney claimed that, "to [his] knowledge," an index of City ordinances "does not exist." The City did not address the Appellant's request for a "revisions listing" or for copies of ordinances more recent than 2023.

On March 12, 2025, the Appellant wrote a follow-up letter claiming there was "still missing information" from his prior requests and asking "to exercise [his] right to inspect [the ordinances] directly." The Appellant further claimed electronic copies of the older ordinances must exist because they were "previously available on the

city's website." He requested that the city attorney "reach out to the Official Records Custodian *i.e.* City Clerk" to confirm whether "a listing or index of ordinances" exists. Finally, the Appellant stated he would "be reaching out . . . to schedule a date and time to review all of the requested ordinances." The record on appeal contains no response to this letter.

On April 12, 2025, the Appellant again wrote to the city attorney to clarify his request. He stated he was "specifically requesting access to ordinances that are valid and lawful, and which have not been rescinded, repealed, superseded or otherwise rendered invalid," in order "to review only those ordinances that are currently in effect and enforceable under the law." On April 16, 2025, the city attorney replied that he had "two binders which appears [*sic*] to represent the prior ordinances of the City." With regard to any ordinances older than 1994, he noted that "no city official currently has knowledge before their time and most if not all of the officials prior to 1994 are deceased," so "there is no way to verify these records are complete." He requested that the Appellant contact him "to schedule a time to review or copy these records." On May 9, 2025, the Appellant wrote a letter objecting to reviewing the records in the city attorney's custody because he was not the "Official Records Custodian." On June 18, 2025, the Appellant initiated this appeal.

When a public agency receives a request to inspect records, that agency must decide within five business days "whether to comply with the request" and notify the requester "of its decision." KRS 61.880(1). Here, the City took four weeks to respond to the Appellant's request and made no attempt to justify its delay.[1] Thus, the City violated the Act.

Furthermore, an agency response denying inspection of public records must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." *Id.* A public agency cannot simply ignore portions of a request. *See, e.g.,* 21-ORD-090. If the requested records exist and an exception applies to deny inspection, the agency must cite the exception and explain how it applies. Conversely, if the records do not exist, then the agency must affirmatively state that such records do not exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant states that "the City did eventually provide a set of documents spanning from 2011–2022." The City failed to respond to the Appellant's request for a "revisions listing" or for copies of any ordinances more recent than 2022. Nor did the City determine conclusively whether an index of ordinances exists, despite its

[1] Under KRS 61.872(5), the time for granting inspection of public records can be extended if "the public record is in active use, in storage or not otherwise available," but only if the agency gives "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record will be available for inspection." Here, however, the City did not give a detailed explanation or the earliest date when records would be available.

somewhat contradictory assertion that the Appellant was "provided with the Ordinance Index" in 2023. Thus, the City violated the Act.

On appeal, the City asserts that no "revisions index" exists. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to make a *prima facie* case that the record does exist. *See Bowling,* 172 S.W.3d at 341. A requester must provide some evidence to make a *prima facie* case that a requested record exists, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support for the existence of the record. *See, e.g.*, 21-ORD-177; 11-ORD-074. Here, the Appellant has not attempted to do so. Accordingly, the City did not violate the Act when it could not provide a record that does not exist.

With regard to ordinances enacted between 1994 and 2011, the City has offered to let the Appellant inspect the records at the city attorney's office during regular business hours. On appeal, the City explains that it "does not have a City Hall and/or City building" or any other "public facilities where its records are maintained," and therefore, "currently in[-]use records" are maintained at the City Clerk's residence and older records are kept in a rental storage facility. Due to flooding, the older records in storage were inaccessible for a time, but "[a]fter a diligent search by the Mayor of the storage facility the older ordinance books were located and have been available" for inspection since April 16, 2025. The City asserts the city attorney's office in Shepherdsville, approximately five miles from Fox Chase, "is a feasible location" which is "open 8:00 a.m. to 5:00 p.m. Monday thru Friday and 9:00 a.m. to 12:00 noon Saturdays." Evidently, the Appellant has not arranged to inspect these records because he objects to inspecting them in the office of the city attorney.

Under KRS 61.872(1), "suitable facilities shall be made available by each public agency for the exercise of [the] right" to inspect public records. Whether facilities are "suitable" can vary depending on the circumstances of the public agency. As the City has explained, neither the City nor the City Clerk has an office. In 15-ORD-195, where a small city[2] did not have a city hall or other public facility where its records were kept, the Office found the city attorney's office five miles away was a suitable facility for inspection under KRS 61.872(1). Here, as there, the city attorney's office is a suitable facility for inspection. Accordingly, the City did not violate the Act when it offered to let the Appellant inspect its records at that location.

Nevertheless, the Appellant complains that he does not know "where these binders originated, nor was it made clear whether they were compiled or certified by the official records custodian." But "questions relating to the verifiability, authenticity, or validity of records disclosed . . . are not generally capable of resolution

[2] Here, according to its website, the City has a population of less than 500. *See* https://foxchase1.weebly.com (last accessed July 9, 2025).

under the Act." 04-ORD-216. Nor does the Act require public agencies to provide "certified" copies of records. *See, e.g.,* 22-ORD-036 n.2; 03-ORD-207. Furthermore, a response granting inspection of records need not be issued by the official custodian, but merely by someone acting "under his or her authority." KRS 61.880(1). Because there is nothing in the record before the Office to suggest that the city attorney lacked the authority to provide records on behalf of the official custodian, the City did not violate the Act when it offered inspection of records via the city attorney. *See, e.g.,* 22-ORD-175.

The Appellant objects, however, that he requested *copies* of the records and therefore should not be required to inspect them before obtaining copies. However, the Appellant is a resident of the county where the records are located. Under KRS 61.872(2)(a), "[a]ny resident of the Commonwealth shall have the right to *inspect* public records" (emphasis added). Inspection of public records on the agency's premises is the basic right provided by the Act. "*Upon inspection,* the applicant shall have the right . . . to obtain copies of all public records not exempted by the terms of KRS 61.878." KRS 61.874(1) (emphasis added). Thus, under KRS 61.874(1), a requester's right to obtain copies of records is conditioned on his prior inspection of those records. If requested, however, "[t]he public agency shall mail copies of the public records to *a person whose residence or principal place of business is outside the county in which the public records are located* after he or she precisely describes the public records which are readily available within the public agency." KRS 61.872(3)(b) (emphasis added). A person who does not live or work outside the county where the records are located is not entitled to receive copies without having first inspected the records in person at the suitable facility provided by the agency. *See Commonwealth v. Chestnut,* 250 S.W.3d 655, 661 (Ky. 2008). Accordingly, the City did not violate the Act when it made the requested records available for the Appellant's inspection during regular business hours, as opposed to sending him copies of the records. *See, e.g.,* 21-ORD-157; 21-ORD-143.[3]

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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[3] The Appellant additionally claims he has been subjected to "repeated incidents of harassment and public admonishment" by other council members, which he views as "retaliatory [and] directly connected to [his] records request." Certainly, any "measures taken by public agencies to discourage or punish access to public records are at odds with the spirit of" the Act. 17-ORD-067. Nevertheless, while KRS 61.880(2) authorizes the Attorney General to determine whether an agency violated the Act, it does not create jurisdiction over a claim of retaliation. *See, e.g.,* 17-ORD-067; 11-ORD-182; 09-ORD-095 n.6; 94-ORD-108. Therefore, the Appellant's allegations are beyond the scope of this appeal.

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Distributed to:

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