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25-ORD-224

August 21, 2025

In re: Big Sandy Area Development District/Martin County Water District

Summary: Martin County Water District ("the District") violated the Open Records Act ("the Act") when it withheld records without citing any exemption authorizing its withholding. The District did not violate the Act when it denied a portion of the request that did not seek "public records" as defined by KRS 61.870(2) or when it did not provide records it does not possess.

Open Records Decision

On July 15, 2025, Eric Ratcliff ("Appellant"), on behalf of the Big Sandy Area Development District ("Big Sandy"), submitted a ten-part request seeking a variety of records related to the District, Big Sandy, and two private corporations, Alliance Water Resources ("AWR") and Xylem Dewatering Solutions, Inc ("Xylem").[1] In response, the District denied the request, stating that it would provide the Appellant with responsive documents "during the discovery process" of the civil action it filed on July 17, 2025. It also stated that "the substantial majority, if not all, of the documents which [the Appellant] has requested . . . are in the possession of" AWR. This appeal followed.

[1] Specifically, the Appellant sought (1) correspondence regarding "the purchase, delivery, and/or installation of any water pumps occurring between May 2019 and July 2025" and specified that responsive records included correspondence between the District and Xylem or between AWR and Xylem; (2) certain documents submitted to the District by Xylem between May 2019 and the date of the request; (3) certain communications between AWR and Xylem between May 2020 and the date of the request; (4) certain communications between AWR and Xylem between January 2021 and the date of the request; (5) certain communications between AWR and Xylem from September 2021 to the date of the request; (6) "rental agreements between" the District and AWR or Xylem related to the "rental of water pumps" and other devices; (7) certain communications between AWR and Xylem from January 2024 to the date of the request; (8) certain documents submitted to the District by Xylem between January 2024 and the date of the request; (9) "meeting minutes and materials from May 2017" to the date of the request belonging to the District or the District's Board; and (10) "written reports submitted to the [District] by AWR from January 2020 to the present."

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." KRS 61.880(1). If an agency denies in whole or in part the inspection of any record, its response 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.

In its initial response, the District denied the Appellant's request because it had initiated litigation against Big Sandy after the request was submitted and advised that most of the requested records are not in its possession. First, the District's reliance on litigation and its preference to provide the documents "during the discovery process" is not a basis for denial and the District did not cite an exemption that authorizes a denial on such grounds.[2] Second, simply stating that "the substantial majority, if not all, of the documents which [the Appellant] has requested . . . are in the possession of" lacks the specificity required by the Act. Such a response fails to clearly state whether the agency does or does not possess records to each part of the request. As such, the District's initial response violated the Act.

On appeal, the District abandons its original denial based on the litigation between the parties and has individually responded to each part of the Appellant's request. Moreover, the District has explained the relationship between the parties and the related corporations that informs who possesses the records requested by the Appellant.

According to the District, in 2019 Big Sandy entered into a contract with Xylem "for pumps required for the [District's] Raw Water Intake and Water Treatment Plant Rehabilitation project ('Project') for the use and benefit of [the District]. Under the terms of that contract, [Big Sandy] was required to administer, manage and coordinate Xylem's work relating to the Project."

AWR is a private corporation that "provides professional water and wastewater operates and management services." The District and AWR entered into their own

[2] Nor could it. "The civil litigation limitation is an explanation of a court's authority to order inspection of documents otherwise exempted from disclosure under KRS 61.878(1)(a)–(n). It is not an exception to an agency's duty to disclose nonexempted records." *Dep't of Revenue, Fin. & Admin. Cabinet v. Wyrick*, 323 S.W.3d 710, 714 (Ky. 2010).

contract in 2019 under which AWR would "provide certain management, operation and maintenance services to" the District. According to the District, under the contract, "AWR played no role in administering, managing or coordinating Xylem's work on the Project."

Turning to the District's denials on appeal, the Office first addresses the District's denial of a portion of part 1[3] and all of parts 3, 4, 5, and 7, which each sought correspondence between employees of AWR and Xylem. The District denied these parts of the request because they do not seek public records. The Act defines "public record" as "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). Here, the District explains that the Appellant has requested "correspondence between two private corporations." There is no evidence in the record here that such records have been prepared, owned, used, in the possession of, retained, or even seen by the District. In the absence of any evidence to the contrary, such materials are not "public records" and are not subject to the Act. *See, e.g.*, 24-ORD-262; 24-ORD-153. Indeed, they could not be provided to the Appellant because they are not the District's to provide. Accordingly, the District did not violate the Act when it denied requests for AWR's private correspondence that does not fit the definition of "public records" under the Act.

Next, the District has denied a portion of part 1[4] and all of parts 2, 6,[5] and 8 of the Appellant's request, stating it does not possess any records responsive to those requests. Once a public agency states affirmatively that it does not possess 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 make a *prima face* 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).

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[3] Specifically, the District asserts that the portion of part 1 of the request seeking communications between AWR and Xylem does not seek public records.

[4] Specifically, the District explains that it does not possess records responsive to the portion of part 1 seeking correspondence between the District and Xylem.

[5] Regarding part 6, the District explained that it does not possess rental agreements with AWR or Xylem. However, the District did say that it would provide "copies of agreements and/or invoices relating to pump rental costs."

Here, the Appellant has not made a *prima facie* case that the District possesses any records responsive to parts 1, 2, 6, and 8 of the request.[6] Accordingly, the Office cannot find that the District violated the Act when it did not provide records it does not possess.[7]

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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
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[6] Moreover, regarding parts 1, 2, and 8 of the request—which each sought materials or communications provided to the District by Xylem—the District has explained that Big Sandy would be the entity in possession of the requested records because it—and not the District—had contractual authority to oversee Xylem.

[7] After the appeal was initiated, the District provided all records responsive to parts 9 and 10 of the request. Accordingly, any disputes as to those parts of the request are moot. *See* 40 KAR 1:030 § 6.