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25-ORD-265

September 19, 2025

In re: Jennifer Setty-Botkin/Maysville-Mason County Industrial Development Authority and Mason County Judge/Executive

Summary: The Maysville-Mason County Industrial Development Authority (“the Authority”) and the Mason County Judge/Executive (“the Judge/Executive”) did not violate the Open Records Act (“the Act”) when they denied a request for records pertaining to a prospective location of a business or industry under KRS 61.878(1)(d).

Open Records Decision

On August 21, 2025, Jennifer Setty-Botkin (“the Appellant”) submitted a request to the Authority and the Judge/Executive (collectively, “the Agencies”) for “[a]ll public records in the possession of Mason County officials regarding the proposed data center project within Mason County, Kentucky,” from January 1, 2020, to the present. Specifically, the Appellant requested “[a]ll applications, proposals, contracts, memoranda of understanding, or agreements submitted by or on behalf of the data center developer(s); “[a]ll correspondence . . . between Mason County officials and representatives of the proposed data center project, its contractors, or consultants”; “[a]ll reports, studies, or assessments related to environmental impact, infrastructure capacity[,] or community impacts”; “[a]ll financial analyses, tax incentive discussions, grant applications, or economic development documents associated with the proposed project”; “[a]ll meeting minutes, presentations, or staff reports presented to the Fiscal Court during closed meetings, planning commissions, or other county boards regarding the project, including Maysville City representatives”; and “[a]ny public notices, press releases, or communication materials prepared by Mason County related to the data center.”

In a timely joint response, the Agencies agreed to provide the relevant meeting minutes of the Fiscal Court, but withheld the remainder of the responsive records under KRS 61.878(1)(d). The Agencies explained that the records “pertain to a potential industrial prospect which is exploring a project in Mason County, and that project has not been disclosed or announced. [T]he exemption exists to permit

conversations and communications between government and development prospects that may involve the disclosure of certain proprietary or confidential information prior to a prospect announcing its intent to relocate or expand.” The Agencies acknowledged that “if a development prospect were to ultimately select Mason County for its project, any actual application for permits, zoning change or other governmental approval would certainly require disclosure under” the Act. This appeal followed.

KRS 61.878(1)(d) exempts from disclosure “[p]ublic records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business’ or industry’s interest in locating in, relocating within or expanding within the Commonwealth.” On appeal, the Authority explains it “has been contacted by a development prospect with an inquiry about the construction of a data center within Mason County,” and the Authority, the Judge/Executive, “and others on behalf of local government have communicated with the” prospect about “preliminary matters” while the “prospect conducts due diligence investigating a number of issues to determine whether to choose Mason County as a site[.]” The Agencies state that “County government has not taken any legislative or executive action with regard to the development prospect” and both agencies are currently “under a nondisclosure agreement[,], which was a condition mandated by the [prospect] in order to consider Mason County for its project.” Moreover, the Agencies assert the prospect “has not made any announcement or committed to a project in Mason County.”

The Appellant makes several arguments for why KRS 61.878(1)(d) should not apply. Primarily, the Appellant claims the records are not exempt because the Agencies have made limited disclosures about the interest of an unnamed company in potentially developing a data center in Mason County. The Agencies, however, deny making any official announcements, but claim their statements were merely “made in response to public comments, questions or objections, and only such facts were disclosed as not prohibited by the nondisclosure agreements.” Furthermore, the Agencies state that “[n]o disclosures have been made [regarding] the identity of the development prospect, its intended location, its business or design plans, or other matters which clearly would be proprietary in nature.”

KRS 61.878(1)(d) applies to a public agency’s “preliminary discussions” with a potential developer who “may later choose to file a formal application” for the prospective development but “has not previously disclosed [its] interest in developing a prospective location as a business or industry.” 05-ORD-179. Thus, in 12-ORD-213, the Office found preliminary, non-binding “letters of intent” from businesses negotiating the potential lease of building space from a public agency were exempt from disclosure under KRS 61.878(1)(d) when the names of the potential tenants had not been publicly disclosed. Here, similarly, the identity of the development prospect

has not been disclosed. Therefore, the Agencies' limited disclosures that an unidentified business is considering Mason County as a possible location for a data center do not preclude KRS 61.878(1)(d) from applying to records of pre-application communications with the development prospect.

The Appellant also claims KRS 61.878(1)(d) should not apply because "[t]he request does not ask for personal information." KRS 61.878(1)(a) exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." But the Agencies did not deny the request under KRS 61.878(1)(a), and KRS 61.878(1)(d) does not depend on the existence of "personal information." Accordingly, the presence or absence of "personal information" is of no consequence here.

The Appellant further claims she is not seeking "proprietary information," arguing that "unfair commercial advantage to competitors does not apply." KRS 61.878(1)(c) exempts from disclosure certain "[r]ecords confidentially disclosed to an agency or required by an agency to be disclosed to it" that are "generally recognized as confidential or proprietary." More particularly, KRS 61.878(1)(c)1. applies to records "which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." Although the Agencies did not cite KRS 61.878(1)(c) in denying the Appellant's request, the exemption under KRS 61.878(1)(d) contains a limited exception to its scope. Namely, "[t]his exemption shall not include those records pertaining to *application to agencies for permits or licenses* necessary to do business or to expand business operations within the state, except as provided in paragraph (c) of this subsection." KRS 61.878(1)(d) (emphasis added).

Here, however, the Agencies state the development prospect has not "select[ed] Mason County for its project," but has merely made "preliminary inquiries" to "governmental officials," "looked at a site," and "conducted its necessary investigations." Preliminary inquiries and investigations by a business before it selects a location for a development project do not constitute "application[s] for permits or licenses" under KRS 61.878(1)(d). Thus, based on the Agencies' description of the stage of the project, there is no "application" that would require analysis under KRS 61.878(1)(c). Accordingly, it is unnecessary to determine the existence of "proprietary information" or an "unfair commercial advantage to competitors."

In 93-ORD-25, the Office found that notations in the Governor's daily schedule would be exempt under KRS 61.878(1)(d) insofar as they related "to meetings with previously undisclosed business or industrial prospects." Here, similarly, the Agencies have established that the requested records pertain to the potential location in Mason County of a previously undisclosed business or industrial prospect. The

Agencies acknowledge that “if the development prospect selects Mason County for its project, there [will] be public hearings and public meetings dealing with zoning, possible public financing, and other issues involving approval by County government.” At this point, however, it is apparent the business is merely exploring options for where to locate its data center, and its preliminary inquiries and negotiations with the Agencies during that process are within the scope of KRS 61.878(1)(d). Therefore, the Agencies did not violate the Act when they denied the Appellant’s request.

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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