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25-ORD-270

September 19, 2025

In re: Lori Davenport/City of Newport

Summary: The City of Newport (“the City”) did not violate the Open Records Act (“the Act”), when it did not provide records it does not possess.

Open Records Decision

On August 12, 2025, Lori Davenport (“Appellant”) submitted a request to the City for “all documentation on complaints and/or personnel action taken against [a specific employee] during his time of employment with the [City].” On August 26, 2025, the City responded that, “[a]fter a review of the file, there are zero complaints or personnel actions taken against” the specific employee while employed with the City. This appeal followed.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to make a *prima facie* case that the records do exist and that they are within the agency’s possession, custody, or control. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, “then the 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). To make a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for that contention. *See, e.g.*, 23-ORD-207; 21-ORD-177; 11-ORD-074.

Here, in her attempt to make a *prima facie* case, the Appellant asserts that she has the “performance appraisals from the years 2005 to 2007” and that the specific employee “got a 2 out of 5” for “[u]ses appropriate language in contact with the

public.” The Appellant claims another section states that the employee “occasionally uses inappropriate language with citizens.” But the Appellant did not provide any of these “performance appraisals.” And even if she had, such statements in a performance appraisal are not *prima facie* evidence of the existence of complaints or personnel actions toward the employee. Nor are they *prima facie* evidence that the City would possess such records today.

At bottom, the Appellant’s bare assertions about the alleged performance appraisals may have made a *prima facie* case that an employee received a poor performance review, but they do not make a *prima facie* case that the City possesses records of complaints or personnel actions related to the identified employee. Accordingly, the City did not violate the Act by not providing records it does not possess.

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
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/s/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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