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26-ORD-021

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In re: Mohamed Aly/Kentucky Real Estate Authority

Summary: The Office cannot find that the Kentucky Real Estate Authority (“the Authority”) violated the Open Records Act (“the Act”) because the Office cannot resolve the factual dispute between the parties regarding the records provided. The Office cannot find that the Authority violated the Act when it affirmatively stated it provided all responsive records in its possession.

Open Records Decision

Mohamed Aly (“Appellant”) submitted a request to the Authority containing five parts, seeking records regarding the Authority’s complaint procedure.¹ The Authority granted the Appellant’s request and provided responsive records. The Authority also noted, “To the extent this request seeks for the Authority to support, explain, or justify certain processes or policies, please be advised this request is denied, as your request is for information, rather than a request for specifically described records.” The Appellant initiated this appeal on three grounds: (1) the records produced by the Authority differ from the records he requested; (2) The

¹ The Appellant requested: (1) “all records supporting, justifying, or explaining the [Authority’s] published policy that only complaints against licensed real estate agents or brokers are accepted.” (2) “Please provide all records that support, justify, or explain [the Authority’s] published policy that complaints may only be filed against licensees, including any relevant legal opinions, internal procedures, forms, staff instructions, or other directives.” (3) “[A]ny forms, templates, or instructions used to report or process allegations of unlicensed real estate practice, as well as any records identifying the legal authority [the Authority] relies upon for declining, rejecting, or refusing to investigate such complaints when the respondent is unlicensed.” (4) “[A]ny procedures or policies for handling cases where an unlicensed individual acts under the supervision of a licensed broker.” (5) “[A]ny policy or instruction regarding the processing of unlicensed-practice reports not submitted on Form 300.”

Authority “denied the core request by mislabeling it as ‘information’”; (3) The Authority’s “[f]ailure to Affirmatively State Nonexistence” of records.²

First, the Appellant claims the records he received differ from those he requested. Conversely, the Authority asserts the records it produced were “all responsive records.” The Office has previously found that it cannot resolve a factual dispute between the parties to an appeal. *See, e.g.*, 22-ORD-010 (declining to resolve a factual dispute that the records received were different from the records requested). Thus, a factual dispute exists between the Appellant and the Authority as to whether the records the Appellant received are responsive to his request. In the end, the Office cannot resolve the factual dispute, and thus, cannot find that the Authority violated the Act.

Second, the Appellant asserted the Authority “denied the core request by mislabeling it as ‘information.’” When an agency denies a request under the Act, its written 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.” KRS 61.880(1). Its response cannot be merely “limited and perfunctory.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). Here, the Authority stated it “denied” the request because the “request is for information, rather than a request for specifically described records.” And the Authority did not assert it was withholding any responsive records, but stated it “produced all responsive records.” The Act applies to requests for specifically described records, not requests for information. *See* KRS 61.872(2)(a). Therefore, the Office cannot find that the Authority violated the Act.

Third, the Appellant asserted the Authority “Fail[ed] to Affirmatively State Nonexistence” of any records. A public agency discharges its duty under the Act by affirmatively so stating. 99-ORD-150. A statement from a public agency that it has provided all records within its possession is “tantamount to an affirmative statement that the remaining records requested do not exist.” 04-ORD-040. Here, the Authority stated it “produced all responsive records.” Thus, the Authority discharged its duty under the Act.

² The Appellant also makes allegations related to the Authority’s “Statutory Authority Requiring Uniform Complaint Procedures” and others that are unrelated to the Act. However, allegations such as these, which do not involve an assertion that the Act was violated, are beyond the scope of this appeal under KRS 61.880(2), and therefore, the Office cannot resolve them.

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
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Distributed to:

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