



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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26-ORD-317

July 15, 2026

In re: Joe Bilby/Greenup County Judge/Executive's Office

Summary: The Greenup County Judge/Executive's Office ("the Judge/Executive's Office") did not violate the Open Records Act ("the Act") when it did not provide records not within its custody or control. However, the Judge/Executive's Office did violate the Act when it did not identify the official custodian of the agency that would possess the records.

Open Records Decision

On June 5, 2026, Joe Bilby ("Appellant"), acting on behalf of five members of the General Assembly,¹ submitted a request to the Judge/Executive's Office seeking "all emails, correspondence, and other documents in your possession or in the possession of your office that refer or relate to any of the following: any data center facility proposed to be located at EastPark; TeraWulf or any of its affiliates; or Industrial Equity Partners or any of its affiliates."

In a timely response, the Judge/Executive's Office denied the request, stating, "There are no known records that are in possession of the [Judge/Executive] as requested due to none of the requested information being part of his elected office. [The Judge/Executive] is on the EastPark Board by appointment which is outside the scope of his elected position as [Judge/Executive]." This appeal followed.

On appeal, the Judge/Executive's Office states only that it "has no emails in [its] possession that would fall under the" request. A public agency "is responsible only for those records within its own custody or control." *City of Fort Thomas v.*

¹ Specifically, the Appellant states he is acting at the direction of Representative Patrick Flannery, Representative Scott Sharp, Representative Aaron Thompson, Senator Robin Webb, and Senator Phillip Wheeler.

Cincinnati Enquirer, 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)). 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 requested record does or should exist. 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 record does or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas*, 406 S.W.3d at 848 (citing *Bowling*, 172 S.W.3d at 341). A requester’s bare assertion that a public agency must or should possess the requested records is not adequate to make a *prima facie* case that the agency does, in fact, possess the records. See, e.g., 22-ORD-040. Rather, to make a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide a statute, regulation, or factual support for that contention. See, e.g., 26-ORD-168; 21-ORD-177; 11-ORD-074.

Initially and on appeal, the Judge/Executive’s Office maintains that it does not possess any records that are responsive to the request. The Appellant has not attempted to make a *prima facie* case that the Judge/Executive’s Office does possess the requested records. The Office therefore cannot find that the Judge/Executive’s Office does, in fact, possess the requested records. Adjudicating such factual questions is beyond the Office’s purview under KRS 61.880(2). See, e.g., 23-ORD-038; see also *Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 879 (Ky. App. 2021) (stating the Office “[l]ack[s] the authority to adjudicate factual disputes”). Thus, because the Appellant has not made a *prima facie* case that the Judge/Executive’s Office possesses the requested records, the Office cannot find that it violated Act when it denied the Appellant’s request.

However, the Judge/Executive’s Office’s response was deficient in one respect. Under KRS 61.872(4), “[i]f the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency’s public records.” The Judge/Executive’s Office’s initial response indicated that any responsive emails would have to do with the “EastPark Board.” If that is the case, then the Judge/Executive’s Office was obligated to identify that agency as the proper target of the request and identify the “name and location of the official custodian” of the records.² Because the Judge/Executive’s Office did not do so, its response violated the Act.

² “EastPark” is the “marketing name for” the “Fivco Area Development District.” See FIVCO AREA DEVELOPMENT DISTRICT, available at <https://fivco.org/economic-development/eastpark-industrial-park/> (last visited July 13, 2026). The Fivco Area Development District (“Fivco”) is an area

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
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

Joe Bilby, Appellant
Bobby Hall, Greenup County Judge Executive
Doug Collins, Greenup County Deputy Judge Executive
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development district established by statute. *See* KRS 147A.050(10). Fivco and any organization created by it is a public agency subject to the Act. *See* KRS 147A.116(1)(a) (“[E]ach area development district and any board, committee, or other organization created by an area development district shall . . . comply with the provisions of” the Act); *see also* KRS 61.870(1)(f) (defining a “public agency” as “[e]very state or local government agency . . . created by or pursuant to state or local statute”).