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26-ORD-321

July 16, 2026

In re: Theresa Ewing/Henderson County Fiscal Court

Summary: The Henderson County Fiscal Court (“the Fiscal Court”) did not violate the Open Records Act (“the Act”) by providing the requester with copies of all existing, responsive records within its possession, custody, or control and referring the requester to the agency that is the custodian of the remaining records under KRS 61.872(4).

Open Records Decision

On April 20, 2026, Theresa Ewing (“the Appellant”) submitted a request to the Fiscal Court for copies of records pertaining to “Henderson County Board of Zoning Adjustment [(the Board)] . . . Appeal #1571.” In particular, the Appellant requested the following: (1) “ANY and ALL documents [that] reference appeal #1571[, including] all notes, reports and correspondence from Mr. Tasa and any other county representative or appointee”; (2) “all investigative reports[, photos submitted to the [B]oard prior to, during and after the meeting held on April 13, 2026, and any other documents applied to this appeal number”; (3) “the meeting video of the [Board] from opening/beginning of meeting until official closure of the meeting”; (4) a “[t]ranscript of [the Board] meeting held on April 13, 2026, from opening/beginning of meeting until official closure of the meeting”; and (5) the “final disposition of appeal #1571 as spoken into the record on April 13, 2026.”

By letter dated April 24, 2026, the Deputy County Judge/Executive responded on behalf of the Fiscal Court and provided the Appellant with copies of all existing records in the possession of the Fiscal Court that are responsive to parts 1 and 2 of the request. However, the Fiscal Court denied the remainder of the request “because the Fiscal Court is not the custodian of the records for the [Board].” In addition, the Deputy County Judge/Executive referred the Appellant to the Board and provided her with the mailing address, telephone number, and email address for the Records Custodian of the Board. The Appellant initiated this appeal on May 5, 2026, stating that after “three attempts to explain that [the Fiscal Court is] the creation/appointing

authority,” the Fiscal Court provided a partial response, which the Appellant does not believe is complete.¹

In response, the Henderson County Attorney (“the County Attorney”) responded on behalf of the Fiscal Court, stating that the Deputy County Judge/Executive “made a complete and timely response to [the Appellant] that included all documents for which he is custodian on behalf of Henderson Fiscal Court, including, but not limited to, copies of emails and notes of the County Codes Administrator and all information the Codes Administrator sent to the [Board].” The County Attorney further explained that Board meetings are not recorded on video, but the Board creates an audio recording of the meetings using Fiscal Court equipment. “Said audio recording is used to create the transcript/minutes. Once created by staff, the minutes are presented to the [Board] at its next meeting for official adoption. The Henderson Fiscal Court has been informed by [Board] staff that the minutes of the April 13, 2026, meeting were presented and approved by the [Board] at its May 12, 2026, meeting.” In addition, Board staff provided the Appellant with a copy of the approved minutes, along with a copy of the final disposition of the subject appeal electronically on May 13, 2026. The Board’s accompanying email advised the Appellant that the audio recording was too large to send via email but provided instructions regarding how the Appellant could obtain a copy of the audio recording on a USB drive.

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 or should be in 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 records are or should be in the agency’s possession, custody, or control, “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). A public agency “is responsible only for those records within its own custody or control.” *City of Fort Thomas*, 406 S.W.3d at 856 (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)); *see also Dep’t of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) (“The ORA does not dictate that [a] public agenc[y] must gather and supply information not regularly kept as part of its records.”).

¹ Given the scope of the Office’s review under KRS 61.880(2), it cannot resolve factual disputes between the parties, including a dispute regarding whether the public agency has provided all existing, responsive records within the agency’s possession, custody, or control. *See, e.g.*, 22-ORD-010 (declining to resolve a factual dispute regarding the perceived discrepancy between the records provided and those requested); 21-ORD-163 (declining to resolve conflicting factual narratives); 26-ORD-107; 19-ORD-083; 03-ORD-61; OAG 89-81.

Here, the Appellant argues that the Fiscal Court can access the records of the Board and, therefore, violated the Act by failing to conduct an adequate search for the records of which the Fiscal Court is not the records custodian. However, “an agency’s ‘access’ to digital records, without more, does not mean that the public agency is the custodian of such records.” 22-ORD-131 (quoting 20-ORD-109); 23-ORD-107. The Appellant has not made a *prima facie* case that additional, responsive records are in the possession, custody, or control of the Fiscal Court.

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 Appellant submitted her April 20 request to the Fiscal Court, which does not have custody or control of the records that remain in dispute. By providing the name and contact information for the Records Custodian of the Board, the Fiscal Court discharged its duty under KRS 61.872(4). Accordingly, the Fiscal Court did not violate the Act by providing the Appellant with copies of all existing, responsive records it possesses and referring the Appellant to the Board for additional, responsive records under KRS 61.872(4).

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.

Russell Coleman
Attorney General

/s/ Michelle D. Harrison
Michelle D. Harrison
Assistant Attorney General

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Distributed to:

Theresa Ewing, Appellant
Brad Schneider, Henderson County Judge/Executive
Kurt Wiesen, Henderson County Deputy Judge/Executive
Steve Gold, Henderson County Attorney
Angela Comer, Henderson County Fiscal Court Clerk