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OFFICE OF THE ATTORNEY GENERAL

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26-ORD-459

October 14, 2026

In re: Howard Froehlicher/City of Falmouth

Summary: The City of Falmouth ("the City") did not violate the Open Records Act ("the Act") when it did not provide records that do not exist. The City violated the Act when its initial response did not clearly grant or deny the request.

Open Records Decision

On September 9, 2026, Howard Froehlicher ("the Appellant") submitted a request to the City that identified a construction company and sought records concerning the procurement of that company. The Appellant identified 13 categories of records he was seeking.[1] In response to the portion of the request having to do with a construction company, the City stated that "records responsive to this portion of your request . . . have previously been provided to you in response to your prior Open Records requests" and that it "is not aware of any additional records beyond those previously provided." This appeal followed.

The Appellant explains he only asks for the Office to "determine whether that response satisfies the [Act] and whether the City has established an adequate search for the specifically identified records."

When a public agency receives a request for public records, that agency must decide within five business days "whether to comply with the request" and notify the requester, in writing, "of its decision." KRS 61.880(1). If the requested records exist but a statutory exception applies to justify withholding the records, the agency must cite the statutory exception and explain how it applies to records or portions thereof being withheld. KRS 61.880(1). Conversely, if the records do not exist, then the agency must affirmatively state that such records do not exist following its diligent

[1] The Appellant also sought records having to do with a different contractor of the City. The City states that it has no records documenting a contractor with the name identified by the Appellant. The Appellant has not challenged this portion of the request.

search. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005).

The City's response stated that it had previously provided responsive records and did not possess records beyond its prior production. However, the City did not identify which previously provided records were also responsive to the Appellant's September 9 request. As a result, the Appellant could only guess at which records he had previously received were also responsive to this request. Such a response fails to meaningfully grant or deny the request. Thus, the City violated the Act when it failed to clearly grant or deny the Appellant's request.[2]

Once a public agency states affirmatively that no responsive records exist, the burden shifts to the requester to make a *prima facie* case that the records do 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 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). A requester must provide some evidence to make a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested record or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester's bare assertion that certain records should exist is insufficient to make a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040. Here, the Appellant has not attempted to make a *prima facie* case that any records responsive to his questions are or should be in the possession, custody, or control of the City. The City is therefore not required to prove that its search was adequate. Accordingly, the Office cannot find that the City violated the Act by conducting an inadequate search.

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.

[2] On appeal, the City has identified the records that are responsive to particular parts of the Appellant's request and has identified the parts of the request for which it has no responsive records.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
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Distributed to:

Howard Froelicher, Appellant
Megan Crouch, City of Falmouth, City Clerk
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