

Ky. Op. Atty. Gen. 07-ORD-011, 2007 WL 293288 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

07-ORD-011

January 23, 2007

In re: Bob Bale/City of Brownsboro Farm

Summary: The City of Brownsboro Farm properly responded to portion of request by providing copies of records responsive to the request or by advising that it did not have other requested records. Portion of response that failed to explain nonexistence of publication records or to advise requester as to what steps were taken to locate responsive records violated Open Records Act. Failure to timely respond to request within three business days of receipt of the request was a procedural violation of the Act.

Open Records Decision

The question presented in this appeal is whether the response of the City of Brownsboro Farm to Bob Bale's December 7, 2006, request for “[c]opies of the city real property tax ordinances for the last five (5) years (2002 thru 2006)” and “[w]ith respect to the above real property tax ordinances, proof of publication in the area's largest newspaper in accordance with KRS 424,” violated the Open Records Act. For the reasons that follow, we find that the city's response to Mr. Bale's request was consistent in part and inconsistent in part with the requirements of the Act.

In his letter of appeal, dated December 20, 2006, Mr. Bale indicated that as of that date, the City had not responded to his request.

By letter dated January 4, 2007, Mr. Bale provided this office with a copy of the City's December 19, 2006, response to his request, which he indicated he had received on December 21, 2006.

The City's December 19, 2006, response to Mr. Bale's request advised:

The City received your Certified Letter dated December 7, 2006 and in response offer the following:

1. 2002 - Copy of the Real Estate Tax Ordinance; there are no documents on file with regard to publication.
2. 2003 - Copy of the Real Estate Tax Ordinance; there are no documents on file with regard to publication.
3. 2004 - Copy of the Real Estate Tax Ordinance; copy of publication.
4. 2005 - Copy of the Real Estate Tax Ordinance; copy of publication.
5. 2006 - Copy of the Real Estate Tax Ordinance; publication was sent via first class mail to all residents on July 25, 2006.

In his letter of appeal, Mr. Bale complains that the City did respond to his request for copies of the tax ordinances, but the majority of the copies were unsigned copies. Addressing his request for proof of publication of the tax ordinances, he complains that no proof was received that the advertisements had been published, and the date

they were published.

[KRS 61.880](#) sets forth the legal obligations of a public agency upon receipt of an open records request. Subsection (1) of that provision requires a public agency to respond to the requesting party within three business days of receipt of the request, notifying the party whether it will comply with his request. These requirements, as the Attorney General has often noted, “are not mere formalities, but are an essential part of the prompt and orderly processing of an open records request.” 93-ORD-125, p. 5.

*2 The record before us indicates that Mr. Bale mailed his open records request on December 7, 2006, and it was received by the City on December 8, 2006. The agency responded by letter dated December 19, 2006. Under these facts, we find the City's delay in responding to the request violated [KRS 61.880\(1\)](#), particularly in light of the fact that it offered no written explanation for the delay. 04-ORD-138.

Turning to the substantive issues, the City provided Mr. Bale with copies of the City's Real Estate Tax Ordinances for the years 2002 - 2006 that he requested. [40 KAR 1:030, Section 6](#) provides: “Moot complaints. If requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.” Accordingly, since Mr. Bale has been provided with copies of the tax ordinances responsive to this portion of his request, the issue as to access to these records is moot and no decision will be rendered in this regard. 06-ORD-253.

Mr. Bale complains that the majority of the ordinances provided were unsigned copies. There is no requirement that the City provide a signed copy of an ordinance in response to an open records request, particularly where Mr. Bale did not ask for signed copies of the ordinances in his request. *Accord*, 03-ORD-207, p. 3. (A public agency is not obligated to “certify... the appropriate records... in such manner that the same may be introduced as evidence in a Court of Law....”). It is presumed that the copies of the ordinances provided are authentic copies and Mr. Bale does not challenge their authenticity relating to the enactment of the ordinances. Accordingly, we find no violation in this regard.

Next, we address the City's response to Mr. Bale's request for records reflecting proof of publication in the area's largest newspaper in accordance with KRS Chapter 424. In its response, the City advised that there were no documents on file with regard to publication for years 2002 and 2003; the City provided copies of the newspaper advertisements published in the newspaper for the years 2004 and 2005; and the City further advised that publication of the notice was sent via first class mail to all residents on July 25, 2006. In his letter of appeal, Mr. Bale asserts that the City did not provide him with proof of publication, in that no proof was received that the advertisements had been published, and the date they were published as called for in [KRS 424.170](#).

As noted above, the City's response to Mr. Bale advised that there are no documents on file with regard to publication for the years 2002 and 2003. With respect to the obligations of an agency denying access to public records on this basis, this office has observed:

[A]n agency's inability to produce records due to their non-existence is tantamount to a denial and... it is incumbent upon the agency to so state in clear and direct terms. 01-ORD-38, p. 9 [other citations omitted]. While it is obvious that an agency cannot furnish that which it does not have or which do not exist, a written response that does not clearly so state is deficient.

*3 02-ORD-144, p. 3. The City's response advising that certain of the requested records do not exist was consistent in part with the Act, in that it affirmatively advised him that the records did not exist, however it was deficient insofar as it failed to provide some explanation for the nonexistence of the records. 01-ORD-038. In order

to satisfy its statutory burden of proof, an agency must offer some explanation for the nonexistence of the records and, at a minimum, document what efforts were made to locate the requested records. 06-ORD-207.

In failing to provide an explanation for the nonexistence of certain publication records and efforts taken to locate those records, the City did not sustain its statutory burden of proof relative to the partial denial of his request. [KRS 61.880\(2\)\(c\)](#). These omissions in the disposition of Mr. Bale's request constituted a violation of the Open Records Act.

The Records Retention Schedule for Local Governments, Common Records, developed by the State Archives and Records Commission, contain records retention requirements for publication of legal notices records, such as Series No. L4944, which are described as:

Publication of Legal Notices - (Publication area means the city, county, district or other local area for which an advertisement is required by law to be made. May include a copy of the printed advertisement, the billing for the advertisement, the request to the newspaper to advertise and affidavit of publisher. This record series documents that all legal notice requirements have been met according to [KRS 424.010](#) through [KRS 424.990](#)).

The schedule describes these records as a vital and permanent record and the disposition instructions read: Retain at agency. The response of the City does not indicate whether publication records no longer exist or whether they have been lost, or destroyed. Thus, we have insufficient information before us in this appeal to address this possible records management issue. [FN1] However, the agency should respond to Mr. Bale's requests for inspection of these publication records, if such exist, or provide an explanation as to why they do not.

Finally, in response to the request for copies of publication records for 2006, the City advised that publication was sent via first class mail to all residents on July 25, 2006. If the City has a copy of this record, it should be provided to Mr. Bale or, as explained above, provide an explanation as to why it does not.

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](#). Pursuant to [KRS 61.880\(3\)](#), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Gregory D. Stumbo
Office of Attorney General

James M. Ringo
Assistant Attorney General

[FN1]. [KRS 61.8715](#) provides:

[T]o ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of... [[KRS 61.870](#), et seq., the Kentucky Open Records Act, [KRS 171.410](#) to [171.740](#), relating to public records management, and [KRS 61.940](#) to [61.959](#), relating to strategic planning for computerized information systems.]

The General Assembly has thus recognized an “essential relationship” between the intent of the Open Records Act and statutes relating to proper records management and maintenance. [KRS 61.8715](#). It is, however, for the Department for Libraries and Archives, and not the Attorney General, to assist the public agency in determining whether it is fully discharging its duty to manage and preserve records containing “adequate and proper documentation of the organizational functions, policies, decisions, procedures, and essential transactions of the

agency and designed to furnish information necessary to protect the legal and financial rights of the government and of persons directly affected by the agency's activities.” [KRS 171.640](#). Accordingly, pursuant to [KRS 61.8715](#), we have referred the matter to the Department for Libraries and Archives for review under KRS Chapter 171.

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