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20-ORD-094

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In re: David McAnally/Cabinet for Health and Family Services

Summary: Cabinet for Health and Family Services ("Cabinet") violated the Open Records Act ("the Act") by its untimely disposition of a request for records and by failing to explain the nonexistence of certain records that should exist.

Open Records Decision

On December 20, 2019, Department for Medicaid Services ("DMS") employee David McAnally ("Appellant") submitted an open records request to the Cabinet. He requested a copy of his grievance filed on September 14, 2018, and the response from DMS. Appellant also requested "all email correspondence that include[s] Carol Steckel, Jill Hunter, John Inman or Stephanie Bates [since March 2018] regarding the performance of [Appellant's] job duties[, including] correspondence with the Division [of] Program Quality and Outcomes, Office of Human Resource Management, Managed Care Organizations, the DMS Commissioner's Office, Office of Legal Services and Division of Program Integrity personnel."[1]

In its initial response on January 3, 2020, the Cabinet provided a copy of the grievance file. However, the Cabinet stated that it would not be able to fulfill the request for e-mails until the week of January 20, 2020, "due to the time required to gather, review and prepare the documents for release." The Cabinet's

[1] The other portions of Appellant's request are not in dispute.

supplemental response stated that "[a]fter a search of the emails of Carol Steckel, Jill Hunter, John Inman and Stephanie Bates, [n]o such emails were found."

KRS 61.880(1) requires a public agency to respond to an open records request within three business days. KRS 61.872(5) permits an agency to extend this period of time when records are "in active use, in storage or not otherwise available," if the agency gives "a detailed explanation of the cause … for further delay and the place, time, and earliest date on which the public record will be available for inspection." Here, the Cabinet's response was clearly late. The Cabinet admits as much. Furthermore, the Cabinet's cursory response did not reference any of the circumstances described in KRS 61.872(5), nor did it give the statutorily-required detailed explanation of the cause for further delay. Thus, the Cabinet violated KRS 61.880(1).

On appeal, Appellant claims that the Cabinet did not conduct an adequate search for records, because it failed to search the e-mails of all employees within the organizational units that he listed in his request. Appellant believes such a search would have yielded responsive records. Regardless, Appellant claims that the Cabinet failed to provide certain attachments that were part of his grievance. In response to the appeal, the Cabinet asserts that its search for e-mails was adequate and that it provided Appellant its entire file relating to his grievance.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling,* 172 S.W.3d at 341). In this case, Appellant has not established a *prima facie* case that correspondence between the four identified employees and other employees within the organizational units exists. Appellant asserts that three of the four identified employees have left and that it is possible that their e-mails were deleted. But Appellant's bare assertion is not sufficient to establish a *prima facie* case here. The Cabinet's response adequately addresses Appellant's claim. He identified four employees he believed communicated about his job duties with employees at the Cabinet, and the Cabinet searched those identified employees' e-mail accounts but did not locate records responsive to

Appellant's request. Having failed to present a *prima facie* case that such records should exist, this Office is unable to find that the Cabinet failed to adequately execute a search for responsive records.

On the other hand, Appellant claims that the Cabinet failed to produce certain records that he knows to exist: six attachments to his grievance. The Cabinet contends that it gave Appellant its entire file on the grievance. But Appellant's grievance makes reference to six "exhibits," and on September 14, 2018, Appellant e-mailed the DMS Commissioner to confirm that he had "just dropped a grievance off with six exhibits." Those documents constitute *prima facie* evidence that the exhibits should exist in the Cabinet's grievance file. *Cf.* 19-ORD-175 (finding that a police report's reference to an "attached" letter created a presumption that the department possessed that letter). Because the Cabinet's response failed to provide any explanation for the nonexistence of a record that presumptively should exist, *see Eplion v. Burchett,* 354 S.W.3d 598, 604 (Ky. App. 2011), the Cabinet failed to meet its burden under KRS 61.880(2)(c) and violated the Act.

A party aggrieved by this decision may appeal it by initiating 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 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.

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/s/ James M. Herrick

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