



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

22-ORD-045

March 8, 2022

In re: Oda Barnes/Kentucky Personnel Cabinet

Summary: The Kentucky Personnel Cabinet (“the Cabinet”) did not violate the Open Records Act (“the Act”) when it could not provide records that do not exist in its possession.

Open Records Decision

Oda Barnes (“the Appellant”) submitted a request to the Cabinet to inspect all emails sent by the Cabinet to employees of the Cabinet for Health and Family Services (“CHFS”) regarding her performance review. The Appellant attached with her request an email from a human resources manager at CHFS, who had responded to certain questions the Appellant had raised about her performance review. In a timely response, the Cabinet responded and notified the Appellant that no such records existed in its possession, but advised that CHFS may possess responsive records. The Cabinet then provided the Appellant with the contact information for the official records custodian of CHFS. This appeal followed.

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public 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).

To make her *prima facie* case that the requested emails should exist, the Appellant argues that the email she had attached to her request referred to

notice that CHFS had received about her performance review inquiry. That email states that CHFS “received notice that [the Appellant had] posted to the MyPURPOSE Technical Group.”¹ The Cabinet, however, claims that the “post” to which CHFS referred no longer appears on MyPURPOSE. The Cabinet further advises that it does not maintain emails exchanged with other agencies about those agencies’ employee-performance reviews. The Cabinet states that it has nevertheless searched its records a second time, but is unable to locate any responsive emails.

Even if the reference to the notice to which CHFS referred established a *prima facie* case that the Cabinet sent emails to CHFS about the Appellant’s performance review, the Appellant has not pointed to any authority requiring the Cabinet to maintain such correspondence. The Cabinet has now searched its records twice for responsive emails, but is unable to locate any. The Cabinet has also provided the Appellant with the contact information of the records custodian for CHFS, which is the agency that claimed to have received the notice that the Appellant seeks.² See KRS 61.872(4). Accordingly, this Office cannot find that the Cabinet violated the Act when it did not produce records that did not exist in its possession.

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 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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

¹ MyPURPOSE is a web service managed by the Cabinet through which human resource services are provided to Commonwealth employees, such as training, performance reviews, and other forms of employee assistance.

² The Appellant claims to have requested similar records from CHFS, but her requests have only gone partially fulfilled. The Appellant has not provided this Office with any request she sent to CHFS, or any responses issued by that agency. She also makes several allegations about issues beyond the purview of the Act.

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Distributed to:

Oda Barnes

Gordon A. Rowe, Jr.