



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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22-ORD-125

June 7, 2022

In re: Ben Richard/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services (the “Cabinet”) did not violate the Open Records Act (“the Act”) when it denied a request for a record that does not exist within its possession.

Open Records Decision

Inmate Ben Richard (“Appellant”) claims to have submitted two requests to the Cabinet, one on April 5 and one on April 7, for a recording of a specific call to its Child Abuse Hotline made on June 14, 2010. In his requests, the Appellant provided the call identification number, the related report number, the time the call was received, the employee that took the call, and the contents of the call. On May 4, 2022, having received no response from the Cabinet, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” This Office has historically found that it is unable to resolve factual disputes between a requester and a public agency, such as whether an agency received a request. *See, e.g.,* 22-ORD-100; 22-ORD-051; 21-ORD-163.

Here, the Appellant claims the Cabinet did not respond to either of his requests within five business days. However, the Cabinet claims, on appeal, that it did not receive either of the Appellant’s requests. This Office is unable to resolve the factual dispute between the parties about whether the Cabinet received either of the

Appellant's requests. Thus, this Office cannot find that the Cabinet violated the Act when it failed to respond within five business days to a request it claims it did not receive.

The Cabinet, on appeal, states affirmatively that it does not possess a record responsive to either of the Appellant's requests. 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).

Here, the Cabinet did not respond until after this appeal was initiated since it claims it did not receive either of the Appellant's requests. Thus, the Appellant could not attempt to make a *prima facie* case that the Cabinet should possess the record he requested. Nevertheless, even if he had made a *prima facie* case, the Cabinet sufficiently explains on appeal why it does not possess the requested record. The Cabinet explains that the audio recording the Appellant requested was never created because calls made to its Child Abuse Hotline in 2010 were not recorded.¹ Accordingly, the Cabinet did not violate the Act when it could not produce a copy of a record that does not exist within its possession.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

¹ The Cabinet invites the Appellant to submit a request for a copy of the document memorializing the call referenced in his request or a full copy of the investigation file if he does not already possess such records.

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s/Matthew Ray
Matthew Ray
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Distributed to:

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