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22-ORD-131

June 17, 2022

In re: Jill Evans-Aldhizer/Department of Education

Summary: The Department of Education ("the Department") did not violate the Open Records Act ("the Act") when it did not provide copies of materials that are not "public records" under KRS 61.870(2).

Open Records Decision

On April 21, 2022, Jill Evans-Aldhizer ("Appellant") requested that the Department provide copies of two training sessions that organizations outside state government had offered to Kentucky school counselors, as had been announced in the Department's electronic newsletter, "Counselor Connection." After a search by the division that published the newsletter resulted in no responsive records, the Department informed the Appellant that the requested materials were not "public records" as defined in KRS 61.870(2) because they were not "prepared, owned, used in the possession of or retained by" the Department.

On April 26, 2022, the Appellant requested that the Department "forward a link" to the requested training records or, alternatively, provide "the direct contact person's name and email address" for both training programs. After an additional search, the Department responded that it possessed no record containing such links or information. This appeal followed.

Under KRS 61.870(2), "public record" includes "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." 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 it does possess the requested

records. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.,* 172 S.W.3d 333, 341 (Ky. 2005).

The Appellant does not argue that the Department prepared or owned the training materials. And the Department has stated that it does not possess or retain any such materials, nor any direct link to the materials or any records containing any person's contact information for the trainings. Thus, to make a *prima facie* case, the Appellant claims that the Department is "using" the requested training materials. In support, she provides excerpts of the training materials to which the newsletter referred. However, even if this evidence were sufficient to demonstrate that the training materials exist somewhere, the Appellant presents no evidence that the Department has actually used or implemented the requested trainings. Even if the Appellant's mere assertion were sufficient to establish a *prima facie* case, the Department has explained that the newsletter simply provides notice of training resources that are available. The Department did not require any district or employee to participate in the training, and thus, the Department does not "use" the training materials.

Nevertheless, the Appellant argues that the Department must at least have "access" to the requested records and information because an issue of its newsletter included links by which school counselors could enroll in the trainings. However, "an agency's 'access' to digital records, without more, does not mean that the public agency is the custodian of such records" or that they are public records for purposes of the Act. *See* 20-ORD-109.

As the Department notes in its response to this appeal, the Appellant's argument would make public agencies "custodians of anything and everything available on the Internet." A public agency "is responsible only for those records within its own custody or control." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980)); *see also Dept. of Revenue v. Eifler,* 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of [their] records."). Because the requested materials are not "public records" under KRS 61.870(2), the Department did not violate 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 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/James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

V. Jill Evans-Aldhizer
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