



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-139

June 28, 2022

In re: Spencer Stone/Board of Social Work

Summary: The Board of Social Work (“the Board”) violated the Open Records Act (“the Act”) when it failed to respond in writing to a request for records in accordance with KRS 61.880(1). The Board did not violate the Act when it did not provide a copy of an administrative regulation that was nonresponsive to the request.

Open Records Decision

On April 25, 2022, Spencer Stone (“Appellant”) requested “copies of all records used to determine the outcome” of a specific disciplinary case decided by the Board in 2020. Although the Board did not issue a written notification that it was complying with the Appellant’s request, the Board produced a copy of the final disposition from the case. This appeal followed.

When a public agency receives a request to inspect records, that agency must decide within five business days “whether to comply with the request” and notify the requester “of its decision.” KRS 61.880(1). Therefore, even if a public agency decides to approve a request to inspect certain records, it must issue a written response notifying the requester “of its decision.” *See, e.g.,* 21-ORD-090. However, a response “denying, in whole or in part, inspection of any record” must “include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1).

Here, the Board did not issue any formal written response, but produced one record in response to the Appellant’s request. On appeal, the Board claims that the request “was oddly stated” and that it “interpreted that request to mean that [the

Appellant] was seeking clarification as to the outcome of this matter.”¹ Because the Board did not issue a written response notifying the Appellant of the Board’s disposition of the Appellant’s request, the Board violated the Act.

After receiving the notice of appeal, the Board provided the Appellant a copy of the complete file relating to the disciplinary matter, along with a copy of the governing statute. The Board asserts that these are the only records on which it relied to determine the outcome of the case.

The Appellant, however, complains that the Board “did not provide any documentation on how a decision [*sic*] was reached, any investigative process, or any statements regarding how complaints are handled.” In response, the Board explains that 201 KAR 23:150, the administrative regulation that governs its disciplinary process, “was not yet in effect at the time” when the Appellant submitted the complaint for this case, and therefore the Board did not rely on the regulation when it reached a decision in the case at issue. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that responsive records do exist. See *Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant cannot present a *prima facie* case that the Board relied upon 201 KAR 23:150 in 2020 because the regulation was first promulgated and took effect on June 16, 2021. Therefore, the Board did not violate the Act when it did not provide a copy of 201 KAR 23:150, because the regulation was not responsive to the Appellant’s request.

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

¹ The Board provided one record in response—a copy of the Board’s final order of disposition. But the Appellant sought “all” records upon which the Board relied in making a decision, which is clearly a request for more records than just the Board’s final adjudication of the matter. Had the Board issued a formal written response, it could have explained how it was construing the Appellant’s request and invited clarification from the Appellant.

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Distribution:

Mr. Spencer Stone
Nicole S. Bearse, Esq.
Ms. Vanessa G. Jones