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-141

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In re: Spencer Stone/Board of Examiners of Psychology

Summary: The Board of Examiners of Psychology ("the Board") violated the Open Records Act ("the Act") when it denied inspection of certain records without explaining how KRS 61.878(1)(l) applied to those records. However, the Board did not violate the Act when it did not provide records that do not exist.

Open Records Decision

On April 24, 2022, Spencer Stone ("Appellant") requested "copies of all records used to determine the outcome" of two disciplinary cases that he brought before the Board in 2018 and 2020. In a timely response, the Board stated that it would not answer the request insofar as the request sought "information," *i.e.,* explanations of the Board's decisions that were not part of an existing record. However, the Board provided the Appellant with copies of the two case files, redacted of psychotherapy notes and medical billing records along with "home addresses, personal telephone numbers, personal cell phone numbers, personal email addresses, the names and initials of minor children, tax identification numbers, dates of birth, insurance claim numbers, treatment codes, medical information, and treatment plans" under KRS 61.878(1)(a). The Board also withheld three pages from one file under KRS 61.878(1)(l) because the Board claimed those pages were confidential under state law. This appeal followed.

KRS 61.878(1)(l) exempts from inspection "public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly." As to the three pages it withheld under KRS 61.878(1)(l), the Board did not state what the records were, identify the statute requiring them to remain confidential, or explain how that statute applied to the records withheld. Under KRS 61.880(1), a public agency denying inspection of public

records must not only cite an exception under the Act, but also give "a brief explanation of how the exception applies to the record withheld." On appeal, the Board still fails to explain how the exemption applies, and fails to carry its burden of proof under KRS 61.880(2)(c) that the records are exempt.[1] By failing to explain why those three pages were exempt from inspection, the Board violated the Act.

Finally, the Appellant does not dispute that the Board's redactions under KRS 61.878(1)(a) implicate information of a private and personal nature. Instead, he claims that under KRS 61.878(3) he is "allowed to view any record that 'relates' to" him. KRS 61.878(3) provides that "[n]o exemption in [KRS 61.878] shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him." But the Appellant has provided no information to indicate that he is within the class of persons covered by KRS 61.878(3). The Appellant appears to have filed a complaint with a state agency, not an application for employment. Therefore, the Appellant has failed to show that he is entitled to obtain records exempt under KRS 61.878(1)(a).[2]

The Appellant also claims that the Board failed to provide additional "records of any investigation, discussion, or any other deliberations regarding the complaints." In response, the Board asserts that no such records exist. Once a public agency states affirmatively that no additional records exist, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.,* 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to support a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester's bare assertion that certain records should exist is insufficient to establish a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040. Thus, the Board did not violate the Act when it did not provide records that do not exist.[3]

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[1] In its response to the appeal, the Board claims that "[a] citation to the specific statutory clause for the (1)(l) basis would identify the item excluded by statute." However, because the Board has never identified a "specific statutory clause" making records exempt under KRS 61.878(1)(l), this statement provides no information to identify the record withheld or the statutory basis for withholding it.

[2] Under KRS 61.884, "[a]ny person shall have access to any public record relating to him or in which he is mentioned by name," but this access remains "subject to the provisions of KRS 61.878." Therefore, the Appellant would not be entitled to inspect any exempt records under that provision.

[3] The Appellant also argues that the Board's disclosure of a custodial evaluation that has been sealed in the record of a family court case constituted "an egregious breach of privacy." A person whose privacy interests are at stake in the release of public records has standing to petition a circuit court for an injunction preventing the release of such records. *See Beckham v. Board of Education of Jefferson Cnty.*, 873 S.W.2d 575 (Ky. 1994). However, the Open Records Act does not create a separate

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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Distribution:

Mr. Spencer Stone
August Pozgay, Esq.

cause of action, or impose any sanction, for "breach of privacy." Under KRS 61.880(2), the Attorney General is only authorized to determine "whether the agency violated provisions of KRS 61.870 to 61.884." Therefore, this Office cannot render an opinion on this aspect of the Appellant's claim.