



COMMONWEALTH OF KENTUCKY  
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**23-ORD-002**

January 3, 2023

In re: Melanie Barker/ Cabinet for Health and Family Services

**Summary:** The Cabinet for Health and Family Services (“the Cabinet”) violated the Open Records Act (“the Act”) when it did not respond to a request to inspect records within five business days of receipt or otherwise notify the requester of the proper email address to submit her requests. *See* KRS 61.872(4). The Cabinet did not violate the Act when it denied requests for records that do not exist in its possession.

***Open Records Decision***

Melanie Barker (“Appellant”) submitted three record requests to the Cabinet on July 14, 2022, October 27, 2022, and October 28, 2022.<sup>1</sup> On August 9, 2022, the Cabinet denied the Appellant’s July 14 request. On November 29, 2022, having received no further response regarding the October 27 and October 28 requests, the Appellant initiated this appeal.

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.” KRS 61.880(1). Here, the Cabinet admits it failed to respond to the October 27 and October 28 requests. However, the Cabinet notes the Appellant failed to properly submit these requests

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<sup>1</sup> The July 19 request was for “the Complaint made against [a specified business] in July 2022. The October 27 request was for “ARPA Funds Payouts” made in October 2022, the “[c]oncern made in regard to [a specified business] in October 2022,” a document listing businesses whose patrons were contacted by the Cabinet from 2018 to 2022, and the criteria used to determine whether such calls will be made. The October 28 request was for the names of trainer who received payments under the “ARPA Grant.”

because she emailed them to a Cabinet employee instead of the email address of its official records custodian.

The Office agrees the method by which the Appellant has submitted her requests does not comply with the Act. If a person chooses to submit her request by email, she must send the email “to the public agency’s official custodian of public records or his or her designee at the e-mail address designated in the public agency’s rules and regulations.” KRS 61.872(2)(b)4. Here, the Appellant has demonstrated a pattern of sending multiple emails to this Cabinet employee—sometimes including employees of this Office—and those emails contain a mix of requests for the Cabinet to take action in relation to an investigation as well as requests to inspect records. The Cabinet claims the Appellant’s habit of sending multiple emails to multiple people containing mostly grievances and insults directed towards Cabinet employees is evidence of “inten[t] to disrupt other essential functions of the public agency.” KRS 61.872(6). However, the Cabinet did not deny the Appellant’s requests on this basis. Moreover, under KRS 61.872(4), “[i]f the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency’s public records.” Thus, while the Appellant’s requests failed to comply with KRS 61.872(2)(b)4, because she emailed them to the wrong person, the Cabinet’s employee (who processes Open Records requests) should have informed the Appellant of the proper email address to which she could submit her requests. Instead, the Cabinet ignored the Appellant’s emails completely. Thus, the Cabinet violated KRS 61.872(4) when it failed to inform the Appellant of the proper method of submitting her request.

On appeal, the Cabinet states it does not possess any records responsive to the Appellant’s October 27 request for the “[c]oncern made in regard to [a specified business] in October 2022,” a document listing businesses whose patrons were contacted by the Cabinet from 2018 to 2022, or the criteria used to determine whether such calls will be made. 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 the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 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 Appellant has not established a *prima facie* case that responsive records exist for any of her requests. Therefore, the Cabinet did not violate the Act when it did not provide records it does not possess.

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**  
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s/ Zachary M. Zimmerer  
Zachary M. Zimmerer  
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