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23-ORD-020

January 31, 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”) within the meaning of KRS 61.880(4), when it did not respond to a request to inspect records within five business days of receiving it. However, the Cabinet did not violate the Act when it did not provide records that do not exist within its possession or when it produced responsive records with personnel identification numbers redacted under KRS 61.878(1)(a).

Open Records Decision

On December 5, 2022, Melanie Barker (“Appellant”) made a request to the Cabinet to inspect the “[j]ob [d]escription” of six Cabinet employees.¹ Having received no response to her request by December 29, 2022, 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 does not dispute that it failed to respond to the December 5, 2022 request. Therefore, the Cabinet violated the Act when it did not respond to the Appellant’s request within five business days.

Upon receiving the appeal, the Cabinet responded to the Appellant’s request and provided five of the six requested records. Relying on KRS 61.878(1)(a), the Cabinet redacted from each record the personnel identification numbers. The Cabinet

¹ Specifically, the Appellant requested the job descriptions of the “Secretary, Inspector General, OIG Director, OIG Assistant Director, DCC Director, and Human Services Surveyors.”

also stated it “does not possess a record containing a ‘[j]ob [d]escription’ for the ‘Cabinet Secretary.’”

Regarding the redacted personnel identification numbers, KRS 61.878(1)(a) exempts from inspection “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” In reviewing an agency’s denial of an open records request based on the personal privacy exemption, the courts and this Office balance the public’s right to know what is happening within government against the personal privacy interest at stake in the record. See *Zink v. Commonwealth, Dep’t of Workers’ Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). However, the Supreme Court of Kentucky has held that certain categories of information about private individuals provide minimal insight into governmental affairs and may be categorically redacted under KRS 61.878(1)(a). *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). This Office has recognized that employee identification numbers may be redacted under KRS 61.878(1)(a). See, e.g., 16-ORD-274, 16-ORD-194, 09-ORD-049. Therefore, the Cabinet did not violate the act when it redacted the personnel identification numbers.

The Cabinet also denied the Appellant’s request for the Cabinet Secretary’s job description because no such record exists. 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 the requested job description exists. Therefore, the Cabinet did not violate the Act when it did not provide a record 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.

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s/ Zachary M. Zimmerer
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Distributed to:

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