



COMMONWEALTH OF KENTUCKY
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23-ORD-034

February 15, 2023

In re: Sebastian Kitchen/Kentucky Department of Agriculture

Summary: The Kentucky Department of Agriculture (“the Department”) violated the Open Records Act (“the Act”) when it did not respond to a request to inspect records within five business days of receiving it.

Open Records Decision

On January 9, 2023, Sebastian Kitchen (the “Appellant”) emailed to the Department two separate requests to inspect records. One request sought emails sent to or received from a specified organization and its agents, and the other sought “leave requests and authorizations for” four specified individuals from November 1, 2022, to the date of the request. On January 18, 2023, the Appellant initiated two identical appeals against the Department because he claimed he had not received a response to either request.¹

Under KRS 61.880(1), 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.” Here, the Appellant claims he submitted his requests on January 9, but had not received a response as of January 18. The Department carries the burden of sustaining its actions, KRS 61.880(2)(c), but has not explained why it did not respond to the request

¹ Because the Appellant has raised the same issue on appeal, *i.e.*, timeliness, the Office has consolidated these two appeals. *See, e.g.*, 23-ORD-003; 22-ORD-167.

within five business days of receiving it. Thus, the Department violated the Act when it failed to respond to the Appellant's requests within five business days.

Although the Department did not respond within five business days, it did respond to the Appellant's requests on January 18, 2023, or seven business days after receipt. In its responses to the Appellant, the Department provided all records responsive to the Appellant's request for "leave requests and authorizations," but stated no emails to or from the specified organization or its agents exist. 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 Department possesses emails to or from the specified organization or its agents.

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
Zachary M. Zimmerer
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#022-023

Distributed to:
Sebastian Kitchen
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* The Attorney General recused himself from this decision. However, the Office must carry out its mandate to adjudicate disputes under the Act. See KRS 61.880(2)