



COMMONWEALTH OF KENTUCKY
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23-ORD-042

February 22, 2023

In re: Vivian Miles/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 failed to adequately explain its search for records once the Appellant presented sufficient evidence calling into question the adequacy of the Cabinet’s search.

Open Records Decision

On December 3, 2022, Vivian Miles (“Appellant”) submitted a request for records to the Cabinet for two categories of records. The first category sought emails and text messages from a former employee between March 16, 2020 and April 16, 2020. The second category of records sought “email server logs” for the same person during the same period. In a timely response, the Cabinet denied the request because it asked the Commonwealth Office of Technology (“COT”) to search the former employee’s email account, but COT was unable to locate the account. Accordingly, the Cabinet stated no emails to or from the employee exchanged during the requested period exist. This appeal followed.

In its initial response, the Cabinet affirmatively stated that “it does not possess records responsive to [the Appellant’s] first two requests.” 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, to make a *prima facie* case, the Appellant provides her previous request to inspect emails from the same former employee's account covering a period up until March 15, 2020. She submitted that request to the Cabinet in October 2022. In response to that request, the Cabinet was able to locate the former employee's email account and provide some responsive emails, including one dated March 13, 2020. The Appellant also provides proof the employee remained employed by the Cabinet through July 2020. She therefore claims the former employee must have sent or received additional emails between March and April 2020, the period covered by this request. Although the Appellant provides proof the employee remained employed by the Cabinet through July 2020, her mere assertion that the employee must have sent or received emails during that period does not constitute a *prima facie* case such emails actually exist. Nor has she made a *prima facie* case the Cabinet should possess "email server logs" related to the former employee. Nevertheless, the fact the Cabinet could locate the former employee's email account in October 2022 to perform a search, but could not do so again in December 2022, calls into question the adequacy of the Cabinet's search.

The Cabinet states on appeal that it "does not know why no records exist in December versus October, but they do not." Although the Cabinet explains that it asked COT to perform the search on its behalf, it does not explain what steps COT took to locate the account, or otherwise explain when the account was deleted, if it was deleted. Given the evidence the Appellant provides on appeal, she is entitled to a written explanation for why the account can no longer be recovered and searched. *See Eplion v. Burchett*, 354 S.W.3d 598, 602 (Ky. App. 2011). Because the Cabinet did not do so, it violated the Act.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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