



COMMONWEALTH OF KENTUCKY
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23-ORD-131

June 13, 2023

In re: Donald R. Phillips/Finance and Administration Cabinet

Summary: The Finance and Administration Cabinet (the “Cabinet”) did not violate the Open Records Act (“the Act”) when it denied a request for records that it does not possess.

Open Records Decision

On April 17, 2023, inmate Donald R. Phillips (“Appellant”) submitted a request to the Cabinet for a copy of the “[c]ontract entered into between Union Supply Direct, and the Kentucky Centralized Inmate Commissary Board” (the “Board”) “to provide inmate canteen operations for the Kentucky Dep’t of Corrections.” On April 28, 2023, the Cabinet denied the Appellant’s request because it does not possess any responsive records.¹ This appeal followed.

On appeal, the Cabinet states again that it “conducted a search of its records for any contracts between any agency of the Commonwealth and Union Supply Direct.” The Cabinet again states that it does not possess any records responsive to the Appellant’s request. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist in the agency’s custody or control. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist in the agency’s

¹ The Cabinet states it received the Appellant’s request on April 21, 2023, and responded to it on April 28, 2023. Thus, the Cabinet timely issued its response within five business days of receiving the request. KRS 61.880(1).

custody or control, “then the agency may also be called upon to prove that its search was adequate.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, in an attempt to make a *prima facie* case, the Appellant states the Cabinet’s initial denial may “technically be true” because the Board “is not an agency of the Commonwealth,” but “a contract must be on file with the Cabinet” because the Board “has contracted with Union Supply Direct to provide services . . . for the Kentucky Dep’t. of Corrections.” However, the Appellant does not provide any proof to support his claim that such a contract exists. Therefore, the Appellant has not made a *prima facie* case that the Cabinet does possess or should possess any records responsive to his request.

Even if the Appellant had made a *prima facie* case, the Cabinet explains on appeal it searched the “eMars contract management system,” which catalogues all state contracts entered into under the Model Procurement Code, for any contract between the Commonwealth and “Union Supply Direct” and could not locate any contracts with an entity by that name. As a result, the Cabinet has explained the adequacy of its search and did not violate the Act when it denied a request for records that it does not possess.²

A party aggrieved by this decision may appeal it by initiating an 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.

² The Office notes that, in 23-ORD-132, a third-party entity named “Union Supply Group” responded to a request to inspect records on behalf of the Eastern Kentucky Correctional Complex. Thus, while no evidence has been presented to the Office that an entity named “Union Supply Direct” exists, the Appellant may have meant to ask for any contract between the Department of Corrections and “Union Supply Group.” Nevertheless, he has not made a *prima facie* case that a contract between “Union Supply Direct” and any state agency exists.

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