



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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23-ORD-136

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In re: Nicole Henson/Office of Attorney General

Summary: The Office of Attorney General (“the Office”) did not subvert the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when it provided records it reasonably believed were responsive to a request.

Open Records Decision

On March 24, 2023, Nicole Henson (“Appellant”) submitted a request containing four subparts to the Office, seeking copies of various records related to a matter involving the Office of Special Prosecutions. She challenges the Office’s response to three of those four subparts.¹ First, she sought the “written request” from the Commonwealth’s Attorney for the Thirteenth Judicial Circuit “to disqualify himself from the matter his office received on or about September 13, 2021, relating to possible [*sic*] EPO violation and fabrication of armory files” involving three named individuals, at least one of whom is allegedly an officer for the Kentucky State Police (“KSP”). Second, she sought a copy of any letter the Office issued appointing a special prosecutor “to the matter” she described in her request. Finally, she sought any emails, including attachments, “between and among” the Commonwealth’s Attorney and the Assistant Deputy Attorney General for the Department of Criminal Litigation between April 1, 2022, and April 30, 2022.

In a timely response, the Office provided two pages of records it deemed responsive to the first and second part of the Appellant’s request. Those records documented the Commonwealth’s Attorney’s request for the appointment of a special

¹ In the subpart she does not challenge, the Appellant asked for any document or record containing the email address of the current Director of the Office of Special Prosecutions. Despite this really being a request for information instead of a record, the Office nevertheless provided the Appellant with the requested email address.

prosecutor, and the Office's subsequent appointment of one, in a matter relating to one of the three individuals the Appellant had identified—the KSP officer. However, those records were created in 2019, not in 2021, which was the date specified in the request. When it provided these records, the Office specifically informed the Appellant that they were “dated before” her specified date of September 13, 2021. The Office did not, however, provide records responsive to the Appellant's third request because the Office “determined it does not possess” any responsive records. This appeal followed.

“If a person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees, delay past the five (5) day period described in [KRS 61.880(1)], excessive extensions of time, or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.” KRS 61.880(4). Here, the Appellant claims the Office subverted the intent of the Act, within the meaning of KRS 61.880(4), by providing two pages of records created before the date she specified in the first part of her request. In response, the Office argues the two pages of records it provided related to the substance of the Appellant's request, namely, the Commonwealth's Attorney's request to appoint a special prosecutor in a matter related to the named KSP officer. The Office notified the Appellant in its original response to her that these two pages of records did not match the date of her request, but they did match the general subject matter of it. On appeal, the Office states it does not possess similar records for the September 2021 date in question.

This Office has previously found that intentionally providing nonresponsive records may impede the requester's right of inspection. *See, e.g.*, 12-ORD-017. In cases where there is absolutely no connection between the records requested and those provided by the agency, such a finding may be warranted. Of course, it is not clear how merely providing nonresponsive records amounts to “subversion” as defined under KRS 61.880(4). Certainly it could amount to the “imposition of excessive fees,” if an agency *charged a fee* for copies of nonresponsive records, or it could be “misdirection” if an agency provided a voluminous amount of nonresponsive records and slipped within them the actual records requested. But here, the Office did not charge the Appellant for the two pages she claims were unresponsive. The Office simply provided her with something that was potentially responsive, because it does not possess records reflecting *both* the date *and* subject matter of her request. As such, the Office provided free of charge two pages of records matching the subject matter of the request, if not the date. That does not amount to subversion within the meaning of KRS 61.880(4).

To the extent the Appellant complains she did not receive records that match both the date and substance of her request, the Office has affirmatively stated it

possesses no such record. 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). Here, the Appellant has not made a *prima facie* case that the Office should possess a letter from the Commonwealth's Attorney that is *both* dated on September 13, 2021, *and* reflects his recusal from a matter involving the named KSP officer. All she provides in support of this claim is an email she sent to the Commonwealth's Attorney's assistant on May 2, 2022, accusing that assistant of not handling appropriately a package previously sent to the Commonwealth's Attorney, and the assistant's response advising the Appellant that the Commonwealth's Attorney stated he was recused from this matter. To the extent such evidence could support a *prima facie* case that a letter from September 2021 should exist, it equally supports a *prima facie* case that the records the Office provided were the responsive records. That is to say, the Commonwealth's Attorney was allegedly recused from a matter involving the named KSP officer in 2021, and the Office possesses and produced records created in 2019 in which the Commonwealth's Attorney sought the appointment of a special prosecutor in connection with investigations into that KSP officer. Simply put, the Appellant has not presented a *prima facie* case that records matching *both* of her specifications exist.

The Appellant also argues the Office violated the Act by claiming not to possess emails exchanged between April 1, 2022, and April 30, 2022, "between and among" the Commonwealth's Attorney and the Assistant Deputy Attorney General. On appeal, the Office advises that it has since located the requested email and provided it to the Appellant. Accordingly, this part of the Appellant's appeal is moot. See 40 KAR 1:030 § 6 ("If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.").

In sum, the Office did not provide the Appellant with a voluminous stack of nonresponsive records for the purpose of impeding her inspection. Rather, it provided the only records it possessed that were remotely responsive to her request. The Appellant has failed to present a *prima facie* case that records responsive to *both* the date and substance of her request exist. Accordingly, the Office did not violate the Act.

A party aggrieved by this decision may appeal it by initiating an 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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Jacob Ford