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23-ORD-190

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In re: Vivian Miles/Cabinet for Health and Family Services

Summary: This Office cannot find that the Cabinet for Health and Family Services (“Cabinet”) violated the Open Records Act (“the Act”) when it denied a request for a record that does not exist.

Open Records Decision

Vivian Miles (“the Appellant”) submitted a request to the Cabinet seeking employment records related to the hiring of two employees with the same name. The first employee was hired in 2011 and the second was hired in 2020. The Cabinet provided all responsive records it possessed. The Appellant then initiated this appeal, claiming the Cabinet did not provide a “KARES Applicant/Employee/Pre-Screening Form” for either employee.

On appeal, the Cabinet claims it has provided all responsive records and no KARES form exists for either employee. Once a public agency states affirmatively that no additional records exist, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to support a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074.

Here, to make a *prima facie* case the KARES forms should exist, the Appellant cites to various federal and state laws requiring an FBI background check for any employee or contractor who will have access to federal tax information. *See, e.g.*, 26 U.S.C. § 6103; KRS 194A.062; 900 KAR 1:0090. In addition to these authorities, the

Appellant also provides records she received in response to another open records request regarding a different Cabinet employee, which included a KARES form. Because the Appellant has cited to authorities and provided evidence that at least some Cabinet employees must undergo an FBI criminal background check, and because the KARES form is the form the Cabinet uses to facilitate these background checks, she has made a *prima facie* case that a KARES form might exist for the identified employees.

However, in response to the Appellant's *prima facie* case, the Cabinet explains the two employees identified in the request were employed in the position of Social Service Worker I. According to the Cabinet, social service workers do not have access to federal tax information and therefore were not required to undergo an FBI criminal background check at the time they were hired in 2011 and 2020, respectively. The employee whose application did contain a KARES form was employed in the position of Family Specialist I and did have access to federal tax information, which necessitated that employee's submission to an FBI criminal background check.

KRS 194A.062(2) requires all “[f]ront-line staff, as defined in KRS 194A.065” to “submit to national and state fingerprint-supported criminal background checks by the Department of Kentucky State Police and the Federal Bureaus of Investigation.” However, KRS 194A.062(2) did not take effect until July 15, 2020. *See* 2020 Ky. Acts. ch. 53 § 1 (amending KRS 194A.062 to add the current subsection (2)); OAG 20-08 (holding the effective date of legislation passed during the General Assembly's 2020 regular session is July 15, 2020). KRS 194A.065 defines “[f]ront-line staff” to include “an employee whose professional duties include ongoing adult or child protective services, protective services investigations or assessments, or regularly conducting interviews, visits, contacts, or providing transportation services or other services in the homes of family members involved in adult or child protective services.” Thus, prior to July 15, 2020, social service workers who did not have access to federal tax information were not required to submit to an FBI criminal background check.

Although the Cabinet has not specified the actual date of hire for the employee hired in 2020, the records the Appellant provided shows that employee submitted her application for employment on April 16, 2020. Assuming the hiring process concluded before July 15, 2020, *i.e.*, three months after the application was submitted, the Cabinet is correct that the employee was not required to submit to an FBI criminal background check. It therefore follows that no KARES form for that employee would exist, and one certainly would not exist for the employee hired in 2011. Accordingly,

although the Appellant has established a *prima facie* case that, since July 15, 2020, social service workers are required to submit to an FBI criminal background check, the Cabinet has adequately explained why no KARES forms for these two employees exist. Accordingly, the Office cannot find that the Cabinet violated the Act when it did not provide a record that does not exist.

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.

Daniel Cameron
Attorney General

s/ Marc Manley
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Distributed to:

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