



COMMONWEALTH OF KENTUCKY
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23-ORD-221

August 17, 2023

In re: Carlos Harris/Kentucky Finance and Administration Cabinet

Summary: The Kentucky Finance and Administration Cabinet (“Cabinet”) did not violate the Open Records Act (“the Act”) when it did not respond to a request it claims it did not receive. The Cabinet also did not violate the Act when it did not provide records that do not exist.

Open Records Decision

On July 3, 2023, inmate Carlos Harris (“Appellant”) submitted a request to the Cabinet to inspect records related to payments made to an expert witness who testified at the Appellant’s criminal trial in 1999. Having received no response to his request by July 17, 2023, the Appellant initiated this appeal.

On appeal, the Cabinet claims to have never received the Appellant’s request.¹ 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.” KRS 61.880(1) (emphasis added). Here, the Cabinet claims it did not receive the Appellant’s request until this appeal was initiated. The Office cannot resolve factual disputes, such as whether a public agency actually received a request. *See, e.g.*, 23-ORD-071; 23-ORD-005; 22-ORD-216; 22-ORD-148; 22-ORD-125; 22-ORD-100; 22-ORD-051; 21-ORD-163. Thus, the Office cannot find the Cabinet violated the Act when it did not respond to a request that it claims it did not receive.

¹ Specifically, the Cabinet stated the Appellant sent his request to an address at which the Cabinet is no longer located. The Cabinet also stated the correct mailing address is displayed on its website. *See* KRS 61.876(2)(b) (requiring that public agencies display their mailing address on their websites).

The Cabinet also states it possesses no records responsive to the Appellant's request. 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 makes 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 made a *prima facie* case that the Cabinet possesses records responsive to his request. Therefore, the Cabinet did not violate the Act when it did not provide the requested records.

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.

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s/ Zachary M. Zimmerer
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