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**23-ORD-259**

September 25, 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 a requester provided *prima facie* evidence that additional records should exist and the Cabinet did not meet its burden of proving that its search was adequate.

***Open Records Decision***

On August 18, 2023, Vivian Miles (“Appellant”) requested inspection of “[a]ll records/document/emails related to” an investigation of a foster care agency of which she was part owner. For reference, the Appellant attached the first page of a Complaint Investigation Report, which indicated the Cabinet received a complaint on March 19, 2019, and initiated an investigation on April 9, 2019. In response, the Cabinet provided a four-page intake summary dated April 10, 2019, which it stated was the only record responsive to the request. This appeal followed.

The Appellant claims the Cabinet has not provided all requested records because she is seeking documents related to a different investigation, along with “emails/correspondence/texts” relating to that investigation and “other records which are required according to” 42 U.S.C. § 5106a, including “the intake, assessment, screening, and investigation of reports of child abuse or neglect.” On appeal, however, the Cabinet states it “has searched diligently and concluded that no such report exists” between April and October 2019.<sup>1</sup>

Once a public agency states affirmatively that it does not possess any additional records, 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*,

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<sup>1</sup> The Cabinet possesses one other report, which relates to the Appellant’s husband as a foster parent, not to the foster care agency. However, the Appellant states she is not seeking that record.

172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that additional records do or should exist, “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). To support a claim that the agency possesses responsive records that it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency’s search. *See, e.g.*, 95-ORD-96.

Here, the Appellant has provided the Complaint Investigation Report regarding the investigation that is the subject of her request, which indicates the complaint the Cabinet received was assigned to two different employees on March 29, 2019. Significantly, the names of the Cabinet employees on this report are not the same names appearing on the intake summary provided by the Cabinet. The Appellant claims the Cabinet should at least have searched the emails and correspondence of the investigative worker whose name appears on the Complaint Investigation Report in order to locate responsive records.

A public agency must “make a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested.” 95-ORD-96 (quotation omitted). In particular, the agency “is required to make a reasonable search of *persons* who are likely to have responsive documents.” 14-ORD-181 (emphasis added); *but see* 17-ORD-104 (finding that agencies complied with the Act by searching the files of persons likely to possess responsive records); 14-ORD-123 (same). An agency’s failure to contact employees who are likely to have responsive records is an inadequate search and a violation of the Act. *See, e.g.*, 17-ORD-273; 14-ORD-181.

Here, the Cabinet has provided no details regarding the search it conducted, but merely claims it “searched diligently.” The Appellant has presented *prima facie* evidence that additional records should exist because the Cabinet conducted another investigation of the foster care agency within the relevant time period. Because the Cabinet provided no records relating to that investigation, the burden rests with the Cabinet to prove that its search was adequate. Because the Cabinet has not met its burden, the Office finds that it violated 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/ James M. Herrick  
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Assistant Attorney General

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Distributed to:

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