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**23-ORD-269**

October 10, 2023

In re: David Webster/Christian County Board of Education

**Summary:** The Christian County Board of Education (“the Board”) violated the Open Records Act (“the Act”) when it failed to notify the requester that records did not exist.

***Open Records Decision***

On September 2, 2023, David Webster (“Appellant”) requested the agenda, minutes, and “conversations concerning” a Board meeting he alleges was held in February 2022 at Bob’s Steakhouse in Louisville; receipts for any meal provided at that time, itemized by Board member, and records documenting who paid the bill; mileage reimbursement records for all but one Board member “broken down to in and out of district travel from” January 1, 2020, to the present; and all reimbursement payments made to each Board member during the same period, excluding the same Board member he excluded from his request for mileage reimbursement records. In response, the Board stated it was providing “[a]ll public records responsive to [the] request.” This appeal followed.

First, the Appellant complains that the records he received included information relating to the Board member whose information he wanted excluded from the records. However, an agency’s failure to exclude information a requester wishes excluded from records does not, standing alone, violate the Act. Therefore, this portion of the appeal fails to allege a violation of the Act.<sup>1</sup>

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<sup>1</sup> The Appellant also complains that a “document labeled OER Stipends.pdf does not include” one of the current Board members. In response to this appeal, the Board states the stipend records for that member were “inadvertently omitted” and have subsequently been provided to the Appellant. Accordingly, this portion of the appeal is moot. See 40 KAR 1:030 § 6.

The Appellant also claims the Board failed to respond to his request “for documents pertaining to a meeting held without notice.” In response, the Board states “[t]here are no other records responsive to [the] request” and the Board “has never met at ‘Bob’s Steakhouse.’” When a public agency receives a request to inspect records, that agency must decide within five business days “whether to comply with the request” and notify the requester “of its decision.” KRS 61.880(1). An agency response denying inspection of public records must “include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” *Id.* Thus, if the requested records exist and an exception applies to deny their inspection, the agency must cite the exception and explain how it applies. However, if the records do not exist, then the agency must affirmatively state they do not exist. *See* 22-ORD-038 (citing *Bowling v. Lexington-Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005)). By failing to notify the Appellant that records relating to a Board meeting at Bob’s Steakhouse did not exist, the Board violated the Act.

The Appellant, however, claims records relating to a Board meeting at Bob’s Steakhouse do or should exist. 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 exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester’s bare assertion that an agency must possess requested records is insufficient to establish a *prima facie* case that the agency actually possesses such records. *See, e.g.,* 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must cite some statute, regulation, or other authority demonstrating the records must be created. The requester may also make a *prima facie* case records do or should exist by providing factual support for his contention that the records were created. *See, e.g.,* 21-ORD-177; 11-ORD-074.

Here, the Appellant attempts to prove the Board held a meeting at Bob’s Steakhouse by presenting certain emails from January 2023 discussing locations in Louisville for the Board to have dinner during the Kentucky School Boards Association conference. However, those emails demonstrate, at most, that the Board planned to have dinner at Bob’s Steakhouse, not that it held a meeting there.<sup>2</sup> Furthermore, the emails could not possibly relate to a meeting held in February 2022, because the emails were sent in January 2023. Therefore, the Appellant has not

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<sup>2</sup> The Appellant claims, without evidence, that the Board discussed “business” in the presence of a “quorum” at Bob’s Steakhouse. This language is apparently intended to insinuate a violation of the Open Meetings Act. *See* KRS 61.810(1). However, that issue is outside the scope of an open records appeal under KRS 61.880(2). *See Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 871 (Ky. App. 2021) (finding a requester’s “unperfected claim of an Open Meetings Act violation was entitled to no [Attorney General] consideration” under KRS 61.880(2)).

established a *prima facie* case that any additional records responsive to his request do or should exist. Accordingly, the Board 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/ James M. Herrick  
James M. Herrick  
Assistant Attorney General

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Distributed to:

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