



COMMONWEALTH OF KENTUCKY
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23-ORD-294

November 3, 2023

In re: John Yarbrough/Justice and Public Safety Cabinet

Summary: The Justice and Public Safety Cabinet (“the Cabinet”) did not violate the Open Records Act (“the Act”) when it denied requests for records that it does not possess.

Open Records Decision

John Yarbrough (“Appellant”) submitted two requests for records to the Cabinet. First, he sought all records related to a specific “KSP-41 form” he attached to his request.¹ Second, he requested “all records showing” an identified person listed on the same “KSP-41” form attached to his previous request. In timely responses, the Cabinet denied both of the requests because “it possesses no records responsive to” them.² The Cabinet also provided the contact information for the records custodian for the Kentucky State Police, advising the Appellant to submit his request to that agency. This appeal followed.

Once a public agency states affirmatively that records do not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant claims the Cabinet should possess the requested records

¹ Presumably, the acronym “KSP” refers to the Department of Kentucky State Police because the Appellant’s requests appear to be related to a criminal investigation.

² The Cabinet’s response was issued October 5, 2023, and denied seven requests received from the Appellant on September 29, 2023. In his request for appeal, the Appellant claims he did not receive a response to his second request. In contrast, however, the Cabinet claims it denied a similar request it received from the Appellant on September 29 in its October 5 response. The Office has previously found that it is unable to resolve factual disputes, such as, whether or not a requester received an agency’s response to their request. *See, e.g.*, 23-ORD-220.

because it “does audio/video work for the Commonwealth of Kentucky.” However, the Office has found that a requester’s mere assertion that records exist is not enough to establish a *prima facie* case that they do exist. *See, e.g.*, 23-ORD-042. Similarly, here, the Appellant’s mere assertion has not established a *prima facie* case that the Cabinet possesses any responsive records.³ Consequently, the Office cannot find that the Cabinet violated the Act when it denied requests for records it does not possess.

A party aggrieved 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/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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³ The Appellant provided a document titled “evidence/recovered property” that lists the “owner” of a “reel to reel tape” as “Post 16.” Presumably, the referenced “Post 16” is Kentucky State Police Post 16.