COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

23-ORD-321

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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 it did not issue a timely response to a request made under the Act. However, the Office is unable to find the Cabinet violated the Act when it denied a request for records that do not exist.

Open Records Decision

On September 14, 2023, Vivian Miles ("Appellant") submitted to the Cabinet a request for records containing three subparts. First, the Appellant requested "identifying notices" or "notification letters provided to" a specific business, its staff, or license holders in 2019. Second, she requested "[r]ecords identifying the [number] of Letters of Concern issued [by the Cabinet] to PCP Agencies in 2019." Third, she requested "[r]ecords identifying the [number] of fatalities and/or near fatalities for children in state care placed in PCP Agencies in 2019." On September 25, having received no response from the Cabinet, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records 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." Here, the Appellant submitted a request to the Cabinet on September 14, 2023, and the Cabinet does not dispute that it failed to respond to the request. Thus, the Cabinet violated the Act.

On appeal, the Cabinet provides the Appellant with records responsive to the second and third subparts of her request.[1] However, the Cabinet states it does not possess any records responsive to the first subpart of the request because it "does not send anything related to investigations, only emails/letters surrounding the Letter of Concern." 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). The Office has found that the existence of a record "can be presumed where statutory authority for its existence has been cited or can be located." 11-ORD-074. 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).

To make a *prima facie* case that the Cabinet should possess records responsive to the first subpart of her request, the Appellant asserts various authorities require the Cabinet to provide notice of an investigation.[2] The Cabinet, however, claims the authority the Appellant cites applies only to investigations conducted into allegations of dependency, neglect, or abuse of a child. *See, e.g.*, KRS 620.030. The Cabinet explains that the records the Appellant requested here related to an investigation into a private childcare facility for alleged violations of an agreement, not an investigation into allegations of dependency, neglect, or abuse. Accordingly, the Appellant's cited authority does not establish a *prima facie* case for the existence of the requested records.

Moreover, even if the Appellant had established a *prima facie* case that the requested records should exist, the Cabinet has explained the adequacy of its search. Specifically, the Cabinet has searched the email accounts of 15 employees related to an investigation into the private childcare facility for its alleged violation of the agreement, as well as the records databases for its Division for Community Based Services and Division of Regulated Child Care. After conducting these searches, the Cabinet found no additional records relating to the private childcare facility, other than those that had already been provided to the Appellant. Accordingly, the Cabinet

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[1] The Cabinet states the records provided were "redacted in accordance with the Kentucky Revised Statutes," and the Appellant has not disputed these redactions.

[2] Specifically, she cites Section 2.11(3)(B) of the Cabinet's standard operating procedure for conducting investigations into allegations of dependency, abuse, or neglect; 42 U.S.C. § 5106a; and 922 KAR 1:330.

has explained the adequacy of its search, and the Office cannot find that it violated the Act when it did not provide records that do 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/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Vivian Miles
Elyssa S. Morris
Peyton Sands