



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-341

December 18, 2023

In re: Kentucky Innocence Project/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services (“the Cabinet”) did not violate the Open Records Act (“the Act”) when it could not provide records that do not exist.

Open Records Decision

On November 2, 2023, the Kentucky Innocence Project (“Appellant”) requested “any and all documentation and information” related to the Cabinet’s investigation of a named individual in 1988 and 1989. In response, the Cabinet stated that, after a “diligent search,” it “determined that it possesses no records responsive to [the] request.” This appeal followed.

Once a public agency states affirmatively that requested records do not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that the record does 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 (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant has requested records relating to an investigation conducted in 1988 and 1989. As evidence that the Cabinet should possess records relating to the investigation, the Appellant has provided trial testimony and a written report from a Cabinet employee in 1989. While the Cabinet does not deny that it conducted an investigation, it asserts that any records from that investigation “would have been destroyed in 2009.” In support of its statement, the Cabinet has provided a copy of the applicable records retention schedule, which specifies that the type of records requested are to be retained no longer than “twenty (20) years from date of

resolution of Agency Action Plan.”¹ Therefore, to the extent the Appellant may have presented a *prima facie* case that responsive records existed, at least at some point, the Cabinet has rebutted the presumption that those records still exist by establishing that they have been destroyed. Accordingly, the Cabinet did not violate the Act by failing to provide the requested records.²

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:

Whitney Wallace Allen, Esq.
Elyssa S. Morris, Esq.

¹ See Cabinet for Health and Family Services, Department for Community Based Services, Records Retention Schedule, “Field Workers’ Investigative Files – Inactive,” Series 06150, *available at* <https://kdla.ky.gov/records/RetentionSchedules/Documents/State%20Records%20Schedules/kycommunitybasedservices.PDF> (last accessed December 18, 2023).

² Because the nonexistence of responsive records is dispositive of the issue on appeal, it is not necessary for the Office to consider the Cabinet’s alternative argument that any such records would be confidential under KRS 620.050(5).