



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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24-ORD-005

January 16, 2024

In re: Anthony Cain/Calloway County Jail

Summary: The Calloway County Jail (“Jail”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

Inmate Anthony Cain (“Appellant”) submitted a request to the Jail seeking a copy of “Calloway’s contract with [the Department of Corrections] to house state inmates” and “any contracts Calloway County has with [the Department of Corrections] or [Kentucky] or [the] Federal Government concerning PREA compliance.” In response, the Jail stated it does not have “knowledge of any contracts between the Kentucky Department of Corrections and the [sic] Calloway County.” This appeal followed.

On appeal, the Jail maintains that it does not possess contracts responsive to the Appellant’s request. 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). 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).

Here, the Appellant has attached the response of the Finance and Administration Cabinet (“FAC”) to an identical request submitted to it by the Appellant. In that response, FAC states it does not possess responsive records but identifies the Calloway County Jail as an agency that “*may* be in possession of records

responsive to [the Appellant's] request" (emphasis added).¹ The FAC's response does not establish a *prima facie* case that the Jail currently possesses responsive contracts.² It merely identifies agencies that might possess such records, if they exist. Therefore, the Jail did not violate the Act when it did not provide records it does not possess.

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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

Anthony Cain
Kenneth Claud
K. Bryan Ernstberger

¹ See KRS 61.872(4) ("If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.").

² The Office notes it is the fiscal court of each county, not the Jailer, who is responsible for the fiscal management of county jails. See KRS 441.025(1). A county jail may receive funding from the Department of Corrections according to a specified formula, or in exchange for incarcerating prisoners who violate state law. See KRS 441.206.