



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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24-ORD-017

January 22, 2024

In re: Michael R. Carter/Board of Cosmetology

Summary: The Board of Cosmetology (“Board”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

Michael R. Carter (“Appellant”) submitted a request seeking a copy of all records created between January 1, 2020, and November 10, 2023, in the Board’s “fleet folder located in the human resources desk at the Board.” He also sought any records that identify the drivers of specific vehicles. The Board provided documents located in “the location identified by” the Appellant and additional electronic records it believed were responsive to the request.¹ This appeal followed.

On appeal, the Board maintains that it has provided the Appellant with all records responsive to his request, “including those found in the referenced folder.” 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 asserts that he “was given information as to the existence of this file,” that he has a “valid reason to believe that the [Board] is being selective of what they produce,” and that the file should include signed documents showing

¹ The Board redacted parts of the records under KRS 61.878(1)(a). The Appellant has not challenged the redactions the Board made. Rather, he asserts only that the Board possesses additional records.

which employees were assigned vehicles for completing their works tasks. But merely asserting that additional records exist does not establish a *prima facie* case that they do.² *See, e.g.*, 23-ORD-294; 23-ORD-042. Therefore, the Board did not violate the Act when it provided all records in its possession that were responsive to the request.

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:

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Julie M. Campbell
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² Further, even if a requester makes a *prima facie* case that additional records may or should exist, the Office cannot conclude that the records do, in fact, exist. Rather, the Office has long held it cannot resolve factual disputes about whether all records responsive to a request have been provided, or whether requested records should contain additional content. *See, e.g.*, 23-ORD-027; 22-ORD-010; 19-ORD-083; 03-ORD-061; OAG 89-81.