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**24-ORD-018**

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 specific Board employee's "complete personnel file," including the employee's "cosmetology license transfer" and the Board's approval of it. The Board provided documents responsive to the request.[1] This appeal followed.

On appeal, the Appellant claims the Board should have produced meeting minutes documenting a vote approving the employee's "cosmetology license transfer."[2] In response, the Board explains that, when all requirements for a license transfer "are clearly met," Board staff may approve an application without presenting it to the Board. As such, the Board maintains that it does not possess minutes approving the employee's license transfer.

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

[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.

[2] The Appellant also asserts that the Board should have produced records showing the Board employee paid the fees associated with a license transfer. In response, the Board states that such records are not kept in employee personnel files, and the Appellant's request did not otherwise specify that it sought such records. Regardless, the Board has since provided those additional records, making this portion of the Appellant's request moot. *See* 40 KAR 1:030 § 6.

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 a Board vote to approve a license transfer "is a standard practice that anyone transferring from out of state must go through." However, he does not cite any statute or administrative regulation requiring the Board to vote on every application for a license transfer. Merely asserting that it is "standard practice" for the Board to vote to approve a license transfer does not establish a *prima facie* case either that it did so in this instance or that meeting minutes reflecting that vote exist.[3] *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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[3] Further, this Office has long held that it cannot resolve factual disputes between the parties to an appeal. *See, e.g.*, 23-ORD-027; 22-ORD-010; 19-ORD-083; 03-ORD-061; OAG 89-81. Accordingly, the Office is unable to find that it is the "standard practice" of the Board to vote on the approval of all license transfers.