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25-ORD-059

March 6, 2025

In re: Melanie Barker/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 failed to issue a response to a request to inspect records within five business days of receiving it. The Cabinet did not violate the Act when it did not provide records it does not possess, or when it did not grant requests seeking information without describing public records to be inspected.

Open Records Decision

On January 29, 2025, Melanie Barker (“Appellant”) submitted, by email, a request to the Cabinet stating, “I have questions regarding the Excel Spreadsheet” the Cabinet had previously provided her.¹ The Appellant then submitted 14 questions regarding the content of the spreadsheet. With the Appellant’s questions, the Appellant also stated, “I need an Itemized Document for the \$194 Million that went to CCAP.” Having received no response to her request by February 6, 2025, 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 her requests to the Cabinet on January 29, 2025, but had not received a response as of February 6, 2025, the sixth business day following submission of the requests. The Cabinet states that, because most of the Appellant’s request asked questions rather than requesting records, it did not initially interpret the Appellant’s January 29 email as a request for records. However, the subject line of the Appellant’s email identified it as a request under the Act. Accordingly, the

¹ The subject line of the Appellant’s email was “Open Records Request (01/29/25).”

Cabinet violated the Act when it failed to respond to the Appellant's requests within five business days.

On appeal, the Complex maintains that it possesses no records responsive to the request for an "Itemized Document" other than what it has already provided to the Appellant. 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 not established a *prima facie* case that additional records exist. Therefore, the Cabinet did not violate the Act when it did not provide records it does not possess.

On appeal, the Cabinet maintains that the rest of the Appellant's request asks questions and does not seek records. The Cabinet is correct. The Appellant submitted a series of questions regarding a record previously provided by the Cabinet. These questions ask "why" the Cabinet made certain expenditures, to "what" certain acronyms refer, or to "who[m]" certain expenditures were directed. Her request did not describe public records to be inspected, but rather, sought information. *See, e.g.*, 23-ORD-257 (denying a request for "the full names" of correctional officers on duty at a specific time); 22-ORD-054 (denying a request asking "who ordered" a letter to be written, how much the author was paid, and "why" the letter "was circulated"). The Act does not require public agencies to answer interrogatories or fulfill requests for information. Rather, it only requires public agencies to produce extant public records for inspection. *See KRS 61.872(2)(a)* (requiring a request to inspect records to include, *inter alia*, a description of "the records to be inspected"); *Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The [Act] does not dictate that public agencies must gather and supply information not regularly kept as part of its records."). Accordingly, the Cabinet did not violate the Act when it did not provide all the information sought by the Appellant because her request did not describe public records she wished to inspect.

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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