



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

25-ORD-063

March 10, 2025

In re: Kurt Wallace/Bullitt County Attorney's Office

Summary: The Bullitt County Attorney's Office ("the County Attorney") violated the Open Records Act ("the Act") when it partially denied the Appellant's first request for records without citing any applicable exemption or otherwise accurately explaining its initial denial of that portion of the request. The County Attorney did not violate the Act when it did not provide records that do not exist.

Open Records Decision

Kurt Wallace ("the Appellant") submitted a 39-part request to the County Attorney, seeking records related to various aspects of the County Attorney's operations.¹ In response, the County Attorney provided two employees' oaths of office and advised that there are no other "public records in its possession that are responsive to the requests." This appeal followed.

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." KRS 61.880(1). *Id.* A public agency cannot simply ignore portions of a request. *See, e.g.,* 21-ORD-090.

Among the Appellant's requests, he sought a copy of the County Attorney's "Form W-9." Although the County Attorney said it possessed no additional records responsive to the Appellant's request, on appeal, it states that it does possess a record responsive to this portion of the Appellant's request. Accordingly, the County Attorney violated the Act when it failed to produce a record it possessed without citing

¹ The request sought records related to various bonds, policies, three individuals' oaths of office to practice law and bar cards, training records, and the County Attorney's IRS Form W-9.

any applicable exemption or otherwise accurately explaining its initial denial of that portion of the request.²

Regarding the remaining portions of the Appellant's request, the County Attorney maintains that it does not possess any responsive records. 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 is able to make 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 made a *prima facie* case that the County Attorney possesses any requested records that were not provided. Instead, the Appellant asserts that, if the County Attorney does not possess the records he seeks, then it and its employees are operating illegally.³ But that bare allegation offers no evidence proving that the requested records exist. A requester's bare assertion that an agency possesses a requested record is insufficient to establish a *prima facie* case that the agency, in fact, possesses it. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested record, the requester must point to some statute, regulation, or factual support for this contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. As the Appellant has provided only a bare assertion, he has not presented a *prima facie* case that County Attorney possesses any of the records he seeks. Accordingly, the County Attorney did not violate the Act when it did not provide records that do not exist in its possession.

Finally, the County Attorney states that “bar cards” for two of its employees exist but are not public records in its possession. Public records are records that have been “prepared, owned, used, in the possession of, or retained by” the public agency. KRS 61.870(2). Here, the County Attorney explains that the identified bar cards are in the personal possession of its two employees, and it does not possess any copies of them. The record before the Office does not suggest that bar cards are “prepared, owned, used, in the possession of or retained by a public agency.” *Cf.* KRS 61.870(2).

² The County Attorney states that this record has been provided to the Appellant.

³ That allegation is beyond the scope of this appeal. *See* KRS 61.880(2)(a) (authorizing the Office to issue “a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884”).

Thus, the County Attorney did not violate the Act when it did not produce any bar cards that it does not possess.⁴

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:

Kurt Wallace
Tammy Baker, Bullitt County Attorney

⁴ The Appellant also alleges the County Attorney violated the Act by not providing the name and location of the official records custodian for the requested records. *See* KRS 61.872(4). But the County Attorney advised the Appellant that it does not possess the requested records, not that another public agency possesses them. Thus, the County Attorney could not have identified an official records custodian for the requested records.