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25-ORD-335

October 24, 2025

In re: Melanie Barker/Education and Labor Cabinet

Summary: The Education and Labor Cabinet (“the Cabinet”) violated the Open Records Act (“the Act”) when it failed to conduct an adequate search for records. The Cabinet did not violate the Act when it denied requests for records it did not possess, requests for information, and requests for preliminary draft records.

Open Records Decision

On August 19, 2025, Melanie Barker (“Appellant”) submitted a request to the Cabinet that (1) sought “the document that shows” the total stipend “that the Early Childhood Advisory Council received” and distributed to certain providers, (2) asked “Who applied for the grant” and what “the total amount of the stipend” to be distributed is, and (3) asked “Where . . . the stipend [came] from.” In response, the Cabinet denied part 1 of the request because it does not possess responsive records, denied part 2 under KRS 61.878(1)(c)2.a. and KRS 61.878(1)(i), and denied part 3 as a request for information.

On September 4, 2025, the Cabinet received an additional request for records from the Appellant containing three parts. This request sought (1) “meeting minutes, memoranda, reports, or correspondence, maintained by the Early Childhood Advisory Council or the Cabinet, that reference or record the approval, allocation, or discussion of stipends intended for Level 1 STAR or Level 2 STAR Child Care Providers”; (2) “records showing communications between the Cabinet, the Early Childhood Advisory Council, and/or the Department of Workforce Development regarding the source of funding for these stipends”; and (3) “finalized records verifying or authorizing the disbursement of stipend funds to Level 1 or Level 2 STAR Child Care Providers once verification was complete.” In response, the Cabinet denied parts 1 and 2 of the request because it “has determined there are no responsive records.” The

Cabinet denied part 3 of the request under KRS 61.878(1)(i) because the identified funds have not been distributed and remain subject to “further verification and processing.”

On September 26, 2025, the Appellant initiated this appeal, challenging each portion of the Cabinet’s responses to both requests.

To start, the Appellant maintains that it does not possess records responsive to part 1 of the August 19 request. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to make a *prima facie* case that the records do exist and that they are within the agency’s possession, custody, or control. *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 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). To make a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for that contention. *See, e.g.*, 23-ORD-207; 21-ORD-177; 11-ORD-074.

Here, to make a *prima facie* case, the Appellant asserts that “[s]omeone has these records” and that another agency “doesn’t have them and they referred” her to the Cabinet. A response from a separate agency stating its belief that the Cabinet may possess the request records is not *prima facie* evidence that the Cabinet does, in fact, possess those records. Thus, the Appellant has not made a *prima facie* case that the Cabinet possess the requested records and did not violate the Act when it could not provide records it does not possess. Accordingly, the Cabinet did not violate the Act when it denied part 1 of the August 19 request.

Regarding part 2 of the August 19 request, the Cabinet states that “the issue is moot because [it] provided the applications in its supplemental response dated October 3, 2025.” Accordingly, as to records regarding “[w]ho applied for the grant” and “the total amount of the stipend that will be distributed,” this appeal is now moot. *See* 40 KAR 1:030 § 6.

The Cabinet denied part 3 of the August 19 request because “it was a request for information.” The Act does not require an agency to provide information, but only to produce public records upon a proper request. *See* KRS 61.872(2)(a) (requiring a request to inspect records to include, among other things, a description of “the records

to be inspected”); *see also 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 [their] records.”). Since the Act does not require a public agency to provide information in response to a request, the Office cannot find that Cabinet violated the Act when it declined the Appellant’s invitation to answer a request for information.

Turning now to the September 4 request, the Cabinet denied parts 1 and 2 of the request because it “did not have responsive records to the request.” Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to make a *prima facie* case that the records do exist and that they are within the agency’s possession, custody, or control. *Bowling*, 172 S.W.3d at 341.

Regarding part 1 of the request, the Cabinet now states that it does possess responsive records and has provided them to the Appellant. When a subsequent search reveals additional records not previously found, the agency’s initial search “was clearly insufficient to locate all responsive records.” 25-ORD-165; 21-ORD-242, 21-ORD-178. Regarding part 1 of the Appellant’s September 4 request, the Cabinet’s subsequent production of documents demonstrates that its initial search was inadequate and, therefore, violated the Act.

Regarding part 2 of the September 4 request, the Appellant has not made a *prima facie* case that the Cabinet possesses or should possess any additional records. Thus, the Cabinet did not violate the Act when it could not provide records that do not exist within its possession.

Finally, the Cabinet denied part 3 of the September 4 request under KRS 61.878(1)(i), stating that the identified stipends “require further verification and processing” and that, until those steps have been taken “and all the funds have been disbursed,” it cannot provide “finalized records.” KRS 61.878(1)(i) exempts from disclosure “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” The Office has interpreted the word “draft” to mean “a tentative version, sketch, or outline of a formal and final written product.” 05-ORD-179. On appeal, the Cabinet explains further that “the disbursement of funds is a multi-step process that requires invoices to be processed, and payment issued by the Finance and Administration Cabinet.” Because this has not yet occurred, the records remain

drafts subject to change. Accordingly, the Cabinet did not violate the Act when it denied a request for records that were preliminary drafts.

In sum, regarding the August 19 request, the Cabinet did not violate the Act when it denied requests for records it did not possess, or when it did not grant a request for information. Regarding the September 4 request, the Cabinet's subsequent production of responsive records indicates that its original search was inadequate, and it therefore violated the Act. But the Cabinet did not violate the Act when it denied a request for records it does not possess or when it withheld records exempt under KRS 61.878(1)(i).

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
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/s/ Zachary M. Zimmerer
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Distributed to:

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