COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

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

26-ORD-037

February 3, 2026

In re: Nathan McCamish/Office of the Secretary of State

Summary: The Office of the Secretary of State ("the Agency") violated the Open Records Act ("the Act") when it denied a request for records prepared and used by the Agency for official purposes on the grounds that they were not public records.

Open Records Decision

Nathan McCamish ("the Appellant") submitted a request to the Agency for "[a]ll 'Memorandum for Non-Commercial Use Subscribers to the Online UCC Bulk Data, UCC Images and/or Business Entity Lists' forms submitted from calendar year 2020 onward for the [Agency's] approval."[1] In a timely response, the Agency stated it "does not retain the requests for UCC Bulk Data and therefore has no responsive documents." The Agency further explained the requests "are sent to [the Agency's] office for approval from Tyler Technologies/Kentucky Interactive. Because they finalize the request, the final documents are within their possession. In fact, they have now digitized the process, so no physical document is provided for [the Agency's] review." This appeal followed.

A public agency "is responsible only for those records within its own custody or control." *City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136 (1980)); *see also Dep't of Revenue v. Eifler,* 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of [their] records."). Once a public agency states affirmatively that it has no responsive records, the burden shifts to the requester to make a *prima facie* case that the requested records do exist within the agency's possession, custody, or control. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341

[1] Under 30 KAR 5:060 § 5(2), "[b]ulk data related to UCC filings may be obtained through subscription as directed by the Web site of the Office of the Secretary of State and shall be made available under the terms and conditions of the subscriber agreement."

(Ky. 2005). If the requester makes a *prima facie* case that 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). Therefore, to support a claim that the agency has responsive records that it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency's search. *See, e.g.*, 95-ORD-96.

Here, the Appellant provides a blank copy of the application form he referenced in his request. As he points out, the form contains a block marked "For Secretary of State Office Use Only," which contains blanks for "SOS Approval" (Yes or No), "SOS Approver Name," "SOS Signature," and the date.[2] Therefore, the Appellant claims that the Agency violated the Act by failing to conduct an adequate search for records routinely prepared and used by the Agency for official purposes. The Agency, however, claims the applications are not "public records" under the Act because they are in the custody and control of "a third-party vendor," not the Agency.[3]

As the Agency describes the application process, "[b]ulk data waiver requests submitted through the [Agency's] electronic processes are transmitted directly to the Commonwealth's state-approved data management vendor, Tyler Technologies, doing business as Kentucky Interactive and Kentucky.gov. The [Agency] does not retain copies of those submissions in its own records management systems. They are instead transmitted to and maintained by Tyler Technologies." The Agency does not, however, refute the Appellant's evidence that, at some point in the process, the submissions are reviewed and acted upon by the Agency when it approves or denies each application.

The definition of "public record" under the Act includes "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are *prepared, owned, used,* in the possession of or retained by a public agency." KRS 61.870(2) (emphasis added). Under this definition, "records are 'public records' if they are 'owned . . . by a public agency,' even if they are 'in the possession of' a vendor." 23-ORD-344 (citing 20-ORD-115). Moreover, "a record can *become the property* of a public agency," and thus a public record, "if it is used or prepared by the public agency for an official purpose." 24-ORD-099 (emphasis added) (citing 23-ORD-057); *see also* 22-ORD-184 (finding social media posts prepared, used, and retained by a public officer in his official capacity were public records under KRS 61.870(2) despite being stored

---

[2] The form also states that "the User must provide very specific information *to the Secretary of State* to prove that it is entitled to application of his [*sic*] exemption" (emphasis added).

[3] The Agency acknowledges, however, "that the use of third-party electronic vendors can present questions regarding electronic custody and agency." Therefore, the Agency states it "is making a good-faith effort to determine whether any responsive records may still exist in the custody of Tyler Technologies/Kentucky Interactive and whether they can be made available to" the Agency.

on a private company's website). Here, the Agency "prepares" the forms insofar as it marks them approved or disapproved and adds a name and signature. The Agency also "uses" the forms for an official purpose when it grants or denies the applications. This is enough to make the forms "public records," regardless of whether they are "in the possession of or retained by" the agency. *See* 24-ORD-099. "A public agency cannot, by means of a contract with a private company, deprive records of their public character." 09-ORD-020. Nor can an agency disclaim "custody or control" of records it uses for official purposes by placing them in the possession of a third-party vendor. Accordingly, the Agency violated the Act when it denied the Appellant's request.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to 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/ James M. Herrick
James M. Herrick
Assistant Attorney General

#1

Distributed to:

Nathan McCamish
Michael R. Wilson, Esq.
Jennifer S. Scutchfield, Esq.