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26-ORD-038

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In re: Jennifer Mortenson/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 respond to a request within five business days. The Cabinet did not violate the Act when it denied requests for information that did not describe extant public records. A public agency is not required to compile information or create a record to respond to a request.

Open Records Decision

This appeal concerns three requests submitted by Jennifer Mortenson (“the Appellant”) to the Cabinet on December 29, 30, and 31, 2025. The Appellant requested as follows:

1. I am requesting to know the number of child maltreatment fatality and near fatality designated investigations are [sic] documented by CHFS/DCBS from January 1, 2024 through September 9, 2025.
2. I am requesting to know the number of child maltreatment fatality and near fatality designated investigations are [sic] documented by CHFS/DCBS for calendar years 2024 and 2025. If available, also please provide a monthly breakdown of the numbers.
3. [P]lease provide me with all statistical data compiled by CHFS/DCBS in regard to maltreatment related child fatalities and near fatalities for the years of 2024 and 2025.

The Cabinet denied all three requests on the grounds that the Act does not require a public agency to fulfill a request for information; in addition, it denied the second and third requests on the grounds that “an agency is not required to compile information or to create a record that does not already exist.” This appeal followed.

First, the Appellant claims the Cabinet's response to her third request was untimely. Under KRS 61.880(1), a public agency must respond to a request for public records within five business days "after the receipt of any such request." Here, the Cabinet admits it received the Appellant's third request on December 31, 2025, and did not respond until January 12, 2026, the sixth business day. Accordingly, the Cabinet violated the Act when it failed to respond timely.

Next, the Appellant claims the Cabinet improperly denied her requests. A public agency "is not obligated 'to respond to questions [or] requests for research[.]'" *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 856 (Ky. 2013) (quoting *Jimenez v. Exec. Off. for U.S. Att'ys*, 764 F. Supp. 2d 174, 182 (D.D.C. 2011)). Thus, an agency need not answer interrogatories or provide information in whatever form a requester demands. Rather, residents of the Commonwealth may inspect identifiable "public records" after submitting a request "describing the records to be inspected." KRS 61.872(2)(a). In her first request and the first sentence of her second request, the Appellant sought the "number" of investigations conducted by the Department for Community Based Services ("DCBS") during particular periods of time. These requests do not describe any public records to be inspected but merely ask for information. Accordingly, the Cabinet did not violate the Act when it denied those requests.

In the second sentence of her second request, the Appellant asked for "a monthly breakdown of the numbers" she had requested, "[i]f available." Similarly, in her third request, the Appellant sought certain "statistical data compiled by" DCBS. While these requests describe identifiable types of public records, the Cabinet claims no such records exist. Once a public agency states affirmatively that no additional records exist, the burden shifts to the requester to make a *prima facie* case that additional records do exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to make a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074.

Here, the Appellant claims the specific "monthly breakdown" and "statistical data" she requested must exist because KRS 620.050(12)(c) requires the Cabinet to "submit a report by September 1 of each year" to certain state officials "containing an analysis of all summaries of internal reviews occurring during the previous year and an analysis of historical trends." However, the Cabinet states that "neither the statistical data nor the number of investigations" the Appellant requested "are maintained in the report." Rather, the Cabinet explains that the function of the report is "to address the Cabinet's actions and any policy or personnel changes taken by the Cabinet as a result of the internal review as well as information received from the investigation," as required by KRS 620.050(12)(b).

The Appellant further asserts that the Cabinet is required by federal law to maintain the specific statistical data she seeks. First, the Appellant claims the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5101 *et seq.*, requires the Cabinet to submit an annual report containing the information she requested. Although the Appellant does not cite a specific section of CAPTA, 42 U.S.C. § 5106a(d) provides that “[e]ach State to which a grant is made under this section shall annually work with the Secretary to provide, to the maximum extent practicable, a report that includes” certain information, including “[t]he number of deaths in the State during the year resulting from child abuse or neglect.” 42 U.S.C. § 5106a(d)(6). However, this information does not correspond to the terms of the Appellant’s request, which sought “statistical data compiled by CHFS/DCBS in regard to *maltreatment related child fatalities and near fatalities*” (emphasis added). If the Appellant wishes to obtain copies of the annual reports submitted under CAPTA or KRS 620.050(12)(c), she may request those reports specifically. However, the Appellant has not made a *prima facie* case that the Cabinet possesses the precise statistical data she requested.¹

According to the Cabinet, producing the data requested by the Appellant “would require the Cabinet to compile the information from each file into a document and create a record that conforms to the Appellant’s requested parameters. This is not information that can simply be queried out of a database.” The Act “does not require public agencies to carry out research or compile information to conform to a given request.” OAG 89-45. Nor is a public agency “obligated to compile a list or create a record to satisfy an open records request.” OAG 76-375. Because the Cabinet does not maintain a record containing the specific information sought by the Appellant, and it is not obligated to create one, the Cabinet did not violate the Act when it denied the Appellant’s requests.

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.

¹ The Appellant also claims the Cabinet is required to maintain the requested data under 42 U.S.C. § 1305. As that statute is merely the short-title provision of the Social Security Act, it is unclear how it supports the Appellant’s argument.

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