



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-086

March 10, 2026

In re: Valerie Frost/Cabinet for Health and Family Services

**Summary:** The Cabinet for Health and Family Services (“the Cabinet”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist or when it denied inspection of employee performance evaluations under KRS 61.878(1)(a).

***Open Records Decision***

Valerie Frost (“the Appellant”) submitted a two-part request to the Cabinet for certain records of the Department for Community Based Services for calendar year 2025. First, the Appellant requested “[a]ll emails and Microsoft Teams messages to, from, or copied to [a named social worker] that reference” the Appellant, Child Protective Services reports involving the Appellant, “[s]ocial media activity,” “[c]onfidentiality or privacy concerns,” or “[c]omplaints, investigations, or reviews related to” the social worker, including “communications with” certain people and offices. Second, she requested “Disciplinary, Investigative, and Personnel Records” relating to the social worker and concerning “[d]isciplinary actions,” “[p]erformance concerns,” “[i]nvestigations or inquiries,” “[c]ounseling, warnings, or corrective actions,” or “[r]eferrals to or communications with HR, OIG, or other oversight entities.”

In response, the Cabinet fulfilled the Appellant’s request in part and denied it in part. Specifically, the Cabinet noted it had already provided her “the disciplinary letter” for the social worker, in response to a previous request, and stated “the other records requested [are] preliminary records consisting of interoffice emails and correspondence with private individuals not intended to give notice of final agency action, under KRS 61.878(1)(i), [and] ‘preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended,’ which are exempt from disclosure under KRS 61.878(1)(j).” In addition, the Cabinet withheld the social worker’s “performance evaluations/concerns” on the grounds that “evaluations of performance are personal and private and not subject to disclosure” under KRS 61.878(1)(a). This appeal followed.

On appeal, the Cabinet states it has reversed its position on the records withheld under KRS 61.878(1)(i) and (j), and so, it has provided those records to the Appellant. Accordingly, this appeal is moot as to the records provided. *See* 40 KAR 1:030 § 6 (“If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.”).

As to the requested emails, the Appellant claims “the production provided is incomplete.” However, the Cabinet asserts it “has produced all emails that were provided by [the Commonwealth Office of Technology] as a result of their search for responsive emails.” 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). 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). A requester must provide some evidence to make a *prima facie* case that additional records exist, such as the existence of a statute or regulation requiring the creation of the records or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester’s bare assertion that certain records exist or should exist is insufficient to make a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040.

Here, the Appellant makes three statements in support of her claim that additional records exist. First, she claims to be “in possession of emails” that are responsive to her request but were not provided. Second, she asserts that “[s]everal emails produced by the Cabinet reference attachments that were not included in the production.” Finally, the Appellant states that some “emails reference a ten-minute Facebook video created by [the social worker] concerning [the Appellant’s] family-court matter,” which was not provided. However, the Appellant does not specify the emails to which she is referring, nor has she submitted copies of them. Accordingly, the Appellant has not made a *prima facie* case that additional responsive records exist.

The Appellant further claims the Cabinet “misapplied” KRS 61.878(1)(a) when it withheld the social worker’s performance evaluations. KRS 61.878(1)(a) exempts from disclosure “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” This exception requires a “comparative weighing of the antagonistic interests” between privacy and the public interest in disclosure. *Ky. Bd. of Exam’rs of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). Kentucky courts have recognized that “the performance of an

ordinary employee or even one of comparatively high rank is not of such significant public interest that it should be subject to disclosure.” *Cape Publ’ns v. City of Louisville*, 191 S.W.3d 10, 13 (Ky. App. 2006). Moreover, public employees maintain a significant privacy interest in their performance evaluations.

The confidentiality of performance evaluations allows evaluators to speak more frankly about an employee than they might if the evaluations were known to be open to public disclosure. In addition, performance evaluations certainly can contain a great deal of personal information, and should not be subject to disclosure without the most pressing of public needs.

*Id.* One example of such a “pressing public need” is when the public employee is charged with “committing a criminal act made possible by his position at a public agency.” *Id.* at 14. In *Cape Publications*, the public employee was charged with such an offense, which also led to the administrative suspension, and eventual resignation, of his supervisor. *Id.* Therefore, the Court found that the employee had “to some extent forfeited his privacy interest” by engaging in criminal activity, and that both his evaluation and that of his supervisor were subject to partial disclosure. *Id.*

Here, although the social worker received a “disciplinary letter,” there is no suggestion of criminal conduct. Policy violations by a public employee, without more, do not forfeit the personal privacy interest in performance evaluations. *See, e.g.*, 25-ORD-106. As the Office has recognized, “an evaluation is a matter of opinion and does not represent any action on the part of the agency[.] Accordingly, the only information to which the public is entitled is information relating to the action which the agency takes in light of the evaluation.” 92-ORD-1365; *see also* OAG 77-394. Here, the Cabinet provided the records pertaining to the disciplinary letter, and the Appellant articulated no “pressing” public interest that would overcome the normal “confidentiality of performance evaluations” under KRS 61.878(1)(a). *Cape Publ’ns*, 191 S.W.3d at 13. Therefore, the Cabinet did not violate the Act when it withheld the social worker’s performance evaluations under KRS 61.878(1)(a).

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

#757

Distributed to:

Ms. Valerie Frost  
Natalie A. Nelson, Esq.  
Peyton Sands, Esq.  
Ms. Evelyn L. Miller