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26-ORD-088

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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 the Appellant with records it does not possess.

Open Records Decision

Valerie Frost (“Appellant”) submitted a request to the Cabinet for three categories of records: (1) “Email Attachments & Metadata”¹; (2) “Device Usage Logs (Work Laptop & State-Issued Phone)”²; and (3) “Network Activity / Internet Browsing History.”³ The Appellant further specified that her extensive list “is representative, not exhaustive” and that she is “requesting all relevant logs showing whether these sites, or similar, were accessed from state-issued devices or the state network.” The

¹ The Appellant requested “[a]ll attachments, metadata, and transmission logs for the email sent by [a specific person] from her state-issued email account to her partner, which DCBS produced without attachments in the prior partial release.”

² The Appellant requested “[a]ll device usage logs for any state-issued devices assigned to or used by [a specific person], including:” application logs, file access logs, USB/drive access logs, cloud storage access (OneDrive, SharePoint), document creation/modification logs, screenshot logs (if retained), any records indicating copying, downloading, or compiling Facebook messages or court documents related to the Appellant.

³ The Appellant requested “[a]ll internet browsing history, URL logs, and network access logs from state devices and the state network used by [a specific person] including but not limited to:” the Appellant’s professional platforms and accounts, the Appellant’s website, the Appellant’s LinkedIn account, the Appellant’s Facebook profile, the Appellant’s podcast, the Appellant’s workplaces, websites associated with impersonation, email spoofing, spam sign-ups, or harassment, COBENFY Dun & Bradstreet, Craigslist, LendingTree, Publishers Weekly, Space Capital Sex, With Emily, TL;DR, Schizophrenia & Psychosis, Action Gizmodo MortgagePros, PolicyGenius, Superior Home, EveryMeds, additional platforms commonly used for spoofing, anonymous email, mass sign-ups, ProtonMail, TutaMail, Temp-Mail, AnonEmail, SpoofCard, or any bulk email subscription service.

Cabinet granted the Appellant's request and provided responsive records.⁴ This appeal followed.⁵

On appeal, the Cabinet maintains that it has produced all responsive records in its possession. Once a public agency states affirmatively that no responsive records exist, the burden shifts to the requester to make a *prima facie* case that the records do or should 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 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. A requester's bare assertion that certain records should exist is insufficient to make a *prima facie* case that the records actually do exist. See, e.g., 22-ORD-040.

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. Here, initially and on appeal, the Cabinet states that it has provided all responsive records in its possession.⁶ The Cabinet further asserts that if a record was not provided, it does not maintain that type of record and is not required to create a record to fulfill the request.

To make a *prima facie* case that the Cabinet does or should possess additional records, the Appellant asserts that the Cabinet did not perform a “good-faith search for other responsive records.” However, the Appellant presents no evidence that the Cabinet possesses, or should possess, any additional records. Thus, the Appellant failed to make a *prima facie* case that any additional responsive records do or should exist. Moreover, the Cabinet is not obligated to create any of those records just to

⁴ The Cabinet invoked KRS 61.872(5) to delay the Appellant's access to the email records. The Appellant does not challenge the Cabinet's delay.

⁵ The Appellant brought the appeal on three grounds: (1) that the cabinet's production of records was incomplete; (2) the Cabinet failed to provide a statement that no additional records exist; and (3) the Cabinet did not explain the omission of the records.

⁶ Specifically, the Cabinet stated, “With this release, this request will be complete, and the Cabinet has responded to all data that is available[.]” A statement from a public agency that it has provided all records within its possession is “tantamount to an affirmative statement that the remaining records requested do not exist.” 04-ORD-040.

fulfill her request. Thus, the Office cannot find that the Cabinet violated the Act when it could not provide the Appellant with records it does not possess.

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/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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