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26-ORD-093

March 13, 2026

In re: Tonya Simpson/Kentucky Department of Aviation

Summary: The Kentucky Department of Aviation (“the Department”) violated the Open Records Act (“the Act”) when it failed to respond to a request under the Act within five business days. The Department did not violate the Act when it issued a response from its official custodian of records and provided all responsive records in its possession.

Open Records Decision

On December 3, 2025, Tonya Simpson (“the Appellant”) submitted a request to the Department for four categories of records related to the Georgetown–Scott County Airport. On December 22, 2025, having received no response from the Department, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” Over a month after the Appellant submitted her request to the Department, she had yet to receive a response.

On appeal, the Department states that it received the Appellant’s December 3 request but did not forward its official records custodian because it believed the request was a duplicate of prior request submitted by the Appellant.¹ Because it is undisputed that the Department failed to respond to the Appellant’s request within five business days of receiving it, the Department violated the Act.²

¹ The Transportation Cabinet’s Office of Legal Services, which is “the custodian of records for the Transportation Cabinet,” is the Department’s official records custodian.

² The Department asks the Office to dismiss this appeal as moot because it eventually provided all responsive records in its possession. However, the Department did not timely respond to the Appellant’s request. As a result, the appeal is not moot as to the issue of timeliness. *See, e.g.*, 24-ORD-163 n.1 (finding an appeal of the agency’s failure to respond was not moot when the agency

On January 6, 2025, in a belated response to the Appellant's request, the Department provided four records, which it asserted were the only responsive records the Transportation Cabinet ("the Cabinet") possessed. The Department further stated the Scott County Fiscal Court or the Federal Aviation Administration might possess additional records, and provided email addresses for the Appellant to request records from those agencies.

The Appellant complains that the Department's response was "improper" because it was issued by a "third-party agency," the Cabinet. However, the Department has advised that the Cabinet's Office of Legal Services is the official custodian of the records of all agencies within the Cabinet. Under the Act, "[o]fficial custodian" means the chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control." KRS 61.870(5). A response to a request under the Act "shall be issued by the official custodian or under his or her authority." KRS 61.880(1). Because the Department is part of the Cabinet, and the Office of Legal Services is the official custodian of the Cabinet's and the Department's records, the response was properly issued by the official custodian.³

The Appellant further claims the Department failed to conduct a reasonable search for records. However, once a public agency states affirmatively that it has provided all responsive records in its possession, the burden shifts to the requester to make a *prima facie* case that additional records 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 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 merely claims that additional records "would reasonably be expected to exist." Because the Appellant has not made a *prima facie* case that additional responsive records exist, the Department need not demonstrate the adequacy of its search.

subsequently produced the records); 23-ORD-274 n.1 (finding an appeal was not rendered moot by the agency's subsequent production of responsive records).

³ Both the Kentucky Airport Zoning Commission and the Department of Aviation are organizational units within the Transportation Cabinet. *See* KRS 183.861(1); KRS 12.020(II)(4)(c). The Commission is headed by an administrator employed by the Department of Aviation. *See* KRS 183.8621(1).

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/ Zachary M. Zimmerer
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