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26-ORD-105

March 19, 2026

In re: Vivian Miles/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 did not conduct an adequate search for records. The Cabinet subverted the intent of the Act when it did not provide a detailed explanation for its delay.

Open Records Decision

On January 27, 2026, Vivian Miles ("Appellant") submitted a request to the Cabinet seeking communications between five named individuals related to "Brighter Futures, BFTFC, [a named individual], investigation[s], [and] allegations" dated between September 1, 2018, and October 30, 2019. On February 3, 2026, the Cabinet responded, invoking KRS 61.872(5) and stating the records would be made available on February 17, 2026. The Cabinet explained that the records "are not readily available" because it "must conduct a manual search of its files and records databases to locate any responsive materials." The Cabinet also stated that delay was necessary "[d]ue to the volume of records that must be reviewed for responsiveness." On February 17, 2026, the Cabinet extended its period of delay by eight days, giving the same reasons for its delay. Later that day, the Cabinet issued its final response, stating that "it possesses no records responsive to [the Appellant's] request" and that it "did not locate any emails responsive to your request." This appeal followed.

Under KRS 61.880(1), a public agency has five business days to fulfill or deny a request for public records. This period may be extended if the records are "in active use, in storage or not otherwise available," but the agency must give "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection." KRS 61.872(5). Under KRS 61.880(4), a person may petition the Attorney General to review an agency's action if the "person feels the intent of [the Act] is being subverted by an agency short

of denial of inspection, including but not limited to . . . delay past the five (5) day period described in [KRS 61.880(1) or] excessive extensions of time."

Here, the Cabinet's initial response did not grant or deny the Appellant's request. Instead, invoking KRS 61.872(5), the Cabinet stated the date the records would be made available and explained that its delay was because of the need to "manually search its files and records database for responsive records." The Cabinet provided no details regarding why this search necessitated any delay. Moreover, the mere fact that an agency must search for responsive records is not a sufficiently detailed explanation for delay under KRS 61.872(5). *See, e.g.*, 25-ORD-076 (finding a statement that "records must be gathered, evaluated, reviewed, and redacted" is not a detailed explanation of delay). Further, although the Cabinet referenced the "volume of records that must be reviewed for responsiveness," the Office has consistently found that "[n]either the volume of unrelated requests nor staffing issues justifies a delayed response." *See* 19-ORD-188 n.1; *see also* 25-ORD-013; 24-ORD-063; 22-ORD-167. Accordingly, the Cabinet subverted the intent of the Act, within the meaning of KRS 61.880(4), when it unreasonably delayed its final response beyond the five-day period under KRS 61.880(1).

On appeal, the Cabinet maintains that it possesses no responsive records. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to make a *prima facie* case that the requested record does 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 record does or should exist, then the public 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's bare assertion that a public agency should or must possess the requested records is not adequate to make a *prima facie* showing that the agency does, in fact, possess the records. *See, e.g.*, 22-ORD-040. Rather, to make a *prima facie* showing the agency possesses or should possess the requested records, the requester must provide a statute, regulation, or other factual support for that contention. *See, e.g.*, 21-ORD-177; 11-ORD-074.

To make a *prima facie* case that records exist, the Appellant provides a copy of an email from the specified time frame, which included four of the five identified individuals, and which discussed "Brighter Futures" by name. That email is clearly responsive to the request. Therefore, the Appellant has made a *prima facie* case that

at least one responsive record exists. As such, the burden shifts to the Cabinet to explain the adequacy of its search, which it has failed to do.[1]

An adequate search for records is one that uses methods reasonably designed to find responsive records. *See, e.g.*, 95-ORD-096. Reasonable search methods include reviewing the files pertaining to the general subject matter of the request, and the files of employees either specifically mentioned in the request or whose job duties are related to the subject matter of the request. *See, e.g.*, 19-ORD-198. The Cabinet has not described the search it conducted for responsive records. Rather it merely asserts that "a thorough search was conducted." But just as a requester cannot make a *prima facie* case that records do or should exist merely by asserting that they do, an agency cannot meet its burden of showing its search was adequate merely by asserting that it was.

At bottom, the Office cannot find that more communication records, in fact, exist. Adjudicating such factual questions is beyond the Office's purview under KRS 61.880(2). The Office can, however, determine whether a requester has made a *prima facie* case that a record should exist. And once such a showing is made, the agency is called upon to explain the adequacy of its search. *City of Fort Thomas*, 406 S.W.3d at 848 n.3. Because the Appellant presented evidence that at least one email record should exist, the Cabinet was required to describe its search methods. By merely asserting it conducted "a thorough search," the Cabinet has not adequately explained its adequacy. Thus, it violated the Act.

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.

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[1] Regarding the email provided by the Appellant, the Cabinet states only that it "did not consider [the] email responsive to [her] request." The Cabinet provides no explanation for that conclusion.

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/s/ Zachary M. Zimmerer
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Distributed to:

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