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-162

April 13, 2026

In re: Kenneth Cooke/University of Kentucky

Summary: The University of Kentucky ("the University") did not violate the Open Records Act ("the Act") when it did not provide materials that are not "public records" within the meaning of KRS 61.870(2).

Open Records Decision

On December 17, 2025, Kenneth Cooke ("the Appellant") submitted a multi-part request for records relating to the University's Environmental Quality Management Center ("EQMC") Project and its Cancer Center Project. At issue in this appeal is the Appellant's request for "[a]ll final versions of the Drainage Report Review, Stormwater Management Plan, and any supplemental hydraulic modeling documents (including XP-SWMM or HEC-RAS model output files, if applicable) associated with" the projects. In its initial response, the University stated it was providing responsive records. In a follow-up email on January 7, 2026, the Appellant complained that "[t]he University provided PDF summaries of model results but failed to provide the raw electronic model files used to generate those results." The University replied that it "does not possess the raw files that may have been used by the design engineer to generate the reports provided to" the Appellant.

After some further discussion with the Appellant, the University reiterated on January 28, 2026, that "all documents that the engineer of record provided to the University had been produced" and "the University does not possess the raw electronic modeling files." The University further explained that "[t]hose files would have been prepared by a subcontractor of the University (Bell Engineering)" and, under the contract, "[t]he University only required submittal of final reports and summaries based on those model files." Because it did not possess the raw electronic model files, nor did it require them from the engineer under the contract, the University asserted they were not public records under KRS 61.870(2). This appeal followed.

The Act defines "public record" as "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). On appeal, the University states the electronic model files sought by the Appellant are "prepared, owned, used, in the possession of or retained by" Bell Engineering, not the University, and "university officials have never even seen" them. Once a public agency states affirmatively that it does not possess certain records, the burden shifts to the requester to make a *prima facie* case that it does possess them. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester's bare assertion that an agency possesses requested records is insufficient to make a *prima facie* case that the agency, in fact, possesses them. *See, e.g.*, 22-ORD-040. Rather, to make a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for his contention. *See, e.g.,* 21-ORD-177; 11-ORD-074.

Here, the Appellant makes three arguments. First, he claims the University should have the electronic models for the two projects in question because he separately requested from the University, and received, electronic models prepared by a different engineering firm for a "Stormwater Master Plan" study from 2010. However, the fact that the University possesses electronic models from a different project is not *prima facie* evidence that it obtained such models from Bell Engineering for the EQMC and Cancer Center projects.

Second, the Appellant argues the University has "constructive possession" of the electronic models because, even though the University has not required Bell Engineering to provide those models, it "has the right to demand" them. The concept of "constructive possession" has not been employed by the courts or this Office in construing the Act. In criminal law, however, constructive possession exists "when a person does not have actual possession but instead *knowingly* has the power and the *intention* at a given time to exercise dominion and control over an object, either directly or through others." *Haney v. Commonwealth,* 500 S.W.3d 833, 835 (Ky. App. 2016) (emphasis in original) (quoting *U.S. v. Craven,* 478 F.2d 1329, 1333 (6th Cir. 1973)). Thus, even if "constructive possession" were a recognized concept under the Act, the Appellant has not made a *prima facie* case that the University had both "the power and the intention . . . to exercise dominion and control over" the electronic models used by Bell Engineering. The Appellant asserts, without evidence, that the University "has the right to demand" the electronic models from the engineer. Even assuming that to be true, however, "an agency's mere 'access' to electronic records, without more, does not make them 'public records' for purposes of the Act." 23-ORD-344. Rather, under KRS 61.870(2), the agency must in fact prepare, own, use, possess, or retain the records. Here, the Appellant has not shown that to be the case.

Finally, the Appellant asserts the University "cannot use a private contractor to shield public records from disclosure." That statement is correct, so far as it goes, but the Appellant's argument "presumes the records in question were public records in the first place." 24-ORD-153. The Appellant relies on 04-ORD-123, in which the Office found a city's "records pertaining to drainage matters," in the possession of an agency's private attorney, were nevertheless "public records" under the Act because they were the city's "own records."[1] Similarly, in 11-ORD-105, the Office found an agency was "obligated to retrieve" certain records from a retired employee for inspection purposes, because they were not his personal property but the agency's own "backup" copies that it had improperly transferred into his custody. Here, by contrast, the Appellant has not shown that the electronic models used by Bell Engineering are "owned" by the University. Thus, the Appellant has not made a *prima facie* case that the University possesses or should possess the records; nor has he refuted the University's position that they are not "public records" under KRS 61.870(2). Accordingly, the University did not violate the Act.[2]

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

[1] Further, the Office has consistently held that "records in the possession of a private attorney relating to his representation of a public agency" are public records "because the file is 'owned' by his client, the public agency." 24-ORD-062 (citing 20-ORD-115; 06-ORD-032).

[2] Because KRS 61.870(2) is dispositive of the issues on appeal, it is unnecessary to address the University's alternative argument that the electronic models are "preliminary" under KRS 61.878(1)(i) or (j).

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Distributed to:

Kenneth Cooke
William E. Thro, Esq.
Amy R. Spagnuolo