



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-085

June 5, 2020

In re: Christopher M. Barber/Department of Housing, Buildings, and Construction

Summary: The Department of Housing, Buildings and Construction (“Department”) violated KRS 61.880(1) by failing to issue a timely written response to a request for public records under the Open Records Act (“Act”). However, the Department did not violate the Act in denying the request based on the nonexistence of responsive records because it cannot produce records it does not possess. The Department discharged its duty under the Act by conducting a reasonable search for any existing responsive records it may have possessed and explaining that search in writing after the requester made a *prima facie* showing that certain records previously existed in the Department’s possession.

Open Records Decision

On April 6, 2020, Christopher M. Barber (“Appellant”) requested a copy of the following:

All documents and communications regarding the building inspector complaint dated March 5, 2019, for the property located at **109 Cimmaron Place, Nicholasville, Jessamine County, Kentucky 40356**, including, but not limited to, the building inspector complaint dated March 5, 2019, any notes, findings or reports from the site visit completed by Duane Curry and Dale Spicer on March 28, 2019, the

outcomes of any administrative proceedings conducted by the Department, and all other relevant orders, findings, disciplinary actions, reports, violations, records, investigations, responses, actions, minutes, communications, inspections, documents or other information relating thereto.

On April 29, 2020, the Department responded and claimed it conducted a diligent search for records, but it concluded that it did not possess any responsive records on file. To assist the Department in conducting its search, Appellant immediately resubmitted his initial request and provided a copy of a March 28, 2019, Department employee's letter directed to the Commissioner at the time. That letter indicated that the Department had investigated a Building Inspector Complaint at the subject property on the subject date, and that additional documents related to the investigation, such as photographs taken during the investigation, existed. In response, the Department summarily denied Appellant's request as duplicative. Appellant now appeals the Department's denial of his requests.

Under KRS 61.880(1), "Each public agency, upon any request for records made under [the Act], shall determine within three (3) [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 three (3) day period, of its decision." In response to the coronavirus pandemic, the General Assembly passed Senate Bill 150 ("SB 150"), which extended the time for a public agency to respond to an open records request to ten days. SB 150 contained an emergency clause and became effective on March 30, 2020, upon the Governor's signature. However, the Department did not issue any response to Appellant's first request until 17 business days later on April 29, 2020. Accordingly, the Department violated the Act by failing to issue a timely written response in accordance with KRS 61.880(1). Notwithstanding this procedural violation, this Office cannot find that the Department committed a substantive violation of the Act by denying Appellant's request for nonexistent records.

The Act only regulates access to records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot provide a requester with access to nonexistent records. *See Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005) ("The

unfettered possibility of fishing expeditions for hoped-for but nonexistent records would place an undue burden on public agencies.”). Once a public agency states affirmatively that it does not possess any existing responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Id.* If the requester establishes a *prima facie* case that records did or should exist, “then the agency may also be called upon to prove that its search was adequate.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n. 3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, Appellant made a *prima facie* showing that potentially responsive documents and images were in the Department’s possession as of March 28, 2019, by providing a copy of the Department employee’s letter created on that date. Because Appellant made a *prima facie* showing that some responsive public records may exist, the Department was required to explain the adequacy of the search it conducted to carry its burden of establishing that no responsive public records do exist. *See* KRS 61.880(2)(c); *City of Ft. Thomas*, 406 S.W.3d at 848 n.3.

On appeal, the Department explained:

That search consisted of reviewing the entirety of the electronic files wherein DHBC stores consumer complaints, as well as a review of all other electronic shared drives utilized by DHBC. The search was conducted using all dates, locations, and DHBC employee names referenced in the request, as well as the names of local Jessamine County inspectors. The search did not result in locating any responsive documents. DHBC’s Records Custodian then contacted Justin Kimes, the DHBC Field Inspector for Jessamine County, and Ric McNees, Mr. Kimes’ supervisor. Neither Mr. Kimes nor Mr. McNees had any responsive records in their possession. DHBC’s Records Custodian then contacted Duane Curry, formerly employed by DHBC as Deputy Commissioner and Building Codes Enforcement Director to determine whether he had any responsive records in his possession. On the date that the inspection of this property occurred, Mr. Curry was serving as Building Codes Enforcement Director, but his employment with DHBC ended on February 4, 2020. Mr. Curry informed DHBC that he was familiar with the inspection, and that he believed records were e-mailed to DHBC’s Staff Attorney. Mr. Curry also said he would check his e-mail and files for the inspection, but did not provide any responsive

documents to DHBC. DHBC's Staff Attorney had no responsive documents, e-mails, or records of any sort in his possession.

The Department further advised that "[n]either Mr. Curry nor Mr. Spicer are currently employed by DHBC, and no records responsive to Mr. Barber's requests, including the March 28, 2019 letter, are in DHBC's possession." The Department's current staff "does not know why this letter or any records referencing the site visit are not in its possession, only that they are not in fact in its possession."¹

In *Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011), the Kentucky Court of Appeals declared that "when it is determined that an agency's records do not exist, the person requesting the records is entitled to a written explanation for their nonexistence." Here, the Department has explained in writing the steps taken by staff to identify and locate any existing responsive public records it may have possessed. In so doing, the Department discharged its duty under the Act. KRS 61.880(1); KRS 61.880(2)(c).

Either party may appeal this decision may appeal it by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. 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 proceeding.

¹ Pursuant to KRS 61.8715, there is "an essential relationship between the intent of [the Open Records Act] and that of KRS 171.410 to 171.740, dealing with the management of public records[.]" Under KRS 171.680(1), "[t]he head of each state or local agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." In accordance with KRS 171.680, the Department has established a Records Retention Schedule. The Schedule indicates that complaints against Department licensees and Department investigations of alleged violations, or "case files," must be retained for three years after the case is closed. See *Department of Housing, Buildings and Construction Records Retention Schedule, Records Series 01401, Case Files*, available at <https://kdla.ky.gov/records/recretentionschedules/Documents/State%20Records%20Schedule%20s/kyhbc.PDF>. Nevertheless, the Department is unable to locate any existing records that fall within this Records Series. While a public agency's failure to comply with its Records Retention Schedule is not a violation of the Act, it may implicate areas of law outside of this Office's jurisdiction.

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/s/ Michelle D. Harrison

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Distributed to:

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