



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITAL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

**20-ORD-164**

October 15, 2020

In re: Donald Phillips/Office of the Secretary of State

**Summary:** The Office of the Secretary of State (“Secretary”) did not violate the Open Records Act (“the Act”) when it denied inspection of a record that did not exist.

***Open Records Decision***

On August 26, 2020, Donald Phillips (“Appellant”), requested from the Secretary a copy of three executive orders issued by former Governor Matthew Bevin. Specifically, he sought Executive Orders 2019-1026, 2019-1027, and 2019-1028. In a timely written response, the Secretary provided a copy of Executive Order 2019-1026 and Executive Order 2019-1028. However, the Secretary stated that “Executive Order 2019-1027 does not exist.” This appeal followed.

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 nor is a public agency required to “prove a negative” to refute a claim that certain records exist. *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.”). However, under KRS 61.880(1), a public agency that denies a request to inspect records must “include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” Thus, a public agency discharges its obligation to explain its denial when it clearly states that no responsive records exist. *See, e.g.*, 13-ORD-052. Once a public

agency states affirmatively that it does not possess any responsive records, then the burden shifts to the requester to make a *prima facie* showing that the requested records do exist. *Bowling*, 172 S.W.3d at 341. If the requester makes a *prima facie* showing that records 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).

Here, Appellant claims that the requested record should exist because executive orders are filed sequentially. Thus, because Executive Orders 2019-1026 and 2019-1028 where both filed in the Executive Journal, he claims that Executive Order 2019-1027 must have also been filed in the Executive Journal. Finding some merit in Appellant’s logic, this Office requested additional information from the Secretary. The Secretary responded that the orders were entered under a prior administration and that current employees have no personal knowledge as to why Executive Order 2019-1027 does not exist. The Secretary explained, however, that on occasion, governors have withdrawn executive orders that they had originally intended to file. In that instance, the executive order is neither filed nor made a part of the Executive Journal. Regardless, the Secretary reiterated that it had searched all potential locations for the requested executive order and its search was unfruitful. This Office finds that the Secretary conducted an adequate search, was unable to locate the record, and provided an adequate response explaining why the requested record may not exist. Accordingly, the Secretary did not violate the Act.

A party aggrieved by 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.

Daniel Cameron  
Attorney General

/s/Marc Manley  
Marc Manley  
Assistant Attorney General

#310

Distributed to:

Donald R. Phillips #149748

Jennifer Scutchfield, Assistant Secretary of State