



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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In re: Kevin Bunton/Department of Public Advocacy

Summary: Department of Public Advocacy (“Department”) did not violate the Open Records Act (“the Act”) when it did not provide a record that did not exist. An appeal filed prior to the expiration of an agency’s time to respond to an open records request is premature and consequently unperfected.

Open Records Decision

On August 11, 2020, inmate Kevin Bunton (“Appellant”) requested that the Department provide him “documentation as to the disposition” of his prior written request to the Department where he had sought assistance in obtaining his criminal case file from his private conflict counsel. The Department responded that it had forwarded Appellant’s correspondence to its Bowling Green office because “they would have better insight on [Appellant’s] case.” However, the Department informed Appellant that his private attorney would possess the file because he had been represented by a private attorney under contract with the Department to represent those with whom the Department has a conflict of interest. The Department further advised Appellant that he could pursue the matter against the attorney by filing a motion to compel in the appropriate court.

On August 24, 2020, Appellant sent a request to the Department’s Bowling Green office, again seeking any record relating to the disposition of his request for assistance with obtaining his file. Two months later, having received no response from the Bowling Green office, Appellant appealed to this Office.

On appeal, the Department asserts that it never received Appellant's request to the Bowling Green office, and consequently it issued no response. However, the Department states that if the request had been received, the Department would have responded with the same information it provided in response to Appellant's first request – that the Department does not possess the file because it did not represent Appellant.¹

The Department's response to the first request confirmed that the requested "documentation as to the disposition" of his request for assistance did not exist. Once a public agency states affirmatively that no responsive records exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Here, however, Appellant has not established a *prima facie* case that any other "disposition" of his request for assistance exists. Thus, the Department did not violate the Act in responding to Appellant's first request.

The Department asserts that it never received Appellant's second request. KRS 61.880(1) allows a public agency three business days to respond to an open records request. However, in response to the coronavirus pandemic, the General Assembly passed Senate Bill 150 ("SB 150"), which provides that during the state of emergency and "[n]otwithstanding KRS 61.872 and 61.880, a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8). SB 150 contained an emergency clause and immediately took effect on March 30, 2020, following the Governor's signature. Accordingly, the Department would have had ten days from the date on which it received Appellant's second request to issue a written response.

Although the Attorney General has the duty to resolve disputes concerning access to public records under KRS 61.880(2), it is incumbent on the complaining party to provide the Attorney General with a copy of the written request and the agency's written denial, if any. *See* KRS 61.880(2)(a). Under 40 KAR 1:030 § 1, "[t]he Attorney General shall not consider a complaint that fails to conform to ... KRS

¹ The Department asserts that it has offered its assistance to the conflict attorney in copying his file for Appellant, but the Department itself cannot take possession of the file due to the same ethical considerations that gave rise to the conflict that necessitated the contract for outside representation.

61.880(2), requiring the submission of a written request to the public agency and the public agency's written denial, if the agency provided a denial."

Because the Department had not received Appellant's second request prior to the filing of this appeal, the appeal was premature and consequently unperfected as to the second request. Therefore, this Office cannot consider this appeal insofar as it relates to the August 24 request.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to 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
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/s/ James M. Herrick

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