



COMMONWEALTH OF KENTUCKY
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21-ORD-037

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In re: Lawrence Trageser/Justice and Public Safety Cabinet

Summary: The Justice and Public Safety Cabinet (Cabinet) did not violate the Open Records Act (“the Act”) when it denied a request for records that do not exist in its possession.

Open Records Decision

Lawrence Trageser (“Appellant”) requested from the Cabinet a copy of a sexual harassment investigation file based on a report of sexual harassment against a former Kentucky State Police Commissioner in the late 1990s to early 2000s. The Cabinet denied the Appellant’s request because the records do not exist in the agency’s possession. The Cabinet also directed the Appellant to the records custodians for the Kentucky State Police and Kentucky Personnel Cabinet.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urb. Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant provides a decision from this Office, rendered in 2002, in which the Office held that this particular sexual harassment investigation file was subject to public inspection. *See* 02-ORD-231. According to the Appellant, this proves that the sexual harassment investigation occurred and records were created in connection with that investigation.

Although the Appellant has made a *prima facie* showing that responsive records may have existed in 2002, more than eighteen years have elapsed since that decision. The Cabinet claims that it “does not maintain personnel files for all employees in the departments under its umbrella as a cabinet,” especially personnel files as old as the one the Appellant seeks. Therefore, the Cabinet directed the Appellant to the records custodians for agencies more likely to possess the requested records. *See* KRS 61.872(4) (“If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.”). In doing so, the Cabinet discharged its duty under the Act.

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 proceedings.

Daniel Cameron
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/s/Marc Manley
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Assistant Attorney General

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Distributed to:

Lawrence Trageser
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