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**21-ORD-046**

March 15, 2021

In re: Samuel Hayward, Jr./Kentucky Labor Cabinet

**Summary:** The Kentucky Labor Cabinet (“Cabinet”) did not violate the Open Records Act (“the Act”) when it provided records that were responsive to a request.

***Open Records Decision***

Samuel Harward, Jr. (“Appellant”) asked to inspect certain unemployment records spanning a period time that ended in June of 2020. *See* 21-ORD-014.<sup>1</sup> On February 4, 2021, he sent another request to the Cabinet seeking the same type of records for the period spanning from November of 2020 to January of 2021. In his second request, the Appellant also sought the “total number” of claimants who were receiving certain messages from the Cabinet’s online unemployment insurance portal. The Appellant refers to all of these records as “updated numbers.” In a timely response, the Cabinet provided the Appellant with duplicate copies of those records originally provided to him in November, and claimed there had been no updates to these records since that time. The Appellant now challenges the Cabinet’s alleged failure to “provide an updated response.”

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<sup>1</sup> In that previous request, the Appellant sought the “total amount of sick days that unemployment referees had taken since June 2020, and the total amount of claimants who have been found eligible for benefits, but who have not yet received a single payment.” 21-ORD-014, p.1-2 (quotations omitted). This Office held that those requests sought information, not records, and that the Cabinet properly denied that portion of the request on that basis.

These requests, which seek the “updated numbers,” are requests for information. *See* 21-ORD-014. The Act does not require public agencies to fulfill requests for information. KRS 61.872; *Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) (“The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.”).<sup>2</sup> Regardless, the Cabinet claims that there are no documents responsive to the Appellant’s request because it has not “updated” the numbers.

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 Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). The Appellant has failed to make a *prima facie* showing that the records he has requested actually exist. The Appellant has not pointed to any statute or regulation that requires the Cabinet to maintain a record that compiles the statistical number of open unemployment cases, the “number of claimants” who receive a certain messages from the Cabinet’s unemployment insurance portal, the “number of claimants waiting on back payment forms to be processed,” or the aggregate number of approved or disqualified claimants.<sup>3</sup> While that may be wise policy or practice, especially given the significant public interest in the Cabinet’s administration of unemployment benefit applications, the Act certainly does not require the Cabinet to compile such information. Therefore, the Cabinet did not violate the Act when it denied the Appellant’s request for “updated numbers” because no such record exists in the Cabinet’s possession.

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<sup>2</sup> In 21-ORD-014, this Office found that the Cabinet had no duty to honor a request that sought information, there “numbers,” rather than public records. However, the Cabinet now claims “[a]t the time of the November 5th Request [*sic*], a record was created via an e-mail that was responsive to the request.” The Cabinet maintains that it produced that email, which presumably contained the numbers that the Appellant seeks. But since that time, the Office of Unemployment Insurance “did not update this record, nor does it keep these types of records in the normal course of business.” Therefore, from this record, it appears that the Cabinet previously created the requested statistical computations, but there is no evidence that the Cabinet has updated that statistical information or that such information is reflected in a public record.

<sup>3</sup> KRS 341.190(4)(g) authorizes the Cabinet to share “statistical information derived from information and records obtained or made by” the Cabinet with the Bureau of Labor Statistics. However, this statute places no affirmative duty on the Cabinet to compile such statistical information.

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  
Attorney General

/s/Marc Manley  
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Distributed to:

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