



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

21-ORD-132

July 21, 2021

In re: Levi Henson/Justice and Public Safety Cabinet

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

Open Records Decision

On June 12, 2021, Levi Henson (“Appellant”) asked the Cabinet’s records custodian to provide a copy of the 2019 list of licensed polygraph examiners required to be published under KRS 329.090. Additionally, the Appellant requested a copy of the license, required to be displayed in a licensee’s place of business under KRS 329.050, of a specifically identified polygraph examiner. In response, the Cabinet advised that it “does not retain the requested listing or licenses of the polygraph examiners.” The Cabinet provided the Appellant with the name, address, telephone number, and e-mail address of the records custodian for the Kentucky State Police (“KSP”), which maintains records relating to licensed polygraph examiners.¹ This appeal followed.

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 in the agency’s possession. *Bowling v. Lexington-Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant argues that the Cabinet should possess records relating to the licensure of polygraph examiners because KRS 329.090 requires the Cabinet

¹ The Cabinet further provided the Appellant with the address of the McCracken County Clerk, as KRS 329.090 requires a copy of the list of polygraph examiners to “be held by [each] county clerk as a public record.”

to publish an annual list of licensees and provides that “[s]uch list shall . . . be mailed by the cabinet to any person in the Commonwealth upon request.” While that statute might serve as *prima facie* evidence that the Cabinet should possess the requested list, the Cabinet has explained that KSP, a department within the Cabinet, maintains the records relating to polygraph examiner licensure. On appeal, the Cabinet further explains that its only involvement in the licensure process is to sign the licenses, attach a seal, and return them to KSP, which processes the licenses and publishes and maintains the required list. This information is sufficient to rebut a *prima facie* case that the Cabinet’s records custodian should possess the requested records.

Under KRS 61.872(4), “[i]f 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.” The Appellant addressed his application to the Cabinet’s records custodian, who does not maintain the requested records. By providing the name and location of KSP’s records custodian, the Cabinet complied with KRS 61.872(4). Thus, the Cabinet did not violate the Act in its disposition of the Appellant’s 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 proceedings.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

#197

Distributed to:

Mr. Levi Henson
Jason C. Reynolds, Esq.
Ms. Deanna Smith