



COMMONWEALTH OF KENTUCKY
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21-ORD-217

November 18, 2021

In re: Jeana Banks/Office of Unemployment Insurance

Summary: The Office of Unemployment Insurance (“OUI”) 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 August 7, 2021, and again on September 14, 2021, Jeana Banks (“Appellant”) requested that OUI provide “all records regarding [her] attempted claim for unemployment insurance benefits.” In 21-ORD-203, this Office determined that OUI did not timely respond to those requests. After that appeal was initiated, OUI provided the Appellant with a copy of her complete unemployment insurance file.

After receiving her complete file, on October 11, 2021, the Appellant renewed her request and claimed that OUI had failed to provide “copies of the correspondence [she] received from” OUI or “any of the dozens of communications [she] sent to” a specific former employee of the Benefits Branch. After OUI asked the Appellant to clarify her use of the word “correspondence” in her request, the Appellant stated that the “correspondence” she sought was a “Money Determination” dated June 9, 2021. OUI then explained that the “Money Determination” was included in the file that OUI had already sent to her. Moreover, OUI further stated that none of the Appellant’s communications to the specified employee existed because the employee’s e-mails were “purged” after she left the Benefits Branch.¹ This appeal followed.

¹ However, OUI located, and provided to the Appellant, one page of an employee’s notes relating to the Appellant’s claim.

Once a public agency states affirmatively that it does not possess any additional responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the agency's possession. *Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant merely asserts that she corresponded with the identified former employee, but OUI states that any such correspondence was deleted when the employee left the OUI.² Accordingly, to the extent that the Appellant has established a *prima facie* case that the requested records should exist, OUI has explained why no responsive records exist in its possession. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (noting that if sufficient evidence exists to conclude that responsive records have been destroyed then the requester is entitled to an explanation of the reason for such destruction). Therefore, OUI did not violate 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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

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² According to the State Agency Records Retention Schedule, Series M0002, *available at* <https://kdla.ky.gov/records/recretentionschedules/Documents/State%20Records%20Schedules/kystateagency.pdf> (last accessed Nov. 9, 2021), "Routine Correspondence/Messages" such as "documents [relating to] day-to-day activities, including but not limited to: customer/constituent service, procurement, or internal communication" and "outgoing correspondence that may consist of: letters, notes, postcards, memoranda, announcements, or information commonly found in the body of e-mail messages and/or any attachments" are to be retained "no longer than two (2) years." There is no mandatory minimum retention period for such records.

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Distribution:

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