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21-ORD-218

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In re: Adam Johnson/Department of Workplace Standards

Summary: The Department of Workplace Standards ("the Department") did not violate the Open Records Act ("the Act") when it did not perform research, create a new record, or grant inspection of records that do not exist in its possession.

Open Records Decision

On September 23, 2021, Adam Johnson ("Appellant") requested "to obtain or inspect . . . public documents," which he described as "statistical information." Specifically, the Appellant requested "[t]he number of [Department] employees which [*sic*] engage in [certain] activities," including investigating workplace safety complaints and reports of retaliation and conducting random inspections of workplaces, and the total number of employees employed by the Department. Additionally, the Appellant requested "[t]he number of complaints received by [the Department] relating to Covid-19 safety measures in the workplace for the last two (2) years"; "[t]he number of workplace retaliation claims [received by the Department] in the last two (2) years"; and "[t]he number of agency actions enforcing an employee's right to not be retaliated against for reporting to the [Department] in the last two (2) years." The Department denied the request on the grounds that it was a request for information and did not "precisely describe" records that were "readily available" under KRS 61.872(3)(b). This appeal followed.

The Act does not require public agencies to provide information. Rather, the Act requires a public agency to make public records available for inspection. 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."). This Office has

previously construed requests that seek the "total amount" of various things as requests for information, *i.e.*, a number, as opposed to a request to inspect identifiable public records. *See, e.g.*, 21-ORD-014; 21-ORD-046. Here, the Appellant did not seek personnel records, but rather, the total number of Department employees. He also did not seek specific complaints, but rather, the total number of such complaints. These requests seek information, not access to identifiable public records.

On appeal, the Appellant argues that the Department should possess records from which the requested information can be obtained, and that therefore he is entitled to the information. However, the Act does not obligate a public agency "to respond to questions [or] requests for research." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 856 (Ky. 2013) (quoting *Jimenez v. Executive Office for U.S. Attorneys,* 764 F.Supp.2d 174, 182 (D.D.C. 2011)); *see also* OAG 89-45; 00-ORD-130; 14-ORD-013. Accordingly, the Department was only obligated to honor the Appellant's request to the extent that the Appellant described an existing record in the Department's possession containing the "statistical information" he requested.

On appeal, the Department states that it has located a record which includes the number of employees who investigate workplace safety complaints and reports of retaliation and has provided that record to the Appellant. That portion of the appeal is therefore moot. 40 KAR 1:030 § 6. However, as to the other statistical information requested by the Appellant, the Department states that it possesses no responsive records. 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 Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005).

The Appellant argues that a record stating the total number of persons employed by the Department, and the number of employees who conduct random inspections of workplaces, should exist because the Department "is required to keep payroll information" under 803 KAR 1:066 §2 and under federal law. But while the Appellant cites regulations that require employers to keep certain payroll information about individual employees, the Appellant does not point to any statute or regulation requiring the payroll information to include the specific statistics he requested. The Appellant further argues that "outdated" versions of this information appear in a federal audit from 2018. However, this does not prove that the Department maintains a document with a current version of the information. Therefore, the Appellant has not

established a *prima facie* case that records responsive to this part of his request exist in the Department's possession.

Additionally, the Appellant argues that the Department should possess a document stating the number of complaints received in the last two years relating to Covid-19 safety measures because KRS 338.161(1) requires the Department to "develop and maintain a program of collection, compilation, and analysis of occupational safety and health statistics." But KRS 338.161(1) does not require that this compilation include the number of workplace complaints that relate to Covid-19 safety measures. Furthermore, the Department states that the relevant database, OSHA Express, "does not separate which complaints are 'related' to COVID-19 and which are not." Thus, to arrive at the number requested by the Appellant, the Department would have to review every complaint received in the last two years and create a new record containing the requested information. The Act does not require this. *See, e.g., Eifler,* 436 S.W.3d at 534; *City of Ft. Thomas,* 406 S.W.3d at 856.

Finally, the Appellant alleges that the Department had "admitted" in a previous appeal, 20-ORD-091, that it keeps a database of complaints related to Covid-19 workplace safety measures. However, the records at issue in that decision were complaints made to the Covid-19 Reporting Hotline regarding alleged non-compliance with the Governor's executive orders related to workplace restrictions during the pandemic. The records at issue here, according to the Department, are maintained in the OSHA Express database, which this Office considered in 20-ORD-197. The Department explains that the Covid-19 Reporting Hotline database is completely separate from OSHA Express and that OSHA Express does not categorize complaints regarding workplace safety based on whether the complaint relates to Covid-19. The Department claims that, to obtain the total number of Covid-19 related workplace complaints, it would be required to independently review every complaint submitted in the last two years, determine whether it related to Covid-19, and then create a record containing the total tally. Therefore, the Appellant has not established a *prima facie* case that the Department possesses a record that already contains the number of complaints it received relating to Covid-19 safety measures.

As for the remainder of the Appellant's request, the Appellant has not attempted to make a *prima facie* case that the Department possesses records containing the number of claims or enforcement actions relating to workplace retaliation in the last two years. Therefore, the Department did not violate the Act by failing to grant access to such records.

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 accepts notice of the complaint through e-mail to OAGAppeals@ky.gov.

Daniel Cameron
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/s/ James M. Herrick

James M. Herrick
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