



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-232**

November 24, 2021

In re: Lynette Warner/Graves County School District

**Summary:** The Graves County School District (“the District”) did not violate the Open Records Act (“the Act”) when it did not provide records that did not exist at the time it received a request to inspect such records. This Office lacks jurisdiction over the Appellant’s Open Meetings Act appeal because her complaint does not comply with KRS 61.846.

***Open Records Decision***

On October 21, 2021, Lynette Warner (“the Appellant”) submitted a request to the District seeking a copy of the District’s meeting minutes for the meeting that had occurred two days prior on October 19, 2021. In a timely response, the District denied the request and stated that the minutes had not yet been approved, but that the minutes would be approved at the District’s meeting in November. This appeal followed.

The District denied the Appellant’s request because the October 19, 2021 meeting minutes had not yet been approved as of the date of the Appellant’s request on October 21, 2021. Thus, the District denied the request because the requested records did not yet exist. Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, to make her *prima facie* case, the Appellant claims that under KRS 61.835, a provision of the Open Meetings Act, the District was required to approve the October 19, 2021 meeting minutes at its next meeting. The District's next meeting was scheduled for October 28, 2021. But the Appellant submitted her request on October 21, 2021, before the District's next meeting. Thus, she has not presented a *prima facie* case that the requested minutes should have existed at the time of her request. Accordingly, the District did not violate the Open Records Act when it did not provide records that did not exist at the time of the request.

As part of her appeal, the Appellant also claims that the District violated the Open Meetings Act by failing to approve the October 19, 2021 meeting minutes at its October 28, 2021 meeting. However, this Office lacks jurisdiction to consider the Appellant's Open Meetings Act complaint. A person seeking to enforce the Open Meetings Act must first submit her "written complaint to the presiding officer of the public agency suspected of the violation. The complaint shall state the circumstances which constitute an alleged violation of [the Open Meetings Act] and shall state what the public agency should do to remedy the alleged violation." KRS 61.846(1). The terms "suspected" and "remedy," which connote past events, suggest that the alleged violation must have already occurred prior to the submission of the complaint.

Here, the Appellant sent an email to the District *before* its October 28, 2021, meeting and, citing KRS 61.835, she *directed* the District to approve the minutes at that meeting. Thus, if this email could even be considered a "complaint" under KRS 61.846(1), it was a preemptive complaint. Moreover, the Appellant does not provide the District's response to her preemptive complaint.<sup>1</sup> And before this Office may exercise jurisdiction to review a complaint alleging violations of the Open Meetings Act, the complainant must provide a copy of the original complaint and the public agency's response. KRS 61.846(2); *see also Univ. of Ky. v. Hatemi*, Case No. 2019-CA-0731, 2019-CA-0794, 2021 WL 5142666 at \*9 (Ky. App. Nov. 2, 2021) (not yet final). Accordingly, this Office lacks jurisdiction to consider the Appellant's Open Meetings Act complaint.

---

<sup>1</sup> Although the Appellant submitted two preemptive complaints to the District, one to the presiding officer and one to the records custodian, the only response contained in this record is that of the District's records custodian thanking the Appellant for providing the statute. The records custodian further stated that the minutes would be available after the November meeting. The Appellant does not include a response from the presiding officer of the District, and her preemptive complaint to the District's records custodian did not comply with KRS 61.846.

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 emailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

/s/Marc Manley  
Marc Manley  
Assistant Attorney General

#341

Distributed to:

Lynette Warner  
Jesse E. Wright