



COMMONWEALTH OF KENTUCKY
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22-ORD-003

January 5, 2022

In re: Mary Talbott/Kentucky Labor Cabinet

Summary: The Kentucky Labor Cabinet (“the Cabinet”) violated the Open Records Act (“the Act”) when it initially did not adequately search for all records responsive to a request submitted under the Act. The Cabinet has subsequently remedied its violation on appeal. The Cabinet’s initial response to the request was timely.

Open Records Decision

On November 8, 2021, Mary Talbott (“the Appellant”) requested various records from the Cabinet related to her client’s unemployment insurance claim. On November 16, 2021, the Cabinet issued its response granting the request, but it was unable to email responsive records to the Appellant due to the size of the electronic file. Instead, the Cabinet mailed a flash drive containing the responsive records to the Appellant. After reviewing the records provided by the Cabinet, the Appellant emailed the Cabinet and described various records that she believed existed in the Cabinet’s possession but were not provided. The Cabinet then conducted a second search and located additional records the Appellant had described. This appeal followed.

The Appellant claims that the Cabinet’s November 16, 2021 response was untimely. Upon receiving a request to inspect records, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” KRS 61.880(1). Here, the Cabinet received the Appellant’s request on November 8, 2021. Thursday, November 11, 2021, was Veteran’s Day, which is a federal and state holiday. Thus, the fifth business day after November 8, 2021, was

November 16, 2021, the day the Cabinet issued its response. Accordingly, the Cabinet timely responded to the Appellant's request.

The Appellant also claims that the Cabinet has failed to provide all records responsive to the request. Upon receiving notice of the appeal, the Cabinet searched a third time for responsive records and found yet more records, and provided them to the Appellant. The Cabinet claims that, after its third search, it has now provided all responsive records and that no other responsive records 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, after the Cabinet conducted its first search, the Appellant described records she believed existed in the Cabinet's possession. Upon conducting a second search, the Cabinet located such records and provided them to the Appellant. On appeal, the Appellant claimed yet more records existed, and after a third search, the Cabinet provided yet more responsive records. Thus, the Appellant established a *prima facie* case that the Cabinet possessed additional records, because the Cabinet subsequently confirmed the existence of such records. The Cabinet has not explained the steps it initially took to search for such records, and given that additional records were located each time the Cabinet conducted a subsequent search, the Cabinet's first search was "inadequate." Thus, it violated the Act. Nevertheless, the Cabinet has continued to search for records and has to date provided approximately 800 pages of responsive records. The Appellant has not presented a *prima facie* case that, following the Cabinet's third search, additional records exist. And this Office has historically declined to adjudicate factual disputes between the parties about whether additional records exist and were not provided. *See, e.g.*, 19-ORD-083. Accordingly, this Office cannot find that the Cabinet has failed to provide all responsive records in its possession.

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

22-ORD-003

Page 3

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/Marc Manley
Marc Manley
Assistant Attorney General

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Distribution:

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