



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

22-ORD-035

February 23, 2022

In re: Chad Heath/Kentucky Finance and Administration Cabinet

Summary: The Kentucky Finance and Administration Cabinet (the “Cabinet”) did not violate the Open Records Act (“the Act”) when it issued a written notice to the requester containing the name and address of an agency the Cabinet believed to be the correct custodian of records.

Open Records Decision

Chad Heath (“Appellant”) submitted two requests to the Cabinet for “[a]n up to date and valid copy of [two] elected public official[s] [p]ublic [o]fficial [b]ond.” Each of the two requests named a specific judge and the Appellant indicated that the information he seeks may also be known as [s]urety, [b]lanket, [p]erformance and etc.” In a timely written response, the Cabinet confirmed receipt of the Appellant’s requests and advised that the “normal custodian of that information is not the” Cabinet. The Cabinet then stated it “believe[s] [the Appellant’s] request should be sent to the Administrative Office of the Courts.” The Cabinet then provided the name of the Administrative Office of the Courts’ records custodian, an address, and a phone number. This appeal followed.

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.” This Office has routinely found that a public agency complies with KRS 61.872(4) when it directly issues written

notice to requester with the name and address of the correct agency's custodian of records. *See, e.g.*, 22-ORD-002; 21-ORD-132; 21-ORD-040.

Here, when the Appellant submitted his request to the Cabinet, it issued a written response that explained it does not have custody or control of the requested public records. Moreover, the Cabinet furnished the contact information of the records custodian of the public agency that the Cabinet believed maintains the records requested. Although the Cabinet correctly claimed that it was not the official custodian of the requested judicial bonds, it incorrectly believed that the Administrative Office of the Courts was the official records custodian of the records. As explained in 22-ORD-033, all bonds secured for judicial officers must be filed with the Secretary of State. KRS 62.200(2). Thus, the Secretary of State is the official custodian of the requested records. Because the Cabinet notified the Appellant pursuant to KRS 61.872(4) that it was not the official custodian of records, and attempted to provide contact information for the agency the Cabinet believed was the official custodian of the records, it did not violate the Act.¹

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.

¹ On appeal, the Cabinet claims it contacted its State Risk and Insurance Services unit. The Cabinet claims that this unit does have custody of "some bond documents" but that the unit has "no responsive documents specific to the two judges identified in the requests." This is not surprising, since the Secretary of State is the official custodian of the requested records. KRS 61.200(2). 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). The Appellant is unable to make a *prima facie* case that the Cabinet should possess the requested records because state law requires the requested bonds to be filed with the Secretary of State.

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Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Chad Heath
Cary B. Bishop