



COMMONWEALTH OF KENTUCKY
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22-ORD-154

July 21, 2022

In re: Bradford McClain/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services (the “Cabinet”) violated the Open Records Act (“the Act”) when it failed to respond to a request under the Act within five business days. The Office cannot resolve factual disputes about whether all records responsive to a request have been provided.

Open Records Decision

On May 4, 2022, Bradford McClain (“Appellant”) mailed a request to the Cabinet to obtain copies of all case files, including interviews, evidence, findings, and court documents, related to a specific minor child. On June 22, 2022, having received no response from the Cabinet, the Appellant initiated this appeal.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). Here, the Cabinet did not respond to a request under the Act within five business days, a violation of the Act.¹

On appeal, the Cabinet responds and claims to have provided all documents responsive to the Appellant’s request that exist within its possession. The Cabinet now claims that the appeal is moot since it has made the records available to the Appellant. Under 40 KAR 1:030 §6, “[i]f the requested documents are made available

¹ Although the record does not indicate when the Cabinet received the Appellant’s request, the Cabinet does not dispute that it failed to issue a timely response.

to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.” However, the Appellant disagrees with the Cabinet’s assertion that all records have been provided to him. Specifically, the Appellant claims that records related to an interview of the child are missing. Thus, this appeal is not moot.

Here, the Cabinet claims that all responsive records that currently exist within its possession have been provided to the Appellant.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).

Here, to make a *prima facie* case, the Appellant provides multiple pages of records related to the ongoing legal issues he is currently experiencing concerning a minor child.³ Although the records indicate that a Cabinet social worker spoke to the child, the child’s answers to the questions are documented in the report. The Appellant does not direct this Office to a statute or regulation requiring the Cabinet to document its interview with the minor child in a particular way. The Office is unable to resolve the factual dispute about whether the case report that has been provided contains the specific interview that has been requested. *See, e.g.*, 19-ORD-083 (stating this Office cannot “resolve the factual dispute between the parties regarding the disparity between records which have been provided and those sought but not provided”). Accordingly, this Office cannot find that the Cabinet failed to provide all responsive records that are in its possession.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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

² The Cabinet also expects to create a final report regarding the matter and will provide that final report to the Appellant “in the near future.” It is not clear whether this final report will contain the interview the Appellant seeks.

³ The records the Appellant provides do not appear to be the full case report provided by the Cabinet. Instead, they are a mixture of documents containing the Appellant’s own statements, sections of the case report, medical records, and other general reference material. Thus, it appears as though the Appellant has not provided a copy of all the records he received from the Cabinet.

any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Bradford McClain
Peyton Sands