



COMMONWEALTH OF KENTUCKY
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22-ORD-185

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In re: Kurt Wallace/Office of the Secretary of State

Summary: The Office of the Secretary of State (“Secretary”) did not violate the Open Records Act (“the Act”) when it could not provide records that do not exist in its possession.

Open Records Decision

Kurt Wallace (“the Appellant”) asked to obtain copies of various records relating to any travel by the Secretary to Washington D.C. during May, June, and July of 2022. The Appellant described such records to include travel itineraries, flight information, and meeting materials related to any meetings the Secretary allegedly attended. In a timely response, the Secretary responded and stated that the Secretary had not traveled to Washington D.C. during the requested period and therefore no responsive records existed. This appeal followed.

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, the Appellant has not presented a *prima facie* case that responsive records should exist. The Appellant presents no evidence to refute the Secretary’s

claim that he did not travel to Washington D.C. in May, June, or July of 2022.¹ Accordingly, the Secretary did not violate the Act.

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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Kurt Wallace
Jennifer Scutchfield

¹ Rather, the Appellant provides almost 60 pages of documents wholly unrelated to the Act, and makes various claims that his constitutional rights have been violated. The Office's mandate under the Act is to review a requester's request to inspect records and the agency's response thereto, and to decide whether the agency violated the Act. KRS 61.880(2)(a). The Office cannot decide ancillary questions of law in appeals brought under KRS 61.880. *See, e.g.*, 22-ORD-091 (declining to consider a requester's claim that a county attorney failed to comply with the Foreign Agents Registration Act).