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**22-ORD-190**

September 13, 2022

In re: Kurt Wallace/Kentucky Finance and Administration Cabinet

**Summary:** The Kentucky Finance and Administration Cabinet (the “Cabinet”) violated the Open Records Act (“the Act”) when it did not initially respond to two of three subparts to a request to inspect records. However, the Cabinet did not violate the Act when it provided all responsive records that exist within its possession.

***Open Records Decision***

Kurt Wallace (“Appellant”) submitted a request to the Cabinet for three categories of records related to the Oldham County Circuit Court Clerk (“the Clerk”), which he believed would be in the Cabinet’s possession. Specifically, the Appellant requested a copy of any employment contracts, the “power of attorney given to bond holder [sic]”, and any liability insurance policies related to the Clerk. The Cabinet responded to the Appellant’s request and provided four pages of documents responsive to his request for insurance policies. However, the Cabinet’s response did not address the Appellant’s request for a copy of any employment contracts or the power of attorney. This appeal followed.

Under KRS 61.880(1), upon receiving a request for records under the Act, 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.” Here, the Cabinet confirmed receipt of the Appellant’s request on August 10, 2022. But the Cabinet only provided documents responsive to the Appellant’s request for insurance records and did not address the other two categories of records the Appellant

requested. Thus, the Cabinet violated the Act when it failed to fully respond to the Appellant's request.

After the Appellant initiated this appeal, the Cabinet issued two additional responses, on August 18 and 22, and provided 53 additional pages of records responsive to the Appellant's request for insurance policies. The Cabinet claims these were in response to what it calls the Appellant's "supplemental" request, which was in fact an email the Appellant sent the evening he received the Cabinet's response asking why the Cabinet had failed to provide copies of the requested employment contract and the power of attorney. In its follow up response on August 18, the Cabinet stated affirmatively that no employment contract or power of attorney related to the Clerk existed in the Cabinet's possession.

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't*, 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 attempted to make a *prima facie* case that the Cabinet should possess a copy of an employment contract related to the Clerk, who is an elected official and not an employee under contract, or that the Cabinet should possess a power of attorney related to the bond secured on behalf of the Clerk. Therefore, the Cabinet did not violate the Act when it provided all responsive records that exist within 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 any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to [OAGAppeals@ky.gov](mailto:OAGAppeals@ky.gov).

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

s/Matthew Ray  
Matthew Ray  
Assistant Attorney General

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Distributed to:

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