



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-226

October 25, 2022

In re: Wayne and Vivian Miles/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 issue a response either granting or denying a request within five business days, and when it failed to explain the adequacy of its search for responsive records. However, the Cabinet did not violate the Act when it withheld records under KRS 620.050(5).

Open Records Decision

On July 13, 2022, Wayne and Vivian Miles (“Appellants”) submitted the first of three requests for records to the Cabinet. Their first request was for “any investigation records or other reports, records of any hearings conducted or meetings” as well as “[r]ecords of visits” related to “Brighter Future TFC” or the Appellants. On the same day, the Cabinet asked the Appellants to supply the “[p]rovider [n]umber” so that it could obtain “records from the correct agency.” The Cabinet also advised the Appellants to provide more “specificity,” otherwise they may find themselves “flooded with needless paper, or [the Cabinet] may have to decline to respond to [the] request because documents are too voluminous.” The Cabinet, however, neither granted nor denied the Appellant’s first request.

Over the following weeks, the Appellants submitted several emails to the Cabinet inquiring about the status of their request. On August 23, 2022, after the Appellants again asked the Cabinet for an update, the Cabinet advised that their original request “may have gotten lost in the shuffle” and that the Appellants should re-submit their request because “a new request will get some attention.”

On August 31, 2022, the Appellants submitted two additional requests to the Cabinet. First, they requested emails from 2019 between the Cabinet and several specifically identified people, including the Commonwealth's Attorney in Fayette County. Second, the Appellants sought records of any meetings between the Cabinet and the Executive Director of "Brighter Futures TFC" in 2019. The Appellants also asked for all emails sent or received in 2019 by a Cabinet employee with the same name as the Executive Director. Over the following weeks, the Appellants and the Cabinet exchanged several emails concerning the records. On September 26, the Appellants appealed to this Office, claiming they have yet to receive any records from the Cabinet.

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). Alternatively, a public agency may delay access to the records if the records are in "active use, storage, or are otherwise unavailable." KRS 61.872(5). However, when a public agency invokes KRS 61.872(5), it must notify the requester of the "earliest date on which the public record will be available" and give a "detailed explanation" of the cause of the delay.

Here, the Cabinet responded to the Appellants' first request the same day it was received, but the Cabinet neither granted nor denied the request. Rather, the Cabinet asked the Appellants to give "[p]rovider [n]umber(s)" and suggested they consider narrowing their request. But the Cabinet did not expressly deny the request, or state an exemption and explain how it applied to deny the request. Accordingly, the Cabinet violated KRS 61.880(1) when it failed to notify the Appellants within five business days whether their request had been granted or denied.

After the appeal was initiated, on October 12, 2022, the Cabinet issued a formal response from its attorney and provided 67 pages of responsive records. Now the Cabinet states it has provided all responsive records that exist within its possession that are not otherwise excluded from inspection. However, the Cabinet denied the Appellants access to 15 messages because the messages are confidential under KRS 620.050(5) and therefore excluded from inspection under KRS 61.878(1)(k) and (l).¹ However, the Appellants claim the Cabinet has not provided all responsive records and that additional records should exist.

¹ The Cabinet asks the Office to consider the appeal moot because it claims it has provided all records it possesses that are responsive to the Appellants' request. Under 40 KAR 1:030 § 6, "[i]f the requested documents are made available to the complaining party after a complaint is made, the

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 Appellants claim the Cabinet has failed to address their request for emails to or from the Cabinet employee sharing the name of the Executive Director.² The Appellants had identified that employee’s state email address, and requested all the emails sent to or received by that email address in 2019. To make their *prima facie* case that at least some responsive emails exist, the Appellants provide an email from that specific Cabinet employee from 2019 that they received in response to another open records request.³ This is sufficient to show that the employee email account the Appellants specified was active in 2019 and sent and received messages, and therefore, the burden shifts to the Cabinet to explain the adequacy of its search. But the Cabinet has not explained the parameters of its search at all, and thus, has not sufficiently explained its adequacy. Accordingly, the Cabinet violated the Act when it did not conduct an adequate search for that employee’s emails.⁴

Finally, the Cabinet withheld 15 responsive messages because the records are confidential under KRS 620.050(5), which states a “report of suspected child abuse, neglect, or dependency and all information obtained by the cabinet or its delegated representative, as a result of an investigation or assessment made pursuant to this

Attorney General shall decline to issue a decision in the matter.” The Cabinet has withheld 15 records from the Appellant, so it has not provided all the requested records. Additionally, the Appellants contest the Cabinet’s withholding of the additional 15 responsive records. This appeal is not moot.

² They also claim not to have received records in response to an oral request they had made. However, the Office does not have jurisdiction to review oral requests for records and declines to consider this aspect of their appeal. See 22-ORD-215.

³ From the email the Appellants provide, the Cabinet employee stated she was confused why certain information was being sent to her. Although unclear, perhaps the confusion stems from the fact the Executive Director of Brighter Futures (which appears to be the actual target of the Appellants’ request) shares the same name with this employee. Regardless, the Appellants requested all emails from that employee’s email account in 2019.

⁴ The Appellants also requested emails between three other Cabinet employees, but only for emails exchanged in August and September 2019. Unlike the employee who shares the name with the Executive Director, the Appellants have not made a *prima facie* case that these three other employees existed or that they sent or received emails in August and September 2019.

chapter . . . shall not be divulged to anyone” except to those people listed in KRS 620.050(6).⁵ Here, the Cabinet claims KRS 620.050 applies to these 15 messages because they “consist[] of information on a child placed at Brighter Futures by the Department for Community Based Services.” Accordingly, they contain “information obtained by the cabinet . . . as a result of an investigation or assessment” under KRS Chapter 620. The Appellants have not presented any evidence that they are among the individuals permitted to review such information under KRS 620.050(6). *See, e.g.*, 20-ORD-161 (a person who was previously suspected of causing dependency, abuse, or neglect was entitled to inspect the records under KRS 620.050(6)). Accordingly, the Cabinet did not violate the Act when it withheld records that are confidential under KRS 620.050(5).

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.

Daniel Cameron
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Wayne and Vivian Miles
Joan Deaton Grefer
Peyton Sands
David T. Lovely

⁵ KRS 620.050(5) is incorporated into the Act under KRS 61.878(1)(l) which exempts from inspection “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]”