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-235

November 3, 2022

In re: Larry Stallard/Department of Criminal Justice Training

Summary: The Department of Criminal Justice Training ("the Department") did not violate the Open Records Act ("the Act") when it did not provide records that are not in its possession.

Open Records Decision

Larry Stallard ("the Appellant") sent multiple requests to the Department to inspect various records related to the training of coroners. Relevant to this appeal, he sought copies of training materials used to teach and certify individuals as qualified to perform "post-mortem examinations" in 2019. He also sought records certifying the Madison County Coroner and his deputies were authorized to perform "post-mortem examinations" in 2019. In a timely response, the Department provided 313 records responsive to the request (including transcripts of the training histories of the specified coroner and his deputies), but claimed it did not possess training materials from more recent years.[1] The Department explained that much of its training is conducted by private individuals who do not share their training materials with the Department. Instead, the Kentucky Association of Coroners screens and approves trainings that would permit an individual to qualify to perform a post-mortem examination.

[1] The Appellant also complains that the Department provided irrelevant records, such as training materials from the 1980s. But the Appellant did not specify which years of training materials he wanted to inspect. Instead, the Appellant specified he was not seeking training materials used in 2019, but training materials upon which a person would have relied to *perform* a "post-mortem examination" in 2019—*i.e.*, training materials from before 2019. A coroner could have relied on his or her training from the 1980s to conduct an examination in 2019. Thus, the Appellant's request was broad enough to include the materials the Department provided.

For the next two months, the parties engaged in extensive correspondence regarding the Department's response. The Appellant would ask for additional records, or explain why he thought the Department's responses were inadequate. Sometimes the Department would find additional records based upon additional requests the Appellant made. Throughout this correspondence the Department continued to assert that private individuals conducted the requested training and the Department did not possess copies of their training materials. This appeal followed.

On appeal, the Appellant claims the Department should possess copies of the training materials because it is the agency that certifies coroners have completed the training. He also claims the Department did not "identify any course or topic within a course where [the Department] had trained the Madison [C]ounty coroner or deputy coroners to perform a post-mortem examination." In response, the Department claims to have reviewed more than 6,000 records and has provided the Appellant with all records responsive to his request. The Department continues to assert that private individuals possess the training materials for coroners.

Once a public agency states affirmatively that a requested record does not exist in its possession, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *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, to make his *prima facie* case, the Appellant cites to the Department's retention policy, which requires certain training materials to be retained for nine years. He also cites to KRS 72.025, which establishes the circumstances when a coroner must perform a post-mortem examination. He argues that coroners could not comply with this statute absent training to perform the examination, and the Department is the agency tasked with training coroners. The Department has also provided transcripts of certain coroners and deputies' training histories, further indicating that these individuals received training of some kind. However, an agency's retention schedule is not *prima facie* evidence that an agency has actually created a record. Rather, *if* the agency has created such a record, *then* the retention schedule requires the agency to retain the record according to the schedule. *See, e.g.*, 10-ORD-187 (coroner did not violate the Act when he chose not to create an "annual statistics report," notwithstanding the applicable retention schedule requirement that such a report be maintained). Moreover, KRS 72.025 does not specify the training requirements for coroners prior to conducting a post-mortem examination.[2]

[2] The Appellant also cites to KRS 72.405(4), which defines a "post-mortem examination" as "a physical examination of the body by a medical examiner or by a coroner or deputy coroner who has

Even if the authority upon which the Appellant relies is sufficient to establish a *prima facie* case that coroners must receive a particular type of training, the Department has adequately explained its search and why it does not possess responsive records. The Department explains it has reviewed over 6,000 records throughout the two month period in which the parties discussed the Appellant's requests. The Department further explains that it does not select the training programs from coroners. Rather, the Kentucky Association for Coroners screens and selects training programs offered by private individuals, which the Department facilitates. The trainers, who wish to protect their proprietary interest in their work product, do not share their training materials with the Department before giving the training, and the Department does not demand that they provide copies. Thus, the Department has adequately explained its search for responsive records and has explained why certain requested records do not exist in its possession. *See Eplion v. Burchett*, 354 S.W.3d 598 (Ky. App. 2011) (noting that if responsive records should exist and do not, the requester is entitled to a written explanation for their nonexistence). Accordingly, the Office cannot find that the Department violated the Act when it did not provide records that do not exist in its possession.[3]

Regarding the Appellant's request about the Madison County coroner and his deputies' training history, the Department has provided a complete transcript of their training histories. The Department argues it is not required to review the transcripts and create a record identifying the courses that qualify as training "to perform a post-mortem examination." The Department is correct. "The [Act] does not dictate that public agencies must gather and supply information not regularly kept as part of its records." *Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013); *see also* 22-ORD-051 (an agency was not required to create an "itemized list" pertaining to a subject when the agency did not maintain its records according to the subject). Accordingly, the Department did not violate the Act when it did not create a record to conform to the Appellant's request.

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.

---

been certified by the" Department. However, this statute does not specify the training requirements for coroners or explain how they qualify to be "certified" by the Department.

[3] The Appellant further argues that, if it is true the Department does not possess copies of the training materials used by private vendors, then it has unlawfully outsourced its duty to train coroners. However, the Office cannot consider ancillary questions of law unrelated to the Act in this forum. *See, e.g.*, 22-ORD-137 (the Office could not decide, in this forum, whether the failure to record an inmate's parole hearing constituted a violation of due process).

Daniel Cameron
Attorney General

s/ Marc Manley
Marc Manley
Assistant Attorney General

#383

Distributed to:

Larry P. Stallard
Robin Cornette
Denna Brockman