



## COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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24-ORD-162

July 18, 2024

In re: Joe Sonka/Office of the Governor

**Summary:** The Office of the Governor (“the Agency”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

### *Open Records Decision*

Joe Sonka (“Appellant”) submitted two requests to the Agency on April 30 and May 7, 2024. Both requests sought “all written messages and documents sent from or delivered to” five specific individuals “using the Microsoft Teams apps.” The April 30 request was limited to messages from April 8–19, 2024, and the May 7 request was limited to messages from March 25–29, 2024.<sup>1</sup> In timely responses to both requests, the Agency stated that, “[a]fter a diligent search,” it “did not locate any responsive records.” This appeal followed.

On appeal, the Agency maintains that “it did not locate any responsive records.” Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should 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).

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<sup>1</sup> The Appellant’s requests also sought certain text messages from the same individuals on the same dates. The Agency advised that no responsive text messages exist. The Appellant is not challenging this portion of the Agency’s response.

To make a *prima facie* case the Microsoft Teams messages<sup>2</sup> exist, the Appellant merely states that he “know[s] with certainty that [the Agency’s] response is false” and argues that it is “totally implausible that no Teams records” were found because the “staff in the [Agency] uses the [Teams] app frequently.” A requester’s bare assertion that an agency must possess requested records is insufficient to establish a *prima facie* case that the agency actually possesses such records. *See, e.g.*, 24-ORD-062; 22-ORD-247; 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must point to a statute, regulation, or some other factual support for the contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. Here, the Appellant’s bare assertions fail to point to a statute, regulation, or some other factual support establishing a *prima facie* case that the requested Microsoft Teams messages exist.<sup>3</sup> Accordingly, the Agency did not violate the Act when it did not provide records that do not exist.<sup>4</sup>

A party aggrieved by this decision may appeal it by initiating an 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.

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<sup>2</sup> The Office has previously found that Microsoft Teams messages are exempt as notes under KRS 61.878(1)(i). *See, e.g.*, 22-ORD-176 n.6.

<sup>3</sup> The Appellant alternatively requests that the Office exercise its authority under KRS 61.880(2)(c) to require the Agency to answer a series of follow-up questions the Appellant had after the Agency’s original denial of his requests. Under KRS 61.880(2)(c), “the Attorney General may request additional documentation from the agency for substantiation.” “However, when the requester fails to make the *prima facie* showing before the [Office], as here, the burden never shifts to the agency to do anything further, nor is there any justification for the [Office] to utilize KRS 61.880(2)(c) to request more documentation.” *Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 877–78 (Ky. App. 2021). Here, because the Appellant has not made a *prima facie* case that the Microsoft Teams messages exist, the Office lacks justification “to utilize KRS 61.880(2)(c) to request more” information.

<sup>4</sup> The Appellant also claims the Agency violated the Act by deleting the alleged Microsoft Teams messages. Notwithstanding the fact that that the Appellant has not made a *prima facie* case the Microsoft Teams messages ever existed, the Agency has explained that the retention schedule applicable to “Routine Correspondence/Messages” requires state agencies to retain such messages for “no longer than two (2) years.” *See* General Schedule for State Agencies, Series M0002, “Routine Correspondence/Messages,” available at <https://kdla.ky.gov/records/RetentionSchedules/Documents/State%20Records%20Schedules/kystateagency.pdf> (last accessed July 18, 2024). Accordingly, the Appellant is incorrect that the Act prohibits the Agency from deleting any Microsoft Teams messages.

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Distributed to:

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