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24-ORD-214

October 3, 2024

In re: Melanie Barker/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services (“the Cabinet”) did not violate the Open Record Act (“the Act”) when it did not provide records it does not possess.

Open Records Decision

Melanie Barker (“Appellant”) submitted a request asking, “Does the state provide any grants, direct economic funding, tax incentives, [or] indirect economic funding” to a specific organization. She then stated that “[she] needs all public documents.” On the fifth business day following her request, the Appellant asked when she would receive a response. Shortly thereafter, the Cabinet stated that it “does not possess any records responsive to this request.” The Appellant then requested the case number for the Cabinet’s denial and the Cabinet stated that it did not know what the Appellant was referring to. This appeal followed.

On appeal, the Cabinet maintains that it does not possess records responsive to the Appellant’s request, nor does it assign case numbers to requests made under the Act. 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 makes 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 made a *prima facie* case that the Cabinet possesses records responsive to her request.¹ Accordingly, the Cabinet did not violate the Act when it did not provide records it does not possess.²

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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

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¹ Instead, she asserts that the Cabinet could not have completed a search in the time between her follow-up and the Cabinet's response. But the Cabinet states that its search began the day it received the Appellant's request and concluded on the fifth business day following receipt of the request.

² The Appellant also takes issue with the Cabinet communicating its response in an email instead of a hard copy letter. But the Act requires only that agencies notify requesters of their decision to grant or deny a request "in writing." KRS 61.880(1). By informing the Appellant that it does not possess responsive records in an email, the Cabinet has satisfied the Act.