



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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24-ORD-229

October 21, 2024

In re: Laurie Mills/Spencer County Clerk's Office

Summary: The Spencer County Clerk's Office ("the Clerk's Office") did not violate the Open Records Act ("the Act") when it could not provide records that do not exist in its custody or control.

Open Records Decision

On August 26, 2024, Laurie Mills ("the Appellant") submitted a request to the Clerk's Office for "Video and Audio from [the Clerk's Office] on October 17, 2023 from 8:45 AM thru 9:55 AM." On the same day, the Appellant submitted a request for "a list of Deputy Clerks that have been employeed [sic] by [the Clerk's Office] since January 1, 2019."¹ In a timely response, the Clerk's Office stated it had "no records responsive to the request." This appeal followed.

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 exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). 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.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for that contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. Here, the Appellant claims she "believe[s]" the Clerk's Office made "a false statement" that it has no responsive records, but she provides no foundation for that belief. Because the Appellant has not established a *prima facie* case that responsive records exist in the custody or control of the Clerk's Office, the Clerk's Office did not violate the Act.²

¹ The Appellant hand-delivered both of her requests to the Spencer County Judge/Executive's Office, which forwarded them to the Clerk's Office.

² A list of Deputy Clerks conforming to the timeframe stated in the Appellant's request was provided to the Appellant by the Judge/Executive's Office on September 3, 2024. However, the Clerk's Office

A party aggrieved by this decision may appeal it by initiating an 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 emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

Ms. Laurie Mills
Cheryl R. Winn, Esq.
Corey Thomas, Esq.
Lynn Hesselbrock, Clerk

states it is unaware whether the Judge/Executive's Office already "had the record . . . or created it" to satisfy the request. The Act does not require a public agency to compile a list or create a record to satisfy a request. *See, e.g.*, 16-ORD-052.