



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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24-ORD-261

December 6, 2024

In re: J. Davis/Kentucky Real Estate Commission

Summary: The Kentucky Real Estate Commission (“the Commission”) did not violate the Open Records Act (“the Act”) when it did not produce records it does not possess.

Open Records Decision

J. Davis (“the Appellant”) submitted a request to the Commission seeking “documentation showing the final decision of the” Commission in a specified complaint. The Appellant also request a “file-stamped copy of this Open Records Request showing the date of receipt by” the Commission. The Commission provided the Appellant with a copy of his request but stated it did not possess additional records responsive to his request. This appeal followed.¹

On appeal, the Commission maintains that it does not possess a final decision related to the specified complaint. 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). Here, the Appellant has not established a *prima facie* case that the records exist.

¹ On appeal, the Commission asserts the Appellant is not a resident of the Commonwealth. Under KRS 61.872(2)(a), only a “resident of the Commonwealth shall have the right to inspect public records.” Because the Commission did not deny the Appellant’s request on the basis of residency, and because the Commission’s response did not otherwise violate the Act, the Office need not address that issue.

Therefore, the Commission 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:

J. Davis

Gerald W. Florence, Records Custodian/Executive Advisor, Kentucky Real Estate Authority

C. Rene Rogers, Staff Attorney III, Kentucky Real Estate Authority

Tracy W. Carroll, Executive Director, Public Protection Cabinet, Kentucky Real Estate Authority

² To the extent the Appellant complains about the Commission's processing of a particular complaint, that matter is beyond the scope of his appeal related to his records request. See KRS 61.880(2)(a) (authorizing the Office to issue "a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884").