



## COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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24-ORD-276

December 23, 2024

In re: Michael Douglas Grant/Kentucky Transportation Cabinet

**Summary:** The Kentucky Transportation Cabinet (the “Cabinet”) did not violate the Open Records Act (“the Act”) when it did not grant a request to inspect records that it does not possess.

### *Open Records Decision*

Michael Douglas Grant (“Appellant”) submitted a request to the Cabinet seeking the “Hydrology Analysis” for a specific property in “Bardstown Kentucky.”<sup>1</sup> The Cabinet granted the Appellant’s request and provided “nearly 5,000 pages” of records. Having claimed the record he requested was not contained in the “5,000 pages,” the Appellant requested the “Hydrology Report” for the property he listed. The Cabinet denied his request because, “[a]fter a diligent search, there are no records responsive to [his] request.” This appeal followed.

On appeal, the Cabinet maintains it does not possess a hydrology report. 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, to make a *prima facie* case that the Cabinet possesses the “Hydrology Analysis” record, the Appellant asserts that the Cabinet is “altering the property” and that “[i]t is inconceivable that an agency . . . would not have done a hydrological study on the affected area.”

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<sup>1</sup> The Appellant’s request contained four subparts. The first three subparts are related to various records regarding a stretch of U.S. Highway 150 on the Nelson and Washington County line. This appeal only concerns the “Hydrology Analysis,” or the fourth subpart.

In response, on appeal, the Cabinet asserts that it does not possess any “hydrology analysis for this highway project” because “the design consultant has not yet produced them.” It explains that it typically receives a “preliminary” hydrology report “at the joint/final inspection meeting which the Cabinet has not yet held for this project.”<sup>2</sup> The Office has found that a requester’s bare assertion that an agency should possess the requested record is insufficient to establish a *prima facie* case that the agency possesses such records. *See, e.g.*, 23-ORD-142; 22-ORD-040. Here, the Appellant has not made a *prima facie* case that the Cabinet possesses additional records responsive to his request. Accordingly, the Cabinet did not violate the Act when it did not provide records it does not possess.

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](mailto:OAGAppeals@ky.gov).

**Russell Coleman**  
**Attorney General**

/s/ Matthew Ray  
Matthew Ray  
Assistant Attorney General

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Distributed to:

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<sup>2</sup> The Cabinet further explains that the design consultant has “performed some low-level hydraulic analysis for the preliminary highway layout,” but “this analysis was never submitted to, approved by, or reviewed by the Cabinet.” The Act defines public records as certain materials “which are prepared, owned, used, in the possession of or retained by a public agency.” KRS 61.870(2). In the absence of evidence to the contrary, such materials are not “public records” and are not subject to the Act. *See* 24-ORD-153 (finding that materials in the possession of a private entity contracted to perform work for the agency are not public records subject to the Act because they had not “been prepared, owned, used, in the possession of, retained, or even seen by the” agency).