

## 19-ORD-230

December 19, 2019

In re: Katherine Brown/McCracken County Sheriff's Office

*Summary:* The McCracken County Sheriff's Office ("MCSO") committed a procedural violation of the Open Records Act ("the Act") by failing to respond to an open records request in writing within three business days. However, the MCSO did not commit a substantive violation of the Act. The Office of the Attorney General cannot resolve a dispute relating to discrepancies, if any, between records described in the request and those provided for inspection.

### *Open Records Decision*

On October 8, 2019, Katherine Brown ("Appellant") submitted the following open records request with MCSO: "What: General Information. Why: A breath [sic] of McCracken County SOP and Policy and Procedures." On October 16, 2019, MCSO contacted Appellant by telephone providing a date and time for inspection of responsive records. Appellant stated that she reviewed a "Policies and Procedures document" at MCSO on October 23, 2019, but "observed no Table of Contents available in the Policies and Procedures Manual[,] and "[MCSO] denied us access to...review the SOP." On November 12, 2019, Appellant appealed the disposition of her request to this Office.

On November 25, 2019, MCSO responded and described Appellant's request as "somewhat unclear" and "vague." MCSO stated that it contacted Appellant for clarification, but "was unable to ascertain her exact request." MCSO stated that it nevertheless allowed Appellant to inspect and copy its "full

Policies and Procedures Manual,” and it assigned an officer to assist Appellant. Appellant did not define “SOP” in her original request or this appeal, but MCSO indicated that it understood Appellant’s request for an “SOP” to be a request for standard operating procedures. MCSO indicated no additional records responsive to the request exist, because “[t]he Policies and Procedures Manual...represents the standard operating procedures[.]”

### **MCSO’s Failure to Respond in Writing was a Procedural Violation of the Act.**

MCSO responded to Appellant’s requests and arranged inspection of public records by telephone. However, KRS 61.880(1) provides the procedures a public agency must follow when responding to open records requests and the statute requires a written public agency response. Specifically, KRS 61.880(1) provides, “Each public agency, upon any request for records made under [the Act], shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision.” Moreover, “[t]he language of the statute directing agency action is exact. It requires the custodian of records to provide particular and detailed information in response to a request for documents.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). Although MCSO argued that it responded to Appellant within three business days, MCSO did not submit a copy of its alleged written response to this Office. This Office has previously distinguished between procedural violations of the Act and substantive violations. 93-ORD-125; 06-ORD-190. Here, MCSO committed a procedural violation by responding to Appellant verbally, approximately eight days following her original request that she could inspect the requested documents on MCSO’s premises.

### **MCSO Did Not Withhold Documents in Violation of the Act.**

MCSO provided Appellant access to the Policies and Procedures Manual, but Appellant argues she was denied access to the “SOP,” and the manual lacked a table of contents. It is not clear whether Appellant is arguing that MCSO withheld chapters from the Policies and Procedures Manual, or that the agency failed to create those aspects of the record. However, MCSO argues that it produced its entire Policies and Procedures Manual for inspection and the

agency possesses no separate “SOP” or table of contents. This Office generally declines to “adjudicate a dispute regarding a disparity, if any, between records for which inspection has already been permitted, and those sought but not provided.” OAG 89-81, p.3; 10-ORD-195; 14-ORD-204. The Attorney General has consistently recognized that “objections to alleged inaccuracies and omissions in the records disclosed” cannot be resolved in the context of an Open Records Appeal. 10-ORD-178, p.2; 09-ORD-101. The Attorney General has found that, “what the public gets is what [the agency has] and in the format in which [the agency] has it.” OAG 91-12, p. 5. Therefore, the Attorney General declines to determine whether the Policies and Procedures Manual disclosed by the MCSO, containing no table of contents, constitutes the entirety of the manual.

Finally, to the extent Appellant argues MCSO failed to create and maintain an “SOP,” Appellant has failed to establish a *prima facie* case that such document should exist. This Office has recognized that a public agency cannot produce that which it does not have, nor is the agency required to “prove a negative” in order to refute a claim that certain records exist in the absence of a *prima facie* showing by the requester. See *Bowling v. Lexington Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 340-41 (Ky. 2005). A *prima facie* case can be maintained if the requester cites a specific statute or regulation requiring an agency to create the requested document. 11-ORD-074. However, Appellant has failed to do so here. Based on the foregoing, the Attorney General finds the Policies and Procedures Manual MCSO provided for inspection constituted the entirety of the manual, and MCSO possesses no additional responsive records. As this Office has previously stated, “With the exception of procedural irregularities, this office finds no error in the position of the [MCSO].” 06-ORD-190.

A party aggrieved by this decision shall appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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 proceeding.

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