



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-010

January 28, 2020

In re: Lawrence Trageser/Kentucky State Police

Summary: Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) in denying a request based on the nonexistence of responsive records. KSP discharged its duty under the Act by conducting a good faith search for responsive records and providing Appellant copies of all existing responsive records located.

Open Records Decision

On November 21, 2019, Lawrence Trageser (“Appellant”) mailed a request for records to the Frankfort KSP post seeking, “any and all records reflecting the personnel file of a KSP employee named Spoynter.” On December 17, 2019, KSP denied the request, stating, “a search of [KSP] records was conducted and no records were found.”

On December 23, 2019, Appellant appealed the disposition of his request, stating, “a KSP employee so named SPOYNTER does exist and works in KSP dispatch within the Post 12 jurisdiction.” Appellant attached a KSP computer assisted dispatch (“CAD”) report containing a notation “Narrative By: 002/SPOYNTER” as evidence of the potential existence of responsive records. Appellant did not attach this CAD report to his initial request to KSP.

On January 3, 2020, KSP responded to the appeal stating, “KSP does not possess any responsive records because there is no KSP employee named

'Spoynter.'" However, KSP stated that upon receiving the CAD report on appeal, KSP searched for and identified employees with "S" as the first letter of his or her name and a last name "Poynter." KSP provided Appellant copies of all existing personnel records for the identified employees with personal identifying information redacted under KRS 61.878(1)(a). KSP stated that it did not possess any other existing responsive records.

KSP properly denied the request based on the nonexistence of responsive records. The right to inspect and receive copies of public records only attaches if the records sought are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2); 02-ORD-120, p. 10; 04-ORD-205. A public agency cannot produce that which it does not have nor is a public agency required to "prove a negative" in order to refute an unsubstantiated claim that certain records exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). To obtain relief, the requester must first establish a *prima facie* case that the requested records exist. *Id.*

Appellant has produced no affirmative evidence, beyond mere assertions, that KSP possesses personnel records relating to "Spoynter." Therefore, this Office does "not have a sufficient basis on which to dispute the agency's representation that no such record [exists]." 09-ORD-214, pp. 3-4; 17-ORD-223. In the absence of the requisite *prima facie* showing, or any facts or evidence to support Appellant's belief that KSP possesses responsive records, the Attorney General affirms the denial of his request per *Bowling*. See also 12-ORD-030 (affirming denial of request for nonexistent records where appellant did not offer any "irrefutable proof that such [records] were created or still exist"); 18-ORD-126.

KSP met its duty by conducting a good faith search for responsive records. A public agency violates KRS 61.880(1) "if it fails to advise the requesting party whether the" records exist, but discharges its duty under the Act in advising that records being sought do not exist following a reasonable search, and explaining why, if appropriate. 98-ORD-154, p. 2 (citation omitted); 14-ORD-204. The record shows that, upon receiving Appellant's request, KSP conducted "a good faith effort to conduct a search using methods which [could] reasonably be expected to

produce the record(s) requested[.]”¹ See 05-ORD-109, p. 3; 12-ORD-030. The record also shows that, with the benefit of the CAD report provided on appeal, KSP was able to search for and locate potentially responsive records and provided Appellant copies of the records it located. “Our analysis turns not on whether the fruits of the agency’s search met the requester’s expectations, but whether it conducted an adequate search.” 06-ORD-042, p. 5. Accordingly, this Office finds that KSP did not violate the Act.

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.

Daniel J. Cameron
Attorney General

/s/John Marcus Jones

J. Marcus Jones
Assistant Attorney General

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Distributed to:

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¹ “In assessing the adequacy of a public agency’s search we ‘need not go further to test the expertise of the agency, or to question its veracity, when nothing appears to raise the issue of good faith.’” 95-ORD-96, p. 7 (citing *Weissman v. Central Intelligence Agency*, 565 F.2d 692, 697 (D.C. Cir. 1977)).