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20-ORD-047

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In re: Heather Richards/Louisville Metro Police Department

Summary: Louisville Metro Police Department (“LMPD”) violated the Open Records Act (“the Act”) by its untimely disposition of requests for records. LMPD’s explanation that a technical malfunction occurred was a sufficient explanation for the partial nonexistence of a video record.

Open Records Decision

LMPD violated the Act by failing to make a timely disposition of Heather Richards’ (“Appellant”) October 17, 2019, December 5, 2019, and January 22, 2020, requests for records relating to her criminal complaint against a former LMPD officer, but did not otherwise violate the Act.

LMPD interviewed Appellant about her complaint against former Officer Pablo Cano on June 5 and 14, 2017. On October 17, 2019, Appellant requested “a copy of the interview recording and the initial report[.]” On the same day, LMPD responded, “Please allow up to and including November 14, 2019[,] to obtain any available records and prepare them for release pursuant to KRS 61.878.” On November 14, 2019, in response to a follow-up inquiry from Appellant, LMPD stated, “Please be advised this file remains open. Pursuant to KRS 61.878(1)(h) the records are denied release at this time.”¹

¹ KRS 61.878(1)(h) “is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when because of the record’s content, its release poses a concrete risk of harm to the agency in the prospective action.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406

KRS 61.880(1) requires a public agency to make a final disposition of an open records request within three business days. KRS 61.872(5) permits a longer period of time when records are “in active use, in storage or not otherwise available,” if the agency gives “a detailed explanation of the cause ... for further delay and the place, time, and earliest date on which the public record will be available for inspection.” LMPD, however, did not make a final disposition of the request within three business days, nor did it allege any of the circumstances described in KRS 61.872(5) or give a detailed explanation of the cause for further delay. Therefore, LMPD violated KRS 61.880(1).

On December 5, 2019, Appellant requested “the entire case file, including any and all documents, audio or video recordings, emails or other records, for the complaint [she] filed against Pablo Cano on June 5, 2017 and June 14, 2017.” The record on appeal does not show that LMPD ever responded to this second request. By failing to issue a response within three business days, LMPD again violated KRS 61.880(1).

On January 14, 2020, LMPD provided Appellant “7 pages and 1 CD” in response to her original request for “the interview recording and the initial report.” The records provided were the Incident/Investigation Report, a report of the final disposition of the criminal case, and a recording of Appellant’s initial telephone interview.

On January 22, 2020, Appellant again requested “the entire case file, including any and all documents, audio or video recordings, email or other records, for the complaint [she] filed against Pablo Cano on June 5, 2018 and June 14, 2017.” She specifically requested the audio/video recordings made of her interview on both of those dates. On January 23, 2020, apparently misconstruing the request as also including records relating to other individuals’ complaints against Cano,² LMPD responded that the records would “have to be reviewed and redacted prior to release pursuant to KRS 61.878(1)(a),” and that this review and

S.W.3d 842, 851 (Ky. 2013). In this case, although LMPD failed to articulate a risk of harm, the subsequent release of records has rendered LMPD’s assertion of the exception moot.

² LMPD’s January 23, 2020, response stated, “[W]e requested the entire file. We thought you just wanted the portion of the investigation pertaining only to you. We apologize for the confusion. Please be advised there are 11 CD’s and a paper record.”

redaction would take until February 13, 2020. Having received no records by February 14, 2020, Appellant initiated this appeal.

On February 28, 2020, LMPD issued a final disposition of Appellant's third request, stating as follows:

The records ... are ready. These include audio copies of your interviews from June 5, 2017 and June 14, 2017 as well as the transcripts of those interviews. Also included is the audio copy of your initial phone call with Det. Hall and that transcript. Video with audio is included for your interview on September 11, 2017 as well. Also included is what appears to be a partial video of one of your interviews with Sgt. Rivera and Det. Hall. The quality of this video is not very good and there must have been a technical error/malfunction. I believe this is all LMPD has in their possession to fulfill your ... request.

That same day, LMPD's counsel confirmed that "LMPD has provided or made available to [Appellant] the records that she originally requested up to an[d] including her January 22, 2020 email." LMPD apologized for "the confusion resulting in the delay past February 13, 2020," and explained that "illnesses of personnel responsible for providing the records" caused LMPD's delay to produce records and failure to respond to Appellant's correspondence.

The records produced for Appellant did not contain redactions. Therefore, whether redaction was appropriate under KRS 61.878(1)(a) is moot. However, the redaction issue is still relevant to determine whether LMPD provided an appropriate justification for its delay in responding to the request under KRS 61.872(5). It did not. Regardless of its initial misunderstanding of the scope of Appellant's third request, LMPD again failed to make a timely disposition of the request under KRS 61.880(1) or to allege any of the circumstances described in KRS 61.872(5) to explain the reason for delay. In fact, LMPD made no redactions to justify or sustain its purported reason for delay. Thus, LMPD's untimely disposition of Appellant's third request violated KRS 61.880(1).

It appears, however, that LMPD did provide all existing records responsive to Appellant's requests on February 28, 2020. Although Appellant argued on

appeal that the records were not complete because some of the video from the interviews was missing, LMPD explained that the partial absence of the video was due to a technical malfunction. A public agency cannot provide a requester access to a record that does not exist. See *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). Once an agency affirmatively states that a record does not exist, the burden then shifts to the requester to present a *prima facie* case that it should exist. *Id.* While Appellant has made a *prima facie* showing that the additional video should exist, LMPD's statement that a technical malfunction prevented the video from being recorded was a reasonable explanation. Thus, LMPD did not withhold any responsive records.

Accordingly, this Office concludes that LMPD violated the Act through excessive delay in fulfilling Appellant's requests. LMPD otherwise complied with the Act by granting access to all existing records responsive to the requests.

A party aggrieved by this decision may 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 proceedings.

Daniel Cameron
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/s/ James M. Herrick

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