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**20-ORD-102**

July 23, 2020

In re: Tyler Fryman/Kentucky State Police

**Summary:** The Kentucky State Police (“KSP”) violated the Open Records Act by failing to respond timely to a request to inspect records. KSP did not violate the Act in redacting birth years from records or by not producing records that do not exist.

***Open Records Decision***

On May 21, 2020, Tyler Fryman (“Appellant”) submitted a request to KSP to inspect five categories of records related to drones. These categories included, among others, licensing information for drone pilots and video footage taken by drones during a three-day period in May. KSP failed to reply and Appellant initiated this appeal. Upon receiving the notice of appeal, KSP issued a written response on July 14, 2020 and recognized that it had “inadvertently overlooked” Appellant’s request. KSP produced 115 pages of responsive records, but claimed that no video footage taken by drones during the three-day period existed in its possession. Included in the records produced was a copy of a drone pilot’s license in which KSP had redacted the pilot’s entire date of birth. Appellant challenges KSP’s failure to provide drone video footage and its redaction of the drone pilot’s birth year, but he accepts KSP’s redaction of the birthday and month.

KSP violated the Act by failing to issue a timely response to a request to inspect records. KRS 61.880(1) requires a public agency to respond to a request for records within three business days. The General Assembly has enlarged the period to respond during the Covid-19 state of emergency to ten days. Senate Bill 150 § 1(8)(a). However, KSP did

not respond until almost two months after the date of the request. KSP acknowledged this violation in its response.

However, KSP did not violate the Act in redacting the drone pilot's birth year. KRS 61.878(1)(a) exempts "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]" In reviewing an agency's denial pursuant to the personal privacy exemption, the courts and this Office engage in a balancing test that weighs the public's right to know what is happening within government and the personal privacy interest at stake in the record. *See Zink v. Commonwealth, Dept. of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). However, the Kentucky Supreme Court has held that certain categories of information, including birthdates, provide minimal insight into governmental affairs and can be categorically redacted pursuant to KRS 61.878(1)(a). *See Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). It may be true that a person's birth year, alone, does not implicate a privacy concern that is as high as a person's privacy interest in his entire date of birth. Nevertheless, a person's birth year provides almost no insight into how an agency conducts public business.<sup>1</sup> KSP properly relied upon KRS 61.878(1)(a) in redacting the pilot's entire date of birth. *Kentucky New Era, Inc.*, 415 S.W.3d at 89.

Finally, Appellant argues that KSP does, in fact, have video footage taken by drones between May 8 and May 11, 2020, but that KSP has failed to provide it. The right to inspect records attaches only if the record in dispute is "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). 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.* Only "[i]f the requester makes a *prima facie* showing that responsive records have not been accounted for, then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013).

To support his claim, Appellant provided this Office with a screenshot that appears to depict KSP's official Facebook page. In a post dated May 9, 2020, the caption states, "Troopers took advantage of a sunny day to participate in advanced crash reconstruction training. This includes learning . . . airborne situations all while utilizing state of the art technology." The post also includes a picture showing KSP equipment,

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<sup>1</sup> That is not to say that birth years, alone, may never provide information relevant to governmental oversight. It is possible that such information could be necessary to determine systemic governmental practices related to age. There is no suggestion that such concerns are present, however, because the birth year in issue relates to a single pilot.

including a drone. Appellant's reliance on this social media post suggests that KSP piloted drones on May 9, 2020, but does not support the conclusion that KSP recorded or preserved any video footage taken by the drone during an apparent training exercise on that date. The social media post Appellant provides is insufficient to establish a *prima facie* case that KSP-owned drones recorded video between May 8, 2020, and May 11, 2020. Accordingly, KSP did not violate the Act.

Either party may appeal this decision by initiating action in the appropriate circuit court per 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 Cameron  
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Distributed to:

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