COMMONWEALTH OF KENTUCKY
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20-ORD-180

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In re: Dwayne Holman/Central City Police Department

Summary: Central City Police Department ("Department") violated the Open Records Act ("the Act") when it failed to issue a timely written response to a request for public records. The Department did not violate the Act when it denied a request for a record that did not exist.

Open Records Decision

On September 14, 2020, Dwayne Holman ("Appellant") requested to inspect the Department's file on a closed investigation of a homicide that occurred on August 7, 1941. Although the city administrator promptly indicated that he would forward the request to the city attorney for a response, the final response to the request was not issued until October 16, 2020. Furthermore, in issuing the response, the city attorney omitted Appellant from the e-mail recipient list. Appellant initiated this appeal, claiming that the Department had not responded to his request.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). To address the novel coronavirus public health emergency, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). Under KRS

446.030(1)(a), the computation of a statutory time period does not exclude weekends unless "the period of time prescribed or allowed is less than seven (7) days." Accordingly, under SB 150, a public agency is required to dispose of a request to inspect records within ten calendar days.

The Department received Appellant's request on September 14, 2020, but did not respond until October 16, 2020 — well beyond the modified deadline provided in SB 150. Thus, the Department violated the Act by failing to timely respond to Appellant's request, and further violated the Act by failing to send the response to Appellant.

On appeal, the Department states that it "did not have records that went back to the 1940s." Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requestor to present a *prima facie* case that the requested records do exist in the agency's possession. *Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005).

In this case, Appellant argues that under the current records retention schedule for local governments, promulgated by the Kentucky Department for Libraries and Archives ("KDLA"), homicide investigation files must be retained permanently. However, the statutes giving KDLA authority over public records retention, KRS 171.410 *et seq.,* were originally enacted in 1958. Thus, the current records retention policy is insufficient to establish a *prima facie* case that the Department should still possess a 1941 case file, because destruction of the file prior to 1958 may have been lawful. Therefore, this Office finds no basis to determine that the Department violated the Act.

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
Attorney General

/s/ James M. Herrick

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#342

Distributed to:

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