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20-ORD-194

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In re: Phillip Edward Cline/Kentucky State Police

Summary: The Kentucky State Police ("KSP") violated the Open Records Act (the "Act") when it failed to respond to an inmate's request for records within the statutory time period. However, KSP did not violate the Act when it denied the request because no responsive records exist within its possession.

Open Records Decision

On October 9, 2020, Phillip Edward Cline ("Appellant") requested from KSP a copy of the case file related to his arrest in Martin County and his prosecution in Floyd Circuit Court, Case No. 03-CR-00100. Claiming that he received no response to his request, Appellant initiated this appeal on November 2, 2020.

On appeal, KSP provides proof that it responded to Appellant's request on October 28, 2020. 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, that "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 must respond to a request to inspect records within ten calendar days.

By its own admission, KSP received the request on October 15, 2020, but it did not respond to that request until October 28, 2020—13 calendar days later. Therefore, KSP violated the Act, as amended by SB 150, when it failed to issue a timely response to Appellant's request.

However, in KSP's response to Appellant, it affirmatively stated that it was "unable to locate any responsive records." KSP then suggested that Appellant should contact certain local agencies that might have responsive records. 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).

Here, Appellant has not claimed that KSP was the law enforcement agency that arrested him. Instead, court records suggest that the Martin County Sheriff's Department arrested Appellant. For this reason, Appellant has not made a *prima facie* case that KSP is in possession of records he seeks. Accordingly, KSP did not violate the Act when it denied a request for records that do not exist within its possession.

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/Marc Manley
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Distributed to:

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