



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITAL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

**21-ORD-024**

February 9, 2021

In re: Newsy/Louisville Metro Police Department

**Summary:** Because the Louisville Metro Police Department (“Department”) failed to respond to an open records request within ten days, it violated the Open Records Act (“the Act”) as modified by Senate Bill 150. However, the Department subsequently complied with the Act. The Department conducted a good faith search for responsive records and provided all responsive records to the requester.

***Open Records Decision***

On October 28, 2020, Newsy (“Appellant”), a media organization, requested copies of “all documents, memos, report’s [sic] and plans that outline [the Department’s] response, adoption and implementation of President Obama’s 21st Century Policing report” since January 1, 2015. Although the Department acknowledged receipt of the Appellant’s request, it did not provide a response within ten days. This appeal followed.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). In response to the public health emergency caused by the novel coronavirus, however, the General Assembly modified that requirement when it enacted Senate Bill 150 (“SB 150”), which became law on March 30, 2020. 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). The Department violated the Act by failing to respond to Appellant's request within ten days.

The Department acknowledges that its response was untimely. However, it now claims it has provided the Appellant all responsive records located by its Strategic Planning Unit.<sup>1</sup> The Appellant disagrees, and claims additional records exist but that they have not been provided.

When a public agency claims that it has provided all responsive records, this Office has historically declined to make a finding that additional records should exist. That is because this Office "is a reviewer of the course of action taken by a public agency and not a finder of documents." OAG 86-35. Moreover, once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, "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) (citing *Bowling*, 172 S.W.3d at 341). Therefore, to support a claim that additional documents exist, the Appellant must produce some evidence that calls into doubt the adequacy of the agency's search. *See, e.g.*, 95-ORD-96. The Appellant has made such a showing here.

On appeal, the Appellant provides a copy of a record it has obtained from a different source that appears to have been created by the Department and that is responsive to the request. Yet the Department did not provide the Appellant with a copy of this record.<sup>2</sup> The Appellant also cites references in various documents that appear to require the Department to generate additional records, but the Department has not provided such records. The Department, however, asserts that if any additional records did exist in its

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<sup>1</sup> The Department claims that the Strategic Planning Unit, the division responsible for implementing the 21st Century Policing policy, would be the only division in possession of responsive records because that division was in charge of "project management" for the 21st Century Policing report.

<sup>2</sup> This record is dated 2016 and titled "LMPD Implementation on 21st Century Policing."

possession, “they no longer do.”<sup>3</sup> The Department explains that the commander of the Strategic Planning unit searched that unit’s work area, “including file cabinets, boxes, and desks,” and all electronic files it possesses using the keywords “21st,” “21st Century,” and “21st Century Policing.” The Department located no records other than those it provided to the Appellant.

The Department has searched all of its records within the Strategic Planning Unit – the division responsible for implementing the 21st Century Policing policy. In doing so, the Department has conducted a reasonable search, in good faith, for responsive records. The Act “requires nothing more.” 06-ORD-42.

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 proceeding.

Daniel Cameron  
Attorney General

/s/ James M. Herrick

James M. Herrick  
Assistant Attorney General

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Distributed to:

Ms. Karen Rodriguez  
Paul V. Guagliardo, Esq.  
Ms. Alicia Smiley

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<sup>3</sup> Although the Department does not claim that the records were lost or destroyed, the Department is unable to explain why it does not possess a copy of the record that the Appellant provides on appeal. If such records did exist and were lost or destroyed, that presents a records management issue, which is within the province of the Kentucky Department for Libraries and Archives.