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21-ORD-118

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In re: Joshua Powell/Lexington Police Department

Summary: The Lexington Police Department (the “Department”) did not violate the Open Records Act (“the Act”) when it denied a request to inspect records that do not exist in its possession.

Open Records Decision

Joshua Powell (“Appellant”) submitted a request to the Department for “CAD entries, calls for service by and any other ‘Code 17’s’” generated by a specific Department detective on October 26 and 27, 2017. In a timely response, the Department denied the Appellant’s request because no responsive records existed in the Department’s possession. According to the Department, the detective “was not dispatched to any calls for service” during the specific timeframe. The Department further claimed that it found no CAD entries and that its records “are not indexed or categorized in a manner which would allow” a search for “Code 17’s.” The Appellant initiated this appeal soon after.

On appeal, the Department states affirmatively that no responsive records exist in its possession. Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist in the agency’s possession. *See Bowling v. Lexington-Fayette Urb. Cty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). This Office has found that a requester can make a *prima facie* case that records should exist by citing a statute, regulation, or other legal authority that requires the creation of the requested record. *See, e.g.*, 20-ORD-038; 11-ORD-074. If the requester can make 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 Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant provides proof, in the form of other police records, that the detective was present at a crime scene on the dates in question. The Appellant further claims that both Lexington Police Department Policy¹ and KRS 524.140² require the Department to create and maintain specific evidence intake forms and dispatch logs that document the detective's activities.³ Although this evidence helps the Appellant to make a *prima facie* case that the detective was present at the crime scene on October 26 and 27, he provides no evidence that the detective was dispatched to the scene by the Department's Computer Aided Dispatch System, or through other means that would generate the requested dispatch reports.⁴

Even if the Appellant were able to establish a *prima facie* case that the requested records may exist, the Department has adequately explained that it searched its records and no records responsive to the Appellants request exist. Specifically, the Department explains on appeal that once the Appellant provided the case number, it searched its "AS 400 system," in which it maintains its dispatch records, but it could not find any CAD entries, calls for service, or Code 17's in connection with the detective's arrival at the scene that night.⁵ Therefore, the Department has adequately explained that it has searched for records in good faith, but none exist in its possession. Accordingly, the Department did not violate the Act.

¹ The Appellant does not specify the policy to which he is referring, but there appears to be two applicable policies here: Lexington Police Department General Order 1991-051 ("Reporting Procedures") and Lexington Police Department General Order 1991-13M ("Property and Evidence Procedures").

² KRS 524.140 pertains to the retention and disposal of biological evidence that may be subject to DNA testing.

³ The Appellant refers specifically to Form #263A, Form #350, and Form #320. According to Department policy, these forms are property intake and evidence management records. But the Appellant did not request to inspect such forms. Rather, his request sought only CAD reports or other types of dispatch records. According to the Department's "Reporting Procedures," the Department "makes a record of every incident to which an employee responds, regardless of whether a written report or an electronic case report is created, in any of the following categories" among which include "criminal and non-criminal cases initiated by officers." Department General Order 1991-51 §IV-D-4. Thus it appears that records are to be created for each incident, not for each employee that responds to such incident.

⁴ It is not clear from this record whether on-duty detectives, such as this one, are dispatched to crime scenes in the same manner as patrol officers such that the same types of dispatch records are created.

⁵ From the record on appeal, it appears as though the parties dispute whether certain evidence was collected by the detective on the night in question. But the Appellant did not seek evidence intake records; he sought dispatch records.

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/Matthew Ray
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Distributed to:

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