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21-ORD-165

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In re: Rebecca Mash/Kentucky State Police

Summary: The Kentucky State Police (the "KSP") did not violate the Open Records Act ("the Act") when it did not allow inspection of records that do not exist in its possession.

Open Records Decision

Rebecca Mash ("Appellant") asked KSP to provide copies of "case records for [a specific person] who had drug trafficking charges filed against him in 1980." The Appellant also stated that the person was "approximately 32 years old at the time the charges were filed" and that he "committed suicide the same year." The Appellant further stated that the investigation took place in both Lexington and London, Kentucky, and she provided the names of witnesses, officers, and suspects that she believed were associated with the investigation. The Appellant specified that she sought to inspect records related to the drug trafficking investigation of the identified person, and any records related to the investigation of his suicide, if such investigation occurred.

In a timely response, KSP denied the Appellant's request because after a "diligent search [KSP] was unable to locate any responsive records." KSP then suggested that the Appellant should "contact any local agencies where the incident took place to determine if they have any records responsive to [her] request." The Appellant initiated this appeal soon after.

On appeal, KSP claims to have found one potentially responsive record that it will make available to the Appellant, but it could not locate any additional records. 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.*, 21-ORD-114; 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, to establish her *prima facie* case, the Appellant provides an excerpt from a local newspaper, dated August 7, 1983, concerning the investigation. The excerpt states that the person who was the subject of the request was charged with drug offenses in 1980 and that he later committed suicide. The excerpt provides more information regarding the investigation, and specifically mentions that KSP was involved.

Because the Appellant provided sufficient proof that KSP was involved in an investigation during the specified time, and that the Appellant had provided KSP with the names of witnesses, suspects, and investigating Officers, this Office asked KSP to provide additional information about the scope of its search. KSP admitted that it was possible the requested case file exists in storage, but such files are stored in boxes labeled by case number. KSP explains that it is unable to search its physically stored files by using the names of suspects, witnesses, or investigating officers. KSP states that if the Appellant could provide the applicable case number, then it would be able to locate the box in which the records may be located in storage. Following this Office's request for additional information and using other search methods, KSP stated that it was able to locate a potentially responsive investigative file, and that it would make that record available "upon receipt of a request by the Appellant."[1]

Although the Appellant has established a *prima facie* case that records should exist, KSP has explained in detail all the methods it used to search for responsive records. Specifically, KSP states that neither of its posts in Lexington or London possess responsive records. KSP states that its Drug Enforcement and Special Investigations ("DESI") units, both East and West,

[1] If KSP is claiming to have found records responsive to this request, then it should make the records available upon payment of any copying fees that are due. There should be no reason for the Appellant to submit another request. Presumably, KSP meant to say it would make the record available upon the Appellant agreeing to pay applicable fees.

"performed a manual search of the hardcopy case log for 1980 and 1981" but DESI did not find any records related to the named individuals. KSP states that its Uniform Crime Reporting Section ("UCRI") conducted a "diligent" search but did not find any additional responsive records. According to KSP, the UCRI would not have opened an investigation into the person's death if the coroner had determined suicide to be the cause of death. Aside from the potentially responsive investigative file it discovered and will make available to the Appellant, KSP has adequately explained that it searched for records in good faith, but no additional responsive records exist in its possession. This Office has historically declined to adjudicate competing claims that additional records do or do not exist. *See, e.g.*, 19-ORD-083. Therefore, this Office cannot find that KSP violated the Act when it did not produce additional 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
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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