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21-ORD-236

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In re: Rodney Newcomb/Garrard County Police Department

Summary: The Garrard County Police Department (the “Department”) did not violate the Open Records Act (“the Act”) when it could not provide records that do not exist within its possession. This Office is unable to resolve factual disputes about whether a public agency received a request to inspect public records.

Open Records Decision

Rodney Newcomb (“Appellant”) claims to have submitted a request to the Department, on October 6, 2021, for records related to a specific incident leading to his arrest on a specific date. The Appellant claims the Department issued a response on October 18, 2021, in which it denied his entire request because the Department was not involved with his arrest, and the officer the Appellant identified was not the arresting officer. This appeal followed.

Under KRS 61.880(1), “[a]n agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” Here, the response the Appellant provides on appeal fails to cite any specific exception to deny his request. However, on appeal, the Department claims it never received the original request and notes that it was sent to a different agency, the Garrard County Sheriff’s Department. Moreover, the address to which the request was sent was not the Department’s address nor the Garrard County Sheriff’s Department’s address. The Department also claims it does not know who denied the original

request. Although the signature is illegible, the person who signed the response identified himself or herself as “Garrard Police.”

Here, there is conflicting evidence about who actually responded to the Appellant’s request. On the face of the request, it was not sent to the Garrard County Police Department or addressed to that agency, but was signed by someone declaring to be part of “Garrard Police.” Moreover, the Department denies having received the request. This Office has historically found that it is unable to resolve factual disputes between a public agency and a requester, such as whether a public agency received a request under the Act. *See, e.g.*, OAG 89-81; 03-ORD-172; 04-ORD-223; 08-ORD-066; 12-ORD-122; 21-ORD-163. Accordingly, this Office cannot find that the Department violated the Act when it claims it did not receive the Appellant’s request.

On appeal, the Department states affirmatively it does not possess any records responsive to the Appellant’s request and explained why. 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 requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public 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).

To make his *prima facie* case, the Appellant provides a copy of a “Crime Supplement,” which indicates that the identified Garrard County Police Department officer “notified Lancaster City Units” about a suspicious vehicle. However, the “Crime Supplement” does not indicate that the identified officer took any other actions in connection with the investigation, and instead, two other officers with the Lancaster Police Department conducted the subsequent investigation and arrest. This evidence does not demonstrate that the Garrard County Police Department should possess responsive records. Accordingly,

the Garrard County Police Department did not violate the Act when it did not produce records that do not exist in its possession.¹

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Rodney Newcomb, #114798
John Wilson

¹ Moreover, the Department explains that “[its] officers do not wear body cameras” and that it possesses “no dash camera footage of this incident,” which is why it could not produce requested video records. The Department also explains that it “does not maintain call logs,” so it does not possess records responsive to the Appellant’s request for “any call log[s].” Furthermore, the Department explains that Bluegrass 911 Communications (“Bluegrass”) maintains its “call logs” and its “communication logs” which are “collectively referred to as the CAD Report” so it does not possess records responsive to the Appellant’s request for radio and phone communications. Regardless, after this appeal was initiated, the Department contacted Bluegrass to obtain such records and made them available to the Appellant.