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**21-ORD-257**

December 20, 2021

In re: James Harrison/Kentucky State Police

**Summary:** The Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) when it issued a response to a request to inspect records within five business days of receipt of the request. KSP also did not violate the Act when it denied a request for records that do not exist within its possession.

***Open Records Decision***

On October 18, 2021, James Harrison (“Appellant”) submitted a request to KSP for records related to a specific individual that he believes, “may be an employee [of KSP] or other law enforcement agencies.” On November 1, 2021, the Appellant initiated this appeal and claimed to have received no response from KSP.

Upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . *after the receipt* of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” KRS 61.880(1) (emphasis added). Here, the Appellant claims he did not receive a response from KSP within five business days. On appeal, however, KSP provides a copy of a response that it issued on October 26, 2021. The response states that KSP received the request on October 21, 2021. Thus, KSP issued its response within five business days of receiving the request, and its response was timely.

In its timely response, KSP stated affirmatively that “a diligent search did not yield any results” and that “KSP has no record of [the specific individual] having been an employee with this agency.” On appeal, KSP again states affirmatively that “a diligent search by KSP did not yield any responsive records[.]” Once an 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).

Here, the Appellant has not made a *prima facie* case that the employee ever worked for KSP. In fact, the Appellant’s request even acknowledged that he did not know whether the employee worked for KSP, because he stated that the specific individual “*may* be an employee with [KSP] or *other law enforcement agencies*” (emphasis added). Accordingly, KSP did not violate the Act when it could not provide copies of 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 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**  
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/s/Matthew Ray  
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Distributed to:

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