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22-ORD-070

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In re: Belle Cushing/Louisville Metro Police Department

Summary: The Louisville Metro Police Department ("the Department") violated the Open Records Act ("the Act") when it failed to respond timely to a request to inspect records and when it did not provide responsive records for almost one year. However, the Department did not violate the Act when it invited a requester to precisely describe additional records she sought to inspect.

Open Records Decision

On April 28, 2021, Belle Cushing ("the Appellant") submitted a request to the Department to inspect "[a]ny and all [Professional Standards Unit ("PSU")] or [Public Integrity Unit ("PIU")] investigations into sexual misconduct, sexual harassment, rape, unwanted sexual advances, possession of pornography, [or] improper treatment toward a" confidential informant. The Appellant also sought the entire investigative file for three specifically identified PIU cases. On May 13, 2021, the Department responded and claimed that the three PIU cases needed to be located, retrieved, and redacted of personally identifiable information. The Department stated that the "[r]ecords should be available for release in 6-8 weeks." The Department also explained that it does not categorize PSU or PIU cases according to the type of criminal offense alleged, and invited the Appellant to provide the case numbers of specific investigations or the names of the officers who were investigated.

In August of 2021, the Department notified the Appellant that it was "checking" with its investigators "on the status" of the request, and that it would "provide an update" as soon as it "heard back" from the investigators.

On October 4, 2021, having received no further communication from the Department, the Appellant asked about the status of her request. The next day, the Department responded and advised that it was still locating the three PIU cases that the Appellant had identified, but did not provide the Appellant with a date on which those records would be available. Regarding the Appellant's request for "any and all" investigations related to rape or sexual assault, the Department again stated that it does not categorize its investigations by the type of criminal offense alleged. Because these investigations involve allegations of police misconduct, the offenses for which officers were accused are labeled as "official misconduct," "conduct unbecoming [of an officer]," failure to abide to rules and regulations, or other similar types of offenses. The Department stated that it could not search its records using the key terms the Appellant provided and explained that the Department would have to manually review every PIU and PSU investigation since 2003 to determine whether the investigation related to sexual assault. The Department anticipated that such a task would take approximately eighteen months, and again invited the Appellant to provide specific case numbers or the names of officers involved, or to at least narrow the temporal scope of the request.

No further communication occurred until February 28, 2022. On that day, the Appellant claimed that the Department must categorize its investigations by the term "sexual assault," because one month earlier an officer stated during a deposition that there were seven investigations into alleged sexual assaults by officers in 2018. The deponent allegedly referenced some report while testifying that seven sexual assault investigations had occurred. The Appellant also reminded the Department that, regardless of how it categorizes its investigations, the Department still had not provided the investigative files of the three PIU cases that she had identified almost one year prior. On March 7, 2022, the Department notified the Appellant that it had obtained the three PIU case files from its investigators, but the Department needed an additional four to six weeks to review and redact them. Ultimately, the Department was able to provide most of the records contained within the three PIU files on March 14, 2022. However, the Department did not provide audio files contained within because the Department was "awaiting" for the audio files to be redacted. The Appellant then initiated this appeal on March 23, 2022, claiming that the Department's continued delay has violated the Act. The Appellant also claims that the Department is capable of searching for other responsive investigative files related to sexual assault, but that it refuses to do so.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1).[1] A public agency may also delay access to responsive records if such records are "in active use, storage, or not otherwise available." KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must also notify the requester of the earliest date on which the records will be available, and provide a detailed explanation for the cause of the delay. But here, the Department did not respond to the Appellant's request at all until May 13, 2021, or 11 business days after receiving the request. Thus, the Department first violated the Act when it failed to issue a timely response to the Appellant's request.

Although the Department's initial tardiness in responding violated the Act, the Department violated the Act in a more egregious way through its extraordinary delay in providing three investigative files. Although the Appellant submitted her request near the end of April of 2021, the Department admits on appeal that the PIU office did not even collect the files until October—more than five months later. Then, the Department "simply lost track of the request until [the Appellant] wrote on February 28, 2022." After the Appellant checked on the status of her request, the Department did not provide responsive records for two additional weeks. But even then, the Department did not provide all responsive records because the Department required additional time to redact responsive audio logs. The Department claims on appeal that it can complete its redaction of the audio logs by May 1, 2022—more than a year after the Appellant's request. There is no question that the Department's extraordinary delay in reviewing and providing nonexempt portions of three investigative files violated the Act.

However, the Department did not violate the Act with respect to the Appellant's broader request. When a requester seeks to inspect copies of public records by mail (or email, as the Appellant has requested), then she must "precisely describe[] the public records which are readily available within the public agency." KRS 61.872(3)(b). This Office has long held that "any-and-all" types of requests about a broad topic, unlimited in temporal scope, does not meet the precise-description standard and places an unreasonable burden on

[1] At the time of the Appellant's request, April 28, 2021, the Department had ten calendar days to respond. *See* 2020 SB 150. However, effective June 29, 2021, public agencies are now required to respond to a request within five business days of receipt. *See* 2021 Ky. Acts ch. 160 § 5. Regardless, the Department did not respond to the Appellant's request until May 13, 2021, or 11 business days after receipt of the request. Thus, the Department's response was untimely under both 2020 SB 150 and KRS 61.880(1) as it is now amended.

public agencies. *See, e.g.*, 20-ORD-025; 08-ORD-058; 99-ORD-014; 96-ORD-101.

Here, the Appellant sought "any and all" investigative files related to alleged sexual assault by officers. The Appellant did not narrow the temporal scope of her request, and the Department explained that its investigative files date back to 2003. The Department states that it does not categorize its investigative files by the term "sexual assault." The Department claims that it would have to manually review every investigative file spanning almost 20 years to look for allegations of sexual assault in each file. Although the Appellant argues that a report was referenced in a deposition that appears to categorize the investigative files by terms like "sexual assault," the Department claims that its annual report does not reflect the Department's actual filing system. The Department states that the 2018 report, which indicated that seven sexual assault investigations were opened that year, was likely created by an employee who reviewed all investigations in 2018 for the purpose of creating the annual report. The Department states that the employee would have been using "subjective judgment" in creating the categories in the report. The Department provides a copy of the 2018 annual report on appeal, and the report does not specifically identify the seven sexual assault cases by case number or officer name. Thus, even the 2018 report would not assist in locating the 2018 investigative files about which the report references.

The Appellant has never disputed that it would take significant time for the Department to manually review every investigative file in its possession for the terms "sexual assault." She instead argues that the Department has categorized its filing system in a way that would alleviate the Department from needing to conduct such a manual review. The Department claims that is not true, and that it must manually review all of its files spanning almost 20 years and subjectively determine whether each file contained an allegation of sexual assault. This Office cannot resolve factual disputes. *See* 22-ORD-051. In what manner the Department categorizes its investigative files within its filing system is a disputed fact, but the Department's explanation of its own filing system should be taken in good faith. The Department originally invited the Appellant to provide specific case numbers, the names of officers, or to narrow the temporal scope of her request. Because the Appellant's request did not "precisely describe" the records she sought, her request as originally framed placed an unreasonable burden on the Department. KRS 61.872(3)(b); KRS 61.872(6). The Department therefore did not violate the Act with respect to the Appellant's "any-and-all" request, which was unlimited in temporal scope.

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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
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Distributed to:

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