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24-ORD-164

July 18, 2024

In re: Vivian Miles/Lexington Police Department

Summary: The Lexington Police Department (“the Department”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

Vivian Miles (“Appellant”) submitted a request to the Department for “[r]ecords identifying” a specific officer’s report “documenting evidence received from” a Department employee between June 22 and June 24, 2019. In a timely response, the Department granted the request and provided three responsive records. On June 19, 2024, the Appellant initiated this appeal, claiming the Department did not provide a “report” from the specific officer she listed in her request.

On appeal, the Department states that it again searched for additional records responsive to the Appellant’s request but was unable to locate the specific officer’s report. Once a public agency states affirmatively that it does not possess any additional records, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to make a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested records, or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. 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, in an effort to make a *prima facie* case that the Department should possess the specific officer's report, the Appellant relies on the Department's Report Procedures.¹ Subsection A states that "[e]lectronic case reports shall be taken on" certain crimes. Subsection D requires that supervisors "approve all electronic case reports" and ensure "that they are accurate, complete, and legible." However, even if the Department's procedures required a "report" be generated in the case the Appellant identified, those procedures do not require a report to be created by a specific officer. Thus, the Appellant has failed to make a *prima facie* case that a "report" created by the specific officer she identified should exist and that the Department should possess it. Further, even if she had made a *prima facie* case, the Department sufficiently explains on appeal that the identified officer's involvement in the case was limited to "retrieving the kit from the Sexual Assault Nurse Examiner and booking the kit into evidence." Accordingly, the Department did not violate the Act when it did not provide a specific officer's report.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

Russell Coleman
Attorney General

/s/ Matthew Ray
Matthew Ray
Assistant Attorney General

#277

Distributed to:

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¹ Specifically, the Appellant cites LPD-G.O. 1991-05I Report Procedures. Part V. Report Taking Guidelines.