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24-ORD-165

July 22, 2024

In re: Chris Henson/Independence Police Department

**Summary:** The Independence Police Department (“the Department”) violated the Open Records Act (“the Act”) when it did not respond to a request to inspect records within five business days. The Department did not violate the Act when it did not provide records that do not exist.

***Open Records Decision***

On May 19, 2024, Chris Henson (“Appellant”) submitted a request to the Department to inspect “all police incident reports” in which 13 named individuals were identified as a crime victim or suspect created between January 2022 and May 2024. Having received no response by June 16, 2024, the Appellant initiated this appeal.

Under KRS 61.880(1), 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.” On appeal, the Department admits it failed to respond to the request within five business days because it only had the Appellant’s mailing address. Accordingly, the Department violated the Act when it failed to issue a timely response within five business days.

On appeal, the Department explains it could not “find any instances where [it has] had contact” with the 13 named individuals and “does not have custody or control of the requested records.”<sup>1</sup> Once a public agency states affirmatively that a record

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<sup>1</sup> Rather, the Department suggests the records may be in the possession of a different agency, but there is insufficient information in the request for it to determine which agency might possess them. See KRS 61.872(4) (“If the person to whom the application is directed does not have custody or control

does not exist, the burden shifts to the requester to make a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes 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 Department possesses “incident reports” relating to the 13 individuals identified in his request. Accordingly, the Department did not violate the Act when it did not provide them.<sup>2</sup>

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/ Zachary M. Zimmerer  
Zachary M. Zimmerer  
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Distributed to:

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of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency’s public records.”).

<sup>2</sup> Because the Department has explained that it does not possess the requested records, it is not necessary to address its argument that the request is unduly burdensome under KRS 61.872(6).