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24-ORD-169

July 30, 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 could not provide records that do not exist.

Open Records Decision

On June 24, 2024, Vivian Miles (“Appellant”) requested inspection of records containing information that was purportedly “missing” from a “Search Warrant Inventory Return” form dated July 12, 2019. Specifically, the Appellant requested the information designated on the form as Items #1 and #2, which do not appear in the columns labeled “Description of Items – Where Found” and “Found by.”¹ In a timely response, the Department stated the request “appears to be a request for information as opposed to a request for specifically described documents.” However, the Department noted that any “information regarding the retrieval and booking of Item #1 and Item #2 associated with this case” might be found in the full case report or the “Property & Evidence Record,” both of which it had previously provided to the Appellant. This appeal followed.

On appeal, the Department explains that “Items #1 and #2 were not seized pursuant to a search warrant, rather, they were obtained with the victim’s permission as part of the investigation and voluntary collection of evidence.” Thus, those items are not described on the Search Warrant Inventory Return form because they were not found in the execution of a search warrant. The Department affirmatively states, “There are no additional documents regarding this request that [the Appellant] has not received.”

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case

¹ The relevant space on the form contains a notation that “item numbers one and two were already booked into property and evidence.”

that such records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, “then the 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 support a claim that the agency possesses responsive records that it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency’s search. *See, e.g.*, 95-ORD-96.

Here, the Appellant provides a copy of a “Medical Forensic Examination” form that identifies Item #1 as a “SAFE [Sexual Assault Forensic Evidence] kit” and Item #2 as “pink/gray shorts.” The Appellant also provides a copy of an “Affidavit in Support of and Petition for Search Warrant” related to a search of a suspect and his apartment to obtain cell phones, photographs of the apartment, buccal swabs of the suspect, “and any other item(s) thought to have been used in the commission of the sexual assault.” The affidavit explains that the “buccal swabs . . . would be used to compare the suspect’s DNA to the recovered DNA collected in the sexual assault examination collection kit.”² However, nothing in those records is contrary to the Department’s claim that the SAFE kit and the shorts were collected voluntarily from the victim and not seized pursuant to a search warrant. Indeed, the affidavit confirms that neither Item #1 nor Item #2 was within the scope of the search warrant, and that DNA evidence had already been collected from the victim before the search warrant was issued. Thus, the Appellant has not presented a *prima facie* case that any records exist, or should exist, containing search warrant information for evidence Items #1 and #2. Accordingly, the Department did not violate the Act.

A party aggrieved by this decision may appeal it by initiating an 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.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

² Buccal swabs from the suspect are listed as Item #3 on the Search Warrant Inventory Return form, while Item #4 is a knife found at the residence.

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Distributed to:

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