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24-ORD-208

September 26, 2024

In re: Vivian Miles/Lexington Police Department

Summary: The Lexington Police Department ("the Department") violated the Open Records Act ("the Act") when it failed to establish by clear and convincing evidence that repeated requests were unduly burdensome or intended to disrupt essential agency functions under KRS 61.872(6). The Department did not violate the Act when it could not provide records that do not exist or when it directed the Appellant to the official custodian of the requested records.

Open Records Decision

Vivian Miles ("Appellant") submitted a request to the Department for records related to the evidence in a sexual assault investigation.[1] In response, the Department relied on KRS 61.872(6) to deny the request, stating the Appellant's 30 requests submitted in 2024 are "deemed to be an unreasonable burden" and are intended to disrupt the Department's "other essential functions." The Department also stated that the Appellant request sought records that would have been created "prior to the incident in question" and, therefore, do not exist. The Department also informed the Appellant that records related to DNA testing are maintained by the Kentucky State Police ("KSP"), not the Department. This appeal followed.

[1] Specifically, the Appellant sought: (1) Property Evidence Records of item #2019 0085 that were released/sent and/or transmitted to KSP on Nov. 28th, 2018. (2) Records of Property and Evidence received by any 'Unknown' or Known source related or identified as related to item 2019 0085 in the month of November 2018. (3) [The Department's] Property 'Chain of Custody' for item 2019 0085 for the month of November 2018. (4) Records identifying Agency # 18630000 related to 18-COD-14358 and/or related to item #2019 0085. (5) Records identifying any testing and/or FAIRS/Rapid databased records of [a Department employee] related to item 2019 0085 and/or Agency 18630000. (6) Records of [a Department employee] related to any testing or evidence entered, related to offender Database 18-COD-14358.

Under KRS 61.872(6), "[i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence." When determining whether a particular request places an unreasonable burden on an agency, the Office considers the number of records implicated, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction. *See, e.g.*, 97-ORD-088 (finding that a request implicating thousands of physical files pertaining to nursing facilities was unreasonably burdensome, where the files were maintained in physical form in several locations throughout the state, and each file was subject to confidentiality provisions under state and federal law). Moreover, the mere fact that a requester has submitted multiple requests in a short time is insufficient, standing alone, to demonstrate by clear and convincing evidence the requester's intent to disrupt the agency's essential functions. *See, e.g.*, 15-ORD-015; 96-ORD-193.

In its original response, the Department stated only that the Appellant had submitted 30 requests "relating to the same incident."[2] The Department has not supplemented its KRS 61.872(6) denial on appeal. Instead, it states only that Appellant "has exhausted the available records for this matter, as [the Department] has nothing further to provide." Neither the Department's assertion that the Appellant has submitted 30 requests in nine months nor its assertion that it has provided all potentially responsive records proves by "clear and convincing evidence" that the Appellant intended to disrupt its essential functions by making repeated requests, or that this particular request is unreasonably burdensome. Accordingly, the Department violated the Act when it denied the request under KRS 61.872(6).

On appeal, the Department maintains that it does not possess records responsive to subparts 1 to 3 of the Appellant's request. 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 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

[2] The Office has previously found that "repeated requests for the same records may become unreasonably burdensome or disrupt the agency's essential functions." *See e.g.*, 95-ORD-047 (involving multiple requests for a large volume of the same documents submitted over time); *see also* 23-ORD-180. But here, it is not clear whether the Appellant's 30 requests all sought the same documents or sought different documents related to the same incident.

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 KSP forensic laboratory report stating, "On November 28, 2018 [item 2019-0085] was received from unknown of the other agency." According to the Appellant, this constitutes *prima facie* evidence that the Department provided item 2019-0085 to KSP on November 28, 2018, and that corresponding documentation of action should exist. But the report provided by the Appellant does not identify the "other agency." Furthermore, the materials provided by the Appellant indicate that KSP received item 2019-0085 from the Department on July 2, 2019. Thus, the Appellant has not made a *prima facie* case that the Department provided item 2019-0085 to KSP on November 28, 2018, or that corresponding documentation of such action exists. Accordingly, the Department did not violate the Act.

The Department also maintains that subparts 4 to 6 of the Appellant's request refer to DNA testing done by KSP and, therefore, those records are in KSP's possession.[3] Under KRS 61.872(4), if "the person to whom the application is directed does not have custody or control 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." Here, the Department determined that KSP is the agency that might possess records responsive to subparts 4 to 6 of the Appellant's request and provided KSP's contact information. Accordingly, the Department did not violate the Act when it provided the name and address of the agency it believed to possess the records the Appellant sought.

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
Assistant Attorney General

[3] The Department further states that it is not aware of the agency referred to as "agency #18630000" and is not familiar with the Appellant's reference to "18-COD-14358."

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Distributed to:

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