



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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25-ORD-070

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In re: Brennan Cain/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) when it denied inspection of a video recording of a field sobriety test because KRS 189A.100 requires the video to remain confidential under these facts. KSP also did not violate the Act when it did not provide records it does not possess.

Open Records Decision

Brennan Cain (“the Appellant”) submitted a request to KSP to inspect all video footage from “the investigation of a fatal DUI crash that occurred on” December 21, 2024. The Appellant specified that he sought body-worn camera and dash camera footage from “troopers responding and investigating the incident” and “video of the full process of transporting” the suspects “to jail.”¹ In response, KSP stated that responsive video footage was exempt under KRS 189A.100(2)(b)5., which makes visual and audible recordings of vehicle pursuits, traffic stops, and field sobriety tests confidential, and thus, exempt under the Act. This appeal followed.

KRS 189A.100 establishes the procedure officers are to use when administering field sobriety tests to persons suspected of driving under the influence of alcohol. Law enforcement officers may record the suspect while administering these tests. KRS 189A.100(2)(a). However, such footage “shall be used for official purposes only.” KRS 189A.100(2)(b)5. The statute provides only three “official purposes” for which the footage may be used: (a) viewing “in court”; (b) viewing “by the prosecution and defense in preparation for a trial”; and (c) viewing “for purposes of administrative reviews and official administrative proceedings.” *Id.* Otherwise, the

¹ The Appellant also requested a variety of other records related to the investigation of the crash scene. KSP advised that it was not in possession of any additional records responsive to the Appellant’s request. The Appellant has not challenged this portion of KSP’s response.

recordings shall be considered “confidential records.” *Id.*² The Office has previously held that such recordings are entirely confidential, and that a law enforcement agency is not authorized to release any portion of such videos. *See, e.g.*, 93-ORD-133; 10-ORD-088; 19-ORD-102; 21-ORD-102; 23-ORD-025. The Act exempts from inspection any records that are confidential under state statute. KRS 61.878(1)(l).

Here, KSP explains that it possesses a video of a “suspect’s refusal to submit to a sobriety test.” The Appellant does not dispute KSP’s description of the content of this video nor does he assert that he is requesting this video for an “official purpose,” as defined in KRS 189.100(2)(b)5. Thus, KSP did not violate the Act when it withheld this video under KRS 189A.100(2).

Next, the Appellant argues that KRS 189A.100 does not exempt videos relating to suspect transport³ and crash reconstruction. In response, KSP explains that it does not possess responsive crash reconstruction video. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present 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 established a *prima facie* case that crash reconstruction video exists. Moreover, KSP explains that crash reconstruction is done at a later date “and is not generally done by the arresting officer at the scene.” Thus, even if the Appellant had established a *prima facie* case that the video should exist, KSP has explained why it does not possess crash reconstruction video from the “troopers responding and investigating the incident.” Therefore, KSP did not violate the Act when it did not provide records it does not possess.

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

² The unauthorized release of such video footage constitutes the crime of official misconduct in the first degree. KRS 189A.100(2)(b)7; *see also* KRS 522.020.

³ On appeal, KSP states that it has made available “a single, in-car video depicting the arrested suspect in the policer cruiser that is not implicated under KRS 189A.100.” Thus, any dispute as to the denial of that video is moot. *See* 40 KAR 1:030 § 6.

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
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Assistant Attorney General

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Distributed to:

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