**18-ORD-164**

August 21, 2018

In re: *The Courier-Journal*/Kentucky State Police

***Summary:*** Kentucky State Police initially failed to make an adequate search for records and did not timely respond to open records request, but subsequently provided all existing records responsive to request.

***Open Records Decision***

The question presented in this appeal is whether the Kentucky State Police (“KSP”) violated the Open Records Act in its disposition of Courier-Journal reporter Deborah Yetter’s June 5, 2018, request for copies of records relating to the restriction of public access to the State Capitol. For the reasons that follow, we find that the KSP procedurally violated the Act.

Ms. Yetter’s request, faxed to KSP’s custodian of records, sought copies of “[a]ll records related to a rule invoked Monday, June 4, 2018, by Kentucky State Police at the Capitol to restrict public access to the building to two individuals at a time following a protest outside,” including “any written copies of the rule, regulation or policy as well as any emails, memos or other documents related to drafting and enactment of the rule as well as directives on how to apply or enforce it.” Having received no response by June 18, 2018, Ms. Yetter initiated this appeal. The following day, June 19, 2018, Ms. Yetter received KSP’s written response to her request, which was dated June 12, 2018, and postmarked June 13, 2018.

Pursuant to KRS 61.880(1), a public agency must respond to a request for public records within three days, excluding weekends and legal holidays. The record reflects that KSP confirmed receipt of Ms. Yetter’s fax on June 5, 2018; accordingly KSP was obligated to respond by June 8, 2018. KSP’s untimely response constituted a procedural violation of the Open Records Act.

With its response, KSP provided to Ms. Yetter a blank copy of the Finance and Administration Cabinet’s form titled “Application to Use Commonwealth Facilities,” which KSP indicated “includes areas for available use and the rules for use of the public areas for the Capitol and grounds.” On June 19, 2018, Ms. Yetter submitted a follow-up to this letter, arguing that the application form was not a record responsive to her request.

On June 25, 2018, KSP Staff Attorney Cody Weber responded to this appeal, stating that KSP had belatedly become “aware that it inadvertently did not include all responsive records” with its response to Ms. Yetter and was providing her with a June 8, 2018, letter from KSP Commissioner Richard Sanders to two State Representatives, which explained the “protocol” of limiting the presence of a protest group in the Capitol. Mr. Weber further advised that KSP had conducted a search for additional records and none had been found.

In response to an inquiry from this office as to the nature of the search conducted, Mr. Weber explained on July 23, 2018, that the records custodian had contacted KSP’s General Counsel, as she “had knowledge of the situation and had previously attended a meeting on May 25, 2018 in which any rules, regulations, and/or policies regarding access at the Capitol were discussed.” He indicated that the May 25 meeting “did not result in the creation of any documents ‘enacting’ or detailing any ‘directives on how to enforce’ any rules, regulations, and/or policies,” and therefore no further responsive records existed. Mr. Weber further provided a copy of an e-mail string relating to the scheduling of the May 25 meeting, which was not responsive to Ms. Yetter’s request but evidently constituted the only e-mails in KSP’s possession pertaining to the subject.

A public agency responding to an open records request must “expend reasonable efforts to identify and locate the requested records.” 95-ORD-96. This entails “a search using methods which can reasonably be expected to produce the records requested.” *Id.* (quoting *Cerveny v. Central Intelligence Agency,* 445 F.Supp. 772, 775 (D. Col. 1978)). Although KSP initially failed to perform an adequate search, resulting in a deficient response to the request, we find that the search conducted subsequent to the filing of this appeal was sufficient under the Open Records Act.

A public agency cannot afford a requester access to a record that it does not have or that does not exist. 99-ORD-98. The agency discharges its duty under the Open Records Act by affirmatively so stating. 99-ORD-150. Since KSP has now provided all responsive records in its possession, and affirmatively stated that other requested records do not exist, we find no substantive violation of the Act.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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 proceeding.

Andy Beshear

Attorney General

James M. Herrick

Assistant Attorney General

#243

Distributed to:

Ms. Deborah Yetter

Cody Weber, Esq.

Ms. Stephanie A. Dawson