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**22-ORD-062**

April 7, 2022

In re: VICE News/Louisville Metro Police Department

**Summary:** The Louisville Metro Police Department (“the Department”) violated the Open Records Act (“the Act”) when it failed to respond to a request for records within five business days. The Department did not violate the Act when it could not provide a record that does not exist.

***Open Records Decision***

On February 22, 2022, VICE News (“Appellant”), a media organization, requested a copy of a consent search form for a search conducted by the Department on or about May 4, 2014. Having received no response from the Department by March 17, 2022, the Appellant initiated this appeal.

Under the Act, a public agency must issue a written response to a request for public records within five business days from its receipt of the request. KRS 61.880(1). On appeal, the Department admits that it failed to respond to the Appellant’s request in a timely manner. Thus, the Department violated the Act.

The Department asserts that it has been unable to locate any records responsive to the Appellant’s request “after an exhaustive search,” including the Department’s records management system and archives, and a search by the division in which the investigating detective worked at the time the consent search was conducted. Once a public agency states affirmatively that a requested record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that the record does or should exist, “then the

agency may also be called upon to prove that its search was adequate.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant has requested records relating to a search that was conducted in 2014. The Appellant is in possession of a property voucher and an investigative report that indicates that a consent search was conducted on or about May 4, 2014, at the location in question. This evidence is sufficient to establish a *prima facie* case that a consent search form should have been executed. However, the Department has explained the adequacy of its search and affirmed that no such form exists. Furthermore, under the applicable records retention schedule, records documenting a search by the Department, including records pertaining to “whether there is consent,” are to be retained for one year and then destroyed.<sup>1</sup> Therefore, the Department has rebutted the Appellant’s *prima facie* case by establishing that the requested record no longer exists. Accordingly, the Department did not violate the Act by failing to provide the record.

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 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 e-mailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

/s/ James M. Herrick

James M. Herrick  
Assistant Attorney General

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<sup>1</sup> See Louisville Metro Records Retention Schedule, “Search Record,” Series L5993, *available at* <https://kdla.ky.gov/records/retentionschedules/Documents/Local%20Records%20Schedules/LouisvilleMetroRecordsRetentionSchedule.pdf> (last accessed March 30, 2022).

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Distributed to:

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