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22-ORD-091

May 11, 2022

In re: Arthur Sewell/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) when it could not fulfill a request for records that do not exist within its possession.

Open Records Decision

Arthur Sewell (“Appellant”) submitted a request to KSP for records related to a Bullitt County family court case. In a timely response, KSP denied his request because KSP “was unable to locate any responsive records.”¹ This appeal followed.

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. See *Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make 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, in an attempt to make his *prima facie* case that KSP possesses responsive records, the Appellant asserts that allegations were made against

¹ KSP also suggested that the Appellant submit his request to the Bullitt County Sheriff’s Office and the Mt. Washington Police Department.

him that have resulted in certain action taken against him in family court. The Appellant claims that since allegations were made against him, records containing the allegations should exist. The Appellant further explains that he has previously requested these records from the Cabinet for Health and Family Services and the Bullitt County Family Court, but he has not received records in response to those requests. However, the Appellant presents no evidence that KSP should possess any of the records he claims should exist.²

In response to the Appellant's claim that responsive records should exist, KSP again states affirmatively that it does not possess any such records. KSP explains that once it received the notice of appeal it "conducted another diligent search for any existing records that were potentially responsive to [the] Appellant's request." Specifically, KSP searched its Computer-Aided Dispatch ("CAD") System and did not find any records of KSP "having any involvement with [the] Appellant or investigating any incident regarding him."³

In sum, KSP states affirmatively it does not possess any responsive records. The Appellant has not made a *prima facie* case that KSP should possess responsive records, and KSP sufficiently explains the adequacy of its search. Accordingly, KSP did not violate the Act when it could not fulfill a request for records that do not exist within its possession.

A party aggrieved by this decision may appeal it by initiating 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

² The Appellant does not indicate whether he submitted his request to the Bullitt County Sheriff's Office or the Mt. Washington Police Department as KSP suggested are two public agencies that may possess the requested records.

³ KSP further explains that historically it did maintain the National Crime Information Center ("NCIC") and Emergency Protection Order ("EPO") files for Bullitt County which is why its search did yield a "reference to a fax in CourtNet" for a domestic relations case involving the Appellant. However, KSP states that Bullitt County has now "regained its NCIC access" and now possesses the same records. Thus, to the extent KSP could have been considered the official custodian of such records on behalf of law enforcement in Bullitt County, KSP no longer is and those law enforcement agencies are once again the official custodians of such records.

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in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Arthur Sewell
Michelle D. Harrison