



COMMONWEALTH OF KENTUCKY
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22-ORD-100

May 19, 2022

In re: Chad Heath/LaRue County Sheriff's Office

Summary: The LaRue County Sheriff's Office (the "Sheriff's Office") did not violate the Open Records Act ("the Act") when it could not provide copies of records that do not exist within its possession.

Open Records Decision

Chad Heath ("Appellant") claims to have submitted a request to inspect records to the Sheriff's Office by email sent on April 17, 2022. The Appellant allegedly sought a copy of "the Anti-Bribery Registration Statement" that the Appellant claims the LaRue County Sheriff and a deputy sheriff should have filed pursuant to the Foreign Corrupt Practices Act ("FCPA"). Having received no response to his email, the Appellant then initiated this appeal on April 22, 2022.

On appeal, the Sheriff's Office claims that it did not receive the Appellant's April 17 email. The Appellant then forwarded what appears to be an email dated April 17, 2022, sent to "Sheriff@laruecounty.org" and "rmccoy@laruecounty.org" that states "[t]here is a 2 page Open Records Request that is attached to this email and it is being submitted at this time."¹ Upon receiving a copy of the email the Appellant claims to have sent, the

¹ The email also contained the two-page open records request that is the subject of this appeal. This same two-page request was also attached to the notice of appeal this Office transmitted to the Sheriff's Office.

Sheriff's Office now claims to have searched both email accounts for the email, but the Sheriff's Office was unable to locate the email.² The Sheriff's Office also states, now that it has received the request, that it does not have any records responsive to the attached request within its possession.

Upon receiving a request for records under the Act, a public agency "shall determine within five (5) [business] days . . . *after the receipt of any such request* whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision." KRS 61.880(1) (emphasis added). This Office has historically found that it is unable to resolve factual disputes between a requester and a public agency, such as whether an agency received a request. *See, e.g.*, 22-ORD-051; 21-ORD-163. Here, the Appellant claims the Sheriff's Office did not respond to his request within five business days. However, the Sheriff's Office claims it did not receive his request. This Office cannot resolve this factual dispute between the parties. Because this Office cannot find that the Sheriff's Office received the Appellant's request, this Office cannot find that the Sheriff's Office's response to that request was untimely.³

On appeal, the Sheriff's Office affirmatively states that it does not possess any records responsive to 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 the requested records do exist in the agency's possession. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005).

Here, the Appellant does not attempt to make a *prima facie* case that the Sheriff's Office should possess any "Anti-Bribery Registration Statements" filed pursuant to the FCPA. Nor could he. This Office has previously explained to the Appellant that the FCPA prohibits individuals from making payments to a foreign official for the purpose of influencing (*i.e.*, bribing) that foreign

² The Sheriff's Office claims to have searched its "junk email and deleted items," yet the Sheriff's Office is unable to locate the email anywhere on either of the two email accounts.

³ The Sheriff's Office also states that it has recently updated its policies and procedures for accepting requests to inspect records, and has promulgated an official email account to which emailed requests may be submitted. *See* KRS 61.876. This Office notes that the Act permits an agency's official custodian of records to accept only those requests submitted by email to the specific email account designated in the agency's policies and procedures. *Id.*

official to take official action. *See, e.g.*, 22-ORD-092 (explaining to the Appellant the application of 15 U.S.C. §§ 78dd-1, *et seq.*). The FCPA also prohibits foreign firms from bribing United States officials on United States Territory. *Id.*

The Appellant has not presented any evidence that the Sheriff's Office has acted on behalf of, or is bribing, foreign officials. As such, there is no reason that the Sheriff's Office would possess any "Anti-Bribery Registration Statement" filed pursuant to the FCPA. Thus, the Sheriff's Office did not violate the Act when it could not provide copies of 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 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:

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