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22-ORD-116

May 23, 2022

In re: Ernest Pasley/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) violated the Open Records Act (“the Act”) when it failed to issue a timely response. However, it did not violate the Act when it could not produce for inspection a copy of a record that does not exist within its possession.

Open Records Decision

On April 18, 2022, Ernest Pasley (“Appellant”) submitted a request to KSP for “a report of any background check and who ran the check, performed on [his] name in the CJIS system since November 1, 2021.”¹ On April 25, 2022, having received no response from KSP, the Appellant initiated this appeal.

On appeal, KSP states it received the Appellant’s request on April 18, 2022, but “inadvertently neglected to send its response.” Under KRS 61.880(1), 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.” Accordingly, KSP violated the Act when it failed to issue a response within five business days of receipt of the request.

¹ “CJIS” means Criminal Justice Information Services.

On appeal, KSP affirmatively states that it does not possess any responsive records. 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, KSP affirmatively states that it does not possess "any record of anyone running a background check [or] criminal history on [the Appellant]." During its search, however, KSP claims that its Information Security Officer and CJIS Compliance Supervisor found a reference to the Lexington Police Department performing a search using the Appellant's driver's license. KSP advises that the Appellant should submit his request to the Lexington Police Department, and has provided the contact information for that agency's records custodian. *See* KRS 61.872(4) ("[i]f the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records"). Accordingly, KSP did not violate the Act when it denied a request for records that do not exist in its possession.²

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 Replying to KSP's claims on appeal, the Appellant now submits a new request for a copy of the record that references the fact that the Lexington Police Department performed the search. This Office lacks jurisdiction to consider the Appellant's new request on appeal, because he has not followed the proper procedure by submitting a copy of the original request and KSP's response. *See* KRS 61.880(2)(a). Simply put, the Appellant may not bootstrap new requests for records into an appeal already pending before the Office. This is because the Office is required to render a decision regarding the Appellant's original request within 20 business days. *See* KRS 61.880(2)(b). By attempting to bring new requests into an appeal that is already pending, the Appellant is in effect shortening the statutory period for this Office to review the agency's response to the new request. Regardless, KSP has informed the Appellant that it cannot provide a copy of the record referencing the Lexington Police Department's search of the Appellant because KSP does not have access to the Lexington Police Department's Computer Aided Dispatch System. Thus, KSP again instructs the Appellant to submit his request to the Lexington Police Department.

22-ORD-116

Page 3

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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