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**22-ORD-208**

October 7, 2022

In re: Cecil Salyers/Madisonville Police Department

**Summary:** The Madisonville Police Department (“the Department”) violated the Open Records Act (“the Act”) when it failed to issue a timely response to a request. The Department did not violate the Act when it did not provide records that do not exist.

***Open Records Decision***

On August 26, 2022, inmate Cecil Salyers (“Appellant”) made a request to the Department for three recorded statements related to his trial, for the warrant and affidavit related to the search of his home and his computer equipment, and for a copy of maintenance reports related to the Department’s recording equipment. On September 9, 2022, having received no response, the Appellant initiated this appeal.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). On appeal, the Department admits that it did not timely respond to the Appellant’s request. Thus, the Department violated the Act when it failed to issue a timely response to the Appellant.

After the appeal was initiated, the Department responded to the request and stated that none of the records requested by the Appellant exist. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *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 the Appellant has not established a *prima facie* case that the requested records exist. Therefore, the Department did not violate the Act when it did not provide the requested records. Furthermore, even if the Appellant had established a *prima facie* case, the Department sufficiently explains on appeal why the records requested by the Appellant do not exist. According to the Department, the recorded statements contain only audio, because the video camera was not working during the three interviews referenced by the Appellant. Second, no warrants or affidavits were executed because the Appellant gave officers consent to search. Finally, the Department states that maintenance reports for video equipment have “never existed.” Thus, even if the Appellant had established a *prima facie* case that responsive records should exist, the Department has adequately explained why the records do not exist. Therefore, the Department did not violate 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 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**  
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s/Marc Manley  
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Assistant Attorney General

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Distributed to:

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