



COMMONWEALTH OF KENTUCKY
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22-ORD-239

November 7, 2022

In re: Perry Probus/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. The Department did not violate the Act when it did not provide records that do not exist in its possession.

Open Records Decision

On September 17, 2022, inmate Perry Probus (“Appellant”) submitted a request to the Department for copies of “[b]ody camera footage from [a] search of” a specific residence on April 10, 2015, and the “[w]arrant issued to execute the search of the same residence.” Having received no response to his request by October 17, 2022, the Appellant initiated this appeal.

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). Here, the Department did not respond to a request within five business days, and thus violated the Act.

On appeal, the Department states that no responsive records 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 or should exist. See *Bowling v. Lexington-Fayette Urb. Cnty. Gov’t*, 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 responsive 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 explains it “did not receive body cameras until the Summer of 2015” and therefore could not have created body-camera footage on April 10, 2015. Thus, even if the Appellant had established a *prima facie* case that responsive records should exist, the Department has adequately explained why they do not. 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.

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s/ Zachary M. Zimmerer
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