



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

22-ORD-244

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In re: Perry Probus/LaGrange Police Department

Summary: The LaGrange Police Department (the “Department”) violated the Open Records Act (“the Act”) when it failed to respond to a request within five business days. 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 16, 2022, inmate Perry Probus (“Appellant”) submitted a request to the Department for all evidence or other materials, including body-worn camera footage, related to his criminal case that was initiated in 2015. On October 2, 2022, the Appellant resubmitted his request and reminded the Department that he had yet to receive any response to his first request. On October 12, 2022, having received no response from the Department, 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). Here, the Department violated the Act when it did not respond to the Appellant’s request within five business days.¹

On appeal, the Department states that all records it possesses related to the Appellant’s criminal matter were previously provided during criminal discovery at his trial. The Department says it will provide another copy of the responsive records

¹ The Department does not claim that it submitted a timely response to either of the Appellant’s requests or that it did not receive either request.

to the Appellant upon payment of the appropriate copying fee.² However, the Department claims body-worn camera footage does not exist because the Department did not obtain such cameras until 2016, the year after the Appellant's arrest.

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 or should exist in the possession of the public agency. *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, to make his *prima facie* case, the Appellant merely claims the Department "should have requested body camera footage that was worn by" officers from a different police department that he claims was involved in the investigation. But the Act does not require the Department to ask other public agencies to provide records in their possession to respond to a request submitted to the Department. *See, e.g.*, 22-ORD-219; 18-ORD-221; 12-ORD-098; 99-ORD-202. The Appellant has not established a *prima facie* case that the Department possesses any body-camera footage. Accordingly, the Department did not violate the Act when it did not provide to the Appellant any records that it does not possess.³

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.

² The fact the Appellant previously obtained these records through criminal discovery does not alleviate the Department of its duty under KRS 61.880(1) to provide nonexempt records responsive to a request made under the Act. However, KRS 61.872(3)(b) does authorize the Department to require the Appellant to submit the appropriate copying and mailing fees before providing the records. Because the Department will make the records available upon receipt of the copying and mailing fees, it has not actually denied the request and it is unnecessary to examine the Department's statement about criminal discovery further.

³ The Appellant also claims the Department violated his Fourth Amendment rights and makes other allegations against the Department. The Office has historically found that an open records appeal is not the appropriate forum to decide issues other than violations of the Act. *See, e.g.*, 22-ORD-206; 21-ORD-001; 19-ORD-040.

Daniel Cameron
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

#395

Distributed to:

Perry Probus, #261864

Bruce Goodfleisch

Greg Collett