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23-ORD-058

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In re: Jimmy Hall/Bowling Green Police Department

Summary: The Bowling Green Police Department ("the Department") violated the Open Records Act ("the Act") when it failed to respond to a request within five business days of receiving it. However, the Department did not violate the Act when it denied a request for records that do not exist within its possession.

Open Records Decision

On January 24, 2023, inmate Jimmy Hall ("Appellant") submitted a request to the Department for copies of various records. The request contained six subparts, all of which appear to be related to evidence logged in an unspecified criminal case. Subpart one sought "the National Court Order to examine the cellphone item inventory" of a particular Samsung cellphone. Subpart two sought "the information taken from" a cellphone he identified by its phone number and what appears to be the SIM card identification number. Subpart three sought "the search warrant and affidavit to CPI item inventory in internal case no. 15-BGPD-07-02." Subpart four sought "the date and time item CPI cellphone was received in case no. 15-BGPD-07-02." Subpart five sought "all evidence found on item CPI and [the SIM card identification number] noted above." Subpart six sought "the chain of custody" documenting the inventory of the items identified in subpart five. On February 10, 2023, having received no response from the Department, the Appellant initiated this appeal.

When a public agency receives a request under the Act, it must determine within five business days whether to grant or deny it and notify the requester of its

decision. KRS 61.880(1). On appeal, the Department admits it received the Appellant's request and failed to issue a timely response to it. Thus, the Department violated the Act when it failed to issue a response within five business days of receiving the request. However, the Department provides on appeal records responsive to subparts three, four, and six of the Appellant's request. Therefore, any dispute regarding those subparts of the Appellant's request is now moot. *See* 40 KAR 1:030 § 6.[1]

As for subparts one, two, and five of the request, the Department states affirmatively that it does not possess any records responsive to those subparts.[2] 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 attempted to make a *prima facie* case responsive records should exist because the Department did not respond to his request until after it received notice of this appeal. Nevertheless, the Department explains that it did not investigate the underlying criminal matter because the alleged offense occurred in Butler County. The Department was instead retained to perform an examination of the identified cellphone. Because the underlying criminal case was not investigated by the Department, it did not log into evidence records responsive to subparts one, two, and five of the request. Rather, the Department explains that it "was able to verify that the Butler County Commonwealth's Attorney has, on a flash drive," the records responsive to these portions of the Appellant's request.[3] Thus, the

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[1] The Department states under KRS 61.878 (1)(a) it redacted "two phone numbers believed to belong to the juvenile victim . . . and the victim's mother's address from a chain of custody document." KRS 61.878(1)(a) exempts from inspection "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." The Supreme Court of Kentucky has held that personally identifiable information such as this may be categorically redacted under KRS 61.878(1)(a). *See Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013).

[2] The Department explains that its involvement in the underlying criminal case "was limited to phone examination." The Department states that one sentence of information responsive to subparts two and five was provided within a copy of a report it provided in response to subparts three, four, and six. The statement was made by one of its detectives and "related to what was not found on the phones."

[3] Under 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." The Department complied with

Department did not violate the Act when it denied a request for 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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KRS 61.872(4) by identifying the Commonwealth's Attorney for the 38th Judicial District as the official custodian of the requested records.