23-ORD-060

March 16, 2023

In re: Joshua Brown/Richmond Police Department

Summary: The Richmond Police Department ("the Department") did not violate the Open Records Act ("the Act") when it could not provide records that do not exist within its custody or control.

Open Records Decision

On January 18, 2023, Joshua Brown ("Appellant") requested the Department provide "[a]udio of the 911 calls" on October 27, 2015, relating to a certain criminal case.[1] In response, the Department stated the 911 calls were not part of the evidence in its case record. The Department further asserted it had contacted the dispatch center, which "advised that there is nothing on their recorder prior to July 2017." Therefore, the Department concluded the 911 calls no longer existed. This appeal followed.

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't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant claims the 911 calls must exist because they were mentioned in a brief in a case currently pending before the Kentucky Court of Appeals and "[t]here is no way a litigant can refer to documentation/audio evidence that is not in the record." However, the fact that the 911 calls may exist in a court record does not establish a *prima facie* case that they exist within the custody or control of the Department. A public agency "is responsible only for those records within its own custody or control." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S.

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[1] The Appellant also requested a certain affidavit, which the Department provided and is not at issue in this appeal.

136 (1980)). Here, the Department states the 911 calls were "obtained by the Commonwealth Attorney directly from [the] dispatch center" and it is not the Department's "policy or usual practice to log a copy of a 911 call for a case in evidence."

A requester's bare assertion that requested records must exist is insufficient to establish a *prima facie* case that a public agency possesses such records. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the Department possesses or should possess the requested records, the Appellant must provide some statute, regulation, or factual support for his contention. *See, e.g.,* 21-ORD-177; 11-ORD-074. The Appellant argues the Department must possess the audio recordings because it initially charged him $12.50 for a flash drive onto which the Department would copy the recordings. However, the Department explains it assessed that fee prior to contacting the dispatch center and learning the recordings no longer exist. After learning the records did not exist, the Department returned the Appellant's check. Therefore, the Appellant has not presented a *prima facie* case that the Department possesses any recordings of the 911 calls. Thus, the Department did not violate the Act when it did not provide records that do not exist within its custody or control.

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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ James M. Herrick
James M. Herrick
Assistant Attorney General

#72

Distributed to:

Joshua Brown, #280311
Ms. Amanda Stasi
Rodney Richardson, Chief
Tyler Frazier, Esq.