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23-ORD-073

March 28, 2023

In re: Damou Bradley/Georgetown Police Department

Summary: The Georgetown Police Department (“the Department”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

Inmate Damou Bradley (“Appellant”) submitted a request to the Department to inspect documents related “to the collection of evidence from the crime scene and” from his person, “audio of the victim questioning,” and video of police interviews with “witnesses, victims, and defendants” all related to a specific criminal case. The Department stated that “[n]o recorded audio of victim” exists and all other “documents, audio, and videos” had been provided. This appeal followed.¹

On appeal, the Department continues to assert that it “has produced all documents and records in its possession.” 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*

¹ The Appellant also requested “audio from [the] grand jury” in the same case. The Department stated it “do[es] not have audio recording of the Grand Jury. That would be the Commonwealth. I will forward this request to them.” In his appeal, the Appellant stated he “acknowledges that the [Department] may not be in possession of grand jury audio recordings.” *See* RCr 5.24(1) (generally requiring all grand jury proceedings to be kept secret); *but see* RCr 5.16(3) (allowing any person indicted by the grand jury to obtain a transcript or recording of the grand jury proceedings involving him or her).

v. Cincinnati Enquirer, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant claims “a document of the evidence informed” him that the “audio of the victim questioning” exists, but he is unable to make a *prima facie* case because he “is limited in his presentation of this document.” However, the Department claims to have provided the Appellant the documentary evidence responsive to his request.² It has also provided copies of those documents to this Office. *See* KRS 61.880(2)(c). While the records contain notes of law enforcement’s interview with the victim, the notes do not indicate whether an audio recording of the interview was made. Accordingly, the documents do not establish a *prima facie* case the requested audio recording exists. Therefore, the Department did not violate the Act when it did not provide the requested records.

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/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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² The Appellant claims he has not received all of the discs provided by the Department, and that one such disc would have contained this document. The Department states it “has produced all documents and recordings in its possession” and that if any “documents or recordings did not reach” the Appellant, that error was not theirs. This Office has consistently found that it is unable to resolve factual disputes between a requester and a public agency, such as whether a requester received an agency’s response to a request. *See e.g.*, 21-ORD-233 (agency claimed it issued a response but the requester claimed he did not receive it); *see also* 22-ORD-125 (agency claimed it did not receive the request); 22-ORD-100 (same); 22- ORD-051 (same); 21-ORD-163 (same). Accordingly, this Office cannot resolve the factual dispute between the parties about whether the Appellant received the responsive records. Regardless, the Department has now provided the records to the Appellant a second time.

Distributed to:

Damou Bradley #316563

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