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**23-ORD-086**

April 13, 2023

In re: Lawrence Trageser/Spencer County Sheriff's Office

**Summary:** The Spencer County Sheriff's Office ("the Sheriff's Office") violated the Open Records Act ("the Act") when it failed to advise a requester that requested records did not exist. The Sheriff's Office did not violate the Act when it could not provide records that do not exist.

***Open Records Decision***

On March 13, 2023, Lawrence Trageser ("Appellant") asked the Sheriff's Office to provide a termination letter it sent to a named special deputy, as well as his personnel file, including "application for employment, work history, training credentials, current hire in position and rate of pay." In a timely response, the Sheriff's Office provided only the undated termination letter and stated the special deputy "was dismissed during the application processes due to an incomplete application." This appeal followed.

On appeal, the Sheriff's Office states no responsive records exist, other than the termination letter it provided to the Appellant. When a public agency receives a request for inspection of public records, it must decide within five business days "whether to comply with the request" and notify the requester "of its decision." KRS 61.880(1). An agency response denying inspection of public records must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." *Id.* The agency must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013). Thus, if the requested records do not exist, then the agency must affirmatively state as much. *See, e.g., 22-ORD-038.*

By initially failing to advise the Appellant that the requested personnel records did not exist, the Sheriff's Office violated the Act.

However, once a public agency states affirmatively that requested records do not exist, the burden shifts to the requester to present a *prima facie* case that requested records do or should exist. See *Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant provides a copy of a news article reporting that the special deputy was sworn in on December 30, 2022. The Appellant argues that, because the special deputy was sworn in, the requested personnel records must exist. He also claims a written application must exist because the special deputy was dismissed “due to an incomplete application.”

On appeal, the Sheriff's Office states that “all responsive documents within the possession, custody, or control of the [Sheriff's Office], including but not limited to the Sheriff, any deputies[,] or any employees[,] were provided” to the Appellant. In particular, the Sheriff's Office explains that no records exist for “current hire in position and rate of pay” because “no person has been appointed to the same position” and because special deputies are not paid. Under KRS 70.045(1), a county sheriff “may appoint and have sworn in and entered on the county clerk order book” a limited number of special deputies “to assist him with general law enforcement and maintenance of public order.” Additionally, under KRS 70.045(2), the sheriff “may appoint and have sworn in, and entered on the county clerk order book, as many special deputies as needed to assist him in the execution of his duties and office in preparation for or during an emergency situation.” Special deputies do “[n]ot receive any monetary compensation for [their] time or services.” KRS 70.045(3)(b). Furthermore, “[t]he position of special deputy . . . is subject to the provisions of [KRS 70.045] only.” KRS 70.045(4). Thus, other provisions of law applying to deputies in general do not apply to special deputies, who are “appointed and dismissed on the authority of the sheriff.” KRS 70.045(3)(a). No provision of KRS 70.045 requires a special deputy to apply in writing for the position,<sup>1</sup> to submit a work history, or to complete any training before being sworn in. Accordingly, to the extent the Appellant may have established a *prima facie* case that the requested personnel file exists, the Sheriff's Office has rebutted that presumption. Therefore, the Sheriff's Office did not violate the Act by failing to provide such records.

A party aggrieved by this decision may appeal it by initiating an 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

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<sup>1</sup> Admittedly, the Sheriff's Office statement that the special deputy was “dismissed . . . due to an incomplete application” could cause a reasonable person to conclude a partial application exists. However, the Sheriff's Office insists no responsive application exists and the applicable statutory authority for hiring special deputies does not require the submission of an application.

action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to [OAGAppeals@ky.gov](mailto:OAGAppeals@ky.gov).

**Daniel Cameron**  
**Attorney General**

s/ James M. Herrick  
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Distributed to:

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