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23-ORD-162

July 6, 2023

In re: Darnell Chivers/Whitley County Detention Center

Summary: The Whitley County Detention Center (“the Center”) did not violate the Open Records Act (“the Act”) when it did not provide a record that does not exist.

Open Records Decision

Inmate Darnell Chivers (“Appellant”) submitted to the Center a request for video taken inside his cell on May 8, 2023, from 8:45am to 6:45pm.¹ The Center denied the request because it had already deleted the video. This appeal followed.

On appeal, the Center maintains that the requested footage has been deleted and no longer exists. 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 makes 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 Center implicitly acknowledges the record should exist, thus establishing the Appellant’s *prima facie* case. According to the Center, after receiving

¹ The Appellant also requested “[a]ny and all reports concerning the taking of hair samples from [the Appellant] on May 8, 2023.” The Center says it has provided all records responsive to this request and the Appellant has not appealed that response. The Appellant also requested that the Center preserve the requested video. Although the Act permits the inspection of public records, it does not provide a requester the right to demand the preservation of public records. Rather, the preservation of public records is governed by a public agency’s records retention schedule. *See* KRS 171.530; KRS 171.680.

the request, “too much time had passed, and the footage requested had already been over-written and is not available.” If a requester makes a *prima facie* case that a record should exist but the agency is unable to locate the missing record, the requester is entitled to an explanation why the record does not exist. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011). Here, the Center explained that the footage does not exist because it has been “over-written.” Thus, the Center did not violate the Act by not producing a record it does not possess.

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 action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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s/ Zachary M. Zimmerer
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Distributed to:

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