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23-ORD-238

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In re: Vivian Miles/Lexington Police Department

Summary: The Lexington Police Department (“the Department”) did not violate the Open Records Act (“the Act”) when it did not provide records it does not possess.

Open Records Decision

Vivian Miles (“Appellant”) submitted a request for “[r]ecords identifying any CPS 115 investigation” regarding a specific business or individuals associated with a specific address that the Department had received between March and November 2019. The Appellant also sought all emails, text messages, or other correspondence related to the same investigation that were sent or received by 17 named individuals. The Department responded by providing a report of calls made to the specified address, but stated it did not possess any responsive emails or other records. This appeal followed.

On appeal, the Department maintains that it provided all responsive records to the Appellant and it does not possess any additional records. 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).

Regarding her request for texts, emails, and other correspondence, the Appellant has not established a *prima facie* case that the Department possesses responsive records. Even if the Appellant had established a *prima facie* case, the Department has explained that it only retains its emails for two years, in accordance with its retention schedule for emails.¹ Thus, the Department did not violate the Act when it did not provide records it does not possess.

Regarding her request for records identifying a CPS 115 investigation, the Appellant submitted what appears to be the first page of a “Complaint Investigation Report,” dated in 2019, which she received from the Cabinet for Health and Family Services. The record indicates that the Department for Community Based Services (DCBS) investigated the subject business. The Appellant also attached a copy of DCBS Standard of Practice, 2.15.1, which states that DCBS will “[p]rovide copies of the DPP-115 to the parties listed on the CPS Investigative Distribution Chart.” Finally, the Appellant attached a copy of the distribution chart referenced in the policy that was last revised in 2021, two years after the subject investigation. The distribution chart lists as a party “Local Law Enforcement or Kentucky State Police.”

Even if these materials establish a *prima facie* case that a DPP-115 should have been sent to the Department, on appeal the Department explains that it searched all its records, including those contained in the Special Victim’s Unit that investigates crimes against children, and it could not locate any additional responsive records. Thus, the Department has explained the adequacy of its search and it did not violate the Act when it did not provide records it does not possess.

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

¹ See Series L5450, Lexington–Fayette Urban County Government Records Retention Schedule, available at <https://kdla.ky.gov/records/RetentionSchedules/Documents/Local%20Records%20Schedules/LexingtonFayetteUrbanCountyGovernmentRecordsRetentionSchedule.pdf> (last accessed Sept. 12, 2023).

Daniel Cameron
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s/ Zachary M. Zimmerer
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Distributed to:

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