



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

23-ORD-306

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In re: John Yarbrough/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) violated the Open Records Act (“the Act”) when it did not provide a copy of an audio recording in its original format and failed to explain why. However, the Office cannot resolve the factual dispute between KSP and the requester about whether additional records exist and were not provided.

Open Records Decision

John Yarbrough (“Appellant”) submitted a request to KSP seeking a variety of records relating to a KSP investigation.¹ In response, KSP stated it would provide the Appellant with records redacted pursuant to KRS 61.878(1)(a)² and “a redacted copy of the digital recording that the FBI provided to it after converting the reel-to-reel tape.” This appeal followed.

Among the records the Appellant claims should have been provided is an “hours-long” tape in analog format. He objects to receiving a digital copy of this analog tape. The digital tape allegedly contains only 8 minutes of audio recordings, but he asserts the analog tape should contain hours of audio recordings unrelated to the criminal case. Allegedly, the analog tape should contain all 911 dispatch calls made

¹ Specifically, the Appellant sought: (1) “all records” related to a specific investigation; (2) “an ‘analog[] reel to reel’ copy of the entire, original Post 16 dispatch ‘reel to reel’ tape in its entirety”; (3) “all records showing clearly all the names and entities listed on this KSP41 as well as the identities of each officer listed by number”; (4) “all records of the ‘Examination’ and ‘Testing,’ listed, as well as the procedures used, reports made and results”; and (5) “all records showing where this tape is now, and any other records for this tape that isn’t on this KSP41, such as the FBI designation for the tape and their investigation.”

² The Appellant has not challenged these redactions on appeal.

during a certain time period, but the digital tape contains only the dispatch call made to initiate the investigation that is the subject of this request.

In response, KSP claims it provided the record responsive to the Appellant's request—"the digital recording that the FBI provided to it after converting the reel-to-reel tape." KSP does not claim the analog tape does not exist or cannot be copied.³ Rather, in response to another part of the Appellant's request, in which he sought documentation stating where the analog tape is currently located, KSP states the "KSP 41" form it previously provided "is the official record of where the tape has been *and is still* stored" (emphasis added). Thus, while it appears KSP has admitted the analog tape stills exists in storage, KSP has not provided the Appellant a copy of it or explained why a copy will not be provided. Accordingly, it violated the Act by denying a portion of the Appellant's request without citing an exception and explaining how it applies to the specific record withheld. KRS 61.880(1).⁴

The Appellant also claims KSP ignored other parts of his request, but KSP claims to have provided him with the entire case file. As such, KSP has not ignored portions of his request. Rather, the Appellant believes additional records should exist and KSP says they do not. 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, in addition to the analog tape and the entire case file, the Appellant's original request sought "any and all records of the 'Examination' and 'Testing,' listed, [sic] as well as the procedures used, reports made and results."⁵ While his original

³ The Appellant states he understands it may be difficult to copy the original analog tape, but he is nevertheless prepared to pay the actual cost of reproducing the tape in analog format. See KRS 61.874(3) (a "public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required").

⁴ KSP has not expressly invoked any exception to the Act in support of withholding a copy of the analog tape, which is why it violated the Act. The Office notes it is possible the tape may contain exempt information and it may be difficult to separate such information on the analog tape, if any exists, from nonexempt information and provide the latter to the Appellant. See KRS 61.878(4). Because KSP has not claimed any portion of the tape contains exempt information, or that it would be unreasonably burdensome to copy the analog tape, the Office need not consider these potential issues further.

⁵ The Appellant also sought documentation stating the current location of the analog tape, which as discussed, had already been provided to him. That record, according to KSP, states the analog tape is still in storage. Finally, the Appellant also sought all records "showing clearly all the names and

request is unclear, the Appellant provides documentation of the chain of custody for the analog tape in dispute, stating the tape had been removed from evidence storage and sent to the FBI for analysis. As such, he claims his reference to reports of “examination” and “testing” refers to the records generated by the FBI and provided to KSP as a result of its examination of the tape. Because the analog tape was specifically removed from evidence and given to the FBI for analysis, the Appellant has made a *prima facie* case that records documenting the FBI’s conclusions, or lack thereof, should exist.

Nevertheless, KSP has adequately explained its search for responsive records. KSP has provided all records it possesses with respect to this investigation, which the Appellant admits was provided on a “1.8 TB⁶” hard-drive. Even if a requester makes a *prima facie* case additional records may or should exist, the Office cannot conclude that the records do, in fact, exist. Rather, the Office has long held it cannot resolve factual disputes about whether all records responsive to a request have been provided, or whether requested records should contain additional content. *See, e.g.*, 23-ORD-027; 22-ORD-010; 19-ORD-083; 03-ORD-061; OAG 89-81. Accordingly, the Office is unable to find that KSP violated the Act when it provided all records it claims to 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.

entities listed on this KSP 41 [form] as well as the identities of each officer listed by number.” To the extent the Appellant is asking KSP to recreate the KSP 41 form such that the signatories’ names are legible and to add the officers’ badge numbers when they did not originally appear on the document, the Act does not require KSP to do so. The Act permits public inspection of public records as they exist. It does not require a public agency to compile information, respond to questions, or create a record to comply with a request. *See Dep’t of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) (“The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records”).

⁶ It is unclear if the data provided really amounts to 1.8 terabytes, as the Appellant indicates, or if this is a typographical error. It is more likely the data amounts to 1.8 gigabytes.

Daniel Cameron
Attorney General

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

#463

Distributed to:

John Yarbrough
Samantha A. Bevins
Stephanie Dawson
Abbey Hub